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

21   OAKLAND DIVISION

22 ORACLE USA, INC., et al.,   Case No. 07-CV-1658 PJH (EDL)

23   Plaintiffs,   **DECLARATION OF JOSHUA L.
                                          FUCHS IN SUPPORT OF
24   v.   DEFENDANTS' OPPOSITION TO
                                          ORACLE'S MOTION TO MODIFY
25 SAP AG, et al.,   THE PROTECTIVE ORDER AND TO
                                          COMPEL DEPOSITION TESTIMONY
26   Defendants.   AND FURTHER RESPONSES TO
                                          REQUESTS FOR ADMISSIONS
27
                                          DISCOVERY MATTER
28

1   I, Joshua L. Fuchs, declare as follows:

2   1.   I am an associate in the law firm of Jones Day, 717 Texas, Suite 3300, Houston,

3   Texas, a member in good standing of the bar of Texas and admitted *pro hac vice* and counsel of

4   record for Defendants SAP AG, SAP America, Inc., and TomorrowNow, Inc. in the above-

5   captioned action. I make this declaration based on personal knowledge and, if called upon to do

6   so, could competently testify thereto. Nothing in this declaration is intended to waive, or should

7   be construed as a waiver of, the attorney-client privilege or attorney work product immunity.

8   **RFA Counts**

9   2.   On September 27, 2007, Oracle served a set of RFAs containing 154 requests on

10   Defendant TomorrowNow, Inc ("TN"). On May 20, 2009, Oracle served a second set of RFAs

11   containing 545 requests on all Defendants. Also on May 20, 2009, Oracle served a third set of

12   RFAs containing 50 requests on all Defendants. On September 30, 2009, Oracle served a fourth

13   set of RFAs containing 279 requests on all Defendants. On October 23, 2009, Oracle served a

14   fifth set of RFAs containing 202 requests on all Defendants. On November 2, 2009, Oracle

15   served a sixth set of RFAs containing 85 requests on all Defendants. Therefore, Oracle has

16   served a total of 1,315 RFAs on Defendants.

17   3.   In Oracle's Motion, it has moved to compel further responses to 316 of Oracle's

18   1,315 RFAs served on Defendants.

19   4.   A review of the of the 1,315 RFAs shows that 539 of those requests contain the

20   term "copy," and out of the 223 RFAs put at issue in Oracles' Motion relating to Oracle's Second

21   Set of RFAs to Defendants Nos. 496-680 and Oracle's Third Set of RFAs to Defendants Nos. 13-

22   50, a total of 118 contain the term "copy."

23   5.   The specific requests from 496-680 that are put at issue in Oracle's Motion and

24   that contain the word "copy" are: 500-507, Amended 512-Amended 519, Amended 524-

25   Amended 527, Amended 532-Amended 535, Amended 540-Amended 559, 564-571, 611-614,

26   629-632, 641-648, 655-662, and 669-676. *See* Russell Decl. (D.I. 571), Ex. W.

27   6.   The specific requests from 13-50 that are put at issue in Oracle's Motion and that

28   contain the word "copy" are: 13-44 and 46-47. *See* Russell Decl. (D.I. 571), Ex. Y.

DECLARATION OF JOSHUA L. FUCHS IN SUPPORT OF
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL
Case No.07-CV-1658 PJH (EDL)

- 2 -

1   7.   The specific requests from 496-680 that are put at issue in Oracle's Motion and

2   that contain the words "Fix" or "Update" are: 496-507, Amended 508-Amended 519, 520-523,

3   Amended 524-Amended 527, 528-531, Amended 532-Amended 535, 536-539, Amended 540-

4   Amended 563, 564-579, 595-614, and 629-680. *See* Russell Decl. (D.I. 571), Ex. W.

5   8.   The specific requests from 13-50 that are put at issue in Oracle's Motion and that

6   contain the words "Fix" or "Update" are: 19-22. *See* Russell Decl. (D.I. 571), Ex. Y.

7   9.   The specific requests from 496-680 that are put at issue in Oracle's Motion and

8   that contain the term "Generic Environment" are: Amended 508-Amended 519, Amended 524-

9   Amended 527, Amended 532-Amended 535, and Amended 540-Amended 563. *See* Russell Decl.

10   (D.I. 571), Ex. W.

11   10.   The specific requests from 13-50 that are put at issue in Oracle's Motion and that

12   contain the term "Generic Environment" are: 17-18, 27-28, and 44. *See* Russell Decl. (D.I. 571),

13   Ex. Y.

14   **Stipulation Discussions**

15   11.   The parties met and conferred regarding a joint stipulation concerning the steps

16   taken to scope, develop, test and deliver objects to TN's HRMS PeopleSoft payroll customers

17   which was one part of TN's business. Defendants submitted a stipulation proposal to Oracle on

18   July 14, 2009.

19   12.   Following Defendants' stipulation proposal, Defendants served their responses to

20   Oracles' Second Set of RFAs on July 20, 2009 including 496-680.

21   **Discussions Regarding Definitions**

22   13.   In Oracle's Second Set of RFAs to Defendants, served on May 20, 2009, Oracle

23   defined "generic environment" as "any Local Environment named without reference to any

24   specific Customer (e.g., HR751CSS)." A true and correct excerpt of Oracle's Second Set of

25   RFAs to Defendants, served on May 20, 2009 containing the defined term "generic environment"

26   is attached as **Exhibit A** to this declaration.

27   14.   The definition stated in paragraph 13 above is the definition that Defendants

28   originally objected to and it was that objection that was contained in Oracle's Motion. Exhibit V

1   to Mr. Russell's declaration is not a true and correct copy of portions of Oracles' Second Set of

2   Requests for Admissions to Defendants but rather a copy of "Oracles' *Revised* Second Set of

3   Requests for Admission to Defendants." (emphasis added) *See* Russell Decl. (D.I. 571), Exh. V at

4   1. This revised set was created as a result of the Parties meet and confer efforts and includes

5   definition and request changes, including a revised definition of "generic environment."

6   15.   John Baugh, who was head of the environments team at TN for a period of time

7   and was presented for two days of Rule 30(b)(6) testimony on behalf of TN concerning

8   environment components, only used the term "generic environment" once during that testimony

9   and only after Oracle's counsel had used the term at least 21 times in his questioning, including in

10 the question for which Mr. Baugh used the term. A true and correct compilation of the deposition

11 testimony from Mr. Baugh's February 6 and 7, 2008 deposition which contains the questions and

12 answers that have the terms "Generic Environment" or "Generic Environments" in them is

13 attached to this declaration as **Exhibit B.** This compilation includes Oracle counsel's notation

14 that "generic environment" was a term that he created for the purpose of his questioning. *See*

15 Exhibit B at 3 (referring to p. 139:14-18 of the testimony). Last, I ran a search for "generic

16 environment" and "generic environments" across the 10,395,592 Bates numbered pages produced

17 on behalf of TN and only received 45 hits.

18   16.   During meet and confer communications related to the term "generic

19 environment," Defendants stated that they were willing to amend their responses to the RFAs

20 similar to 542 by replacing the phrase "one environment specific to TomorrowNow's retrofit

21 support of specific TomorrowNow customers" with "in one environment that was both specific to

22 TomorrowNow's retrofit support of, and used to support a specific sub-set of, TomorrowNow

23 customers designated to receive retrofit support."

24   17.   Further, Defendants were in good faith willing to reexamine RFAs using the term

25 "copy" and informed Oracle of that during the meet and confer process. Oracle's request for this

26 reexamination, however, was not limited to the 223 RFAs put at issue by its Motion but all of the

27 1,315 RFAs served in the case. During the meet and confer process, it was expressed to Oracle

28 that if Oracle was willing to define "copy" as "the word's plain meaning" and withdraw Oracle's

1 previous definitions of that term, then Defendants will no longer rely on their objection to "copy,"

2 and will constructively remove that objection from Defendants' responses. Because there are

3 hundreds of requests that contain the term "copy" and many of those will not need to be

4 supplemented simply because of the definition change, Defendants during the meet the confer

5 sought to avoid the time and burden to amend each set of objections for those requests simply to

6 take out the objection to the term "copy." Oracle rejected Defendants proposals.

7   18.   As an example, RFA 15 from the third set states: "For each item 1-33186 on

8 Exhibit D, admit that a Copy of the listed Fix Object was Created using a Local Environment that

9 did not solely consist of an installation from, a Copy of, or an installation from a Copy of

10 software received from or on behalf of the recipient stated for the respective item." *See* Russell

11 Decl. (D.I. 571), Ex. Y. The response currently states as follows: "Subject to the General

12 Objections and these specific objections, after a reasonable inquiry and based on Defendants'

13 understanding of these questions, Defendants lack sufficient information to respond to these

14 requests as the information sought was not tracked, recorded, or maintained by TomorrowNow in

15 a 'readily obtainable manner.' On this basis, therefore, these requests are DENIED." *See* Russel

16 Decl. (D.I. 571), Ex. Y. This response would not need to be changed simply because of the

17 definitional change of "copy."

18   **Description of Fix Container and Update Container**

19   19.   The following screenshot is the high-level folder structure of the fix container for

20 WMI-TN-0102085972. It shows that within that container there are two sub-folders. The folder

21 0102085972_INSTALL contains documentation about the objects contained within this fix

22 container. The folder 0102085972, contains the objects themselves.
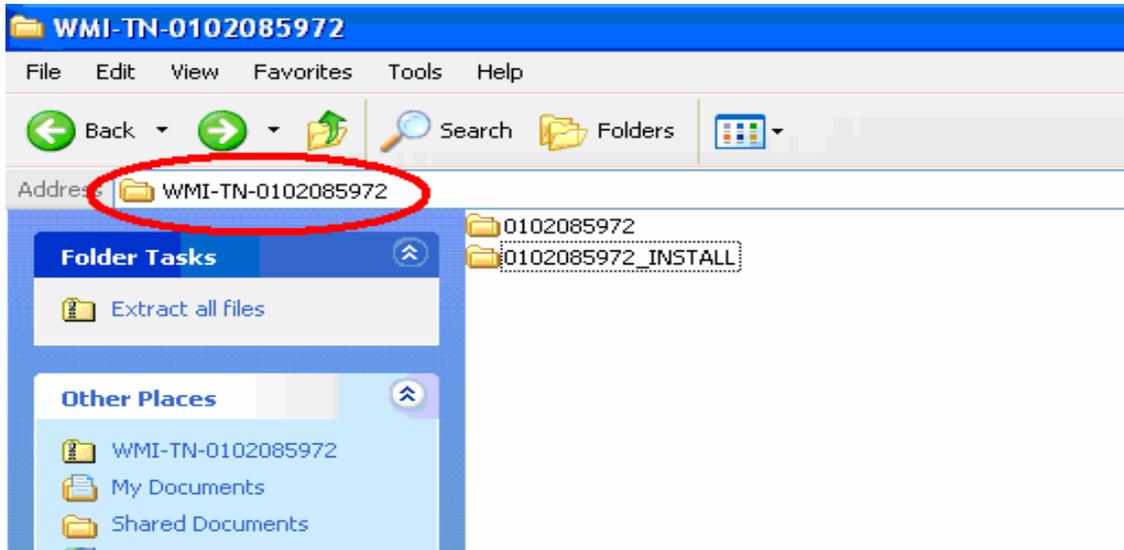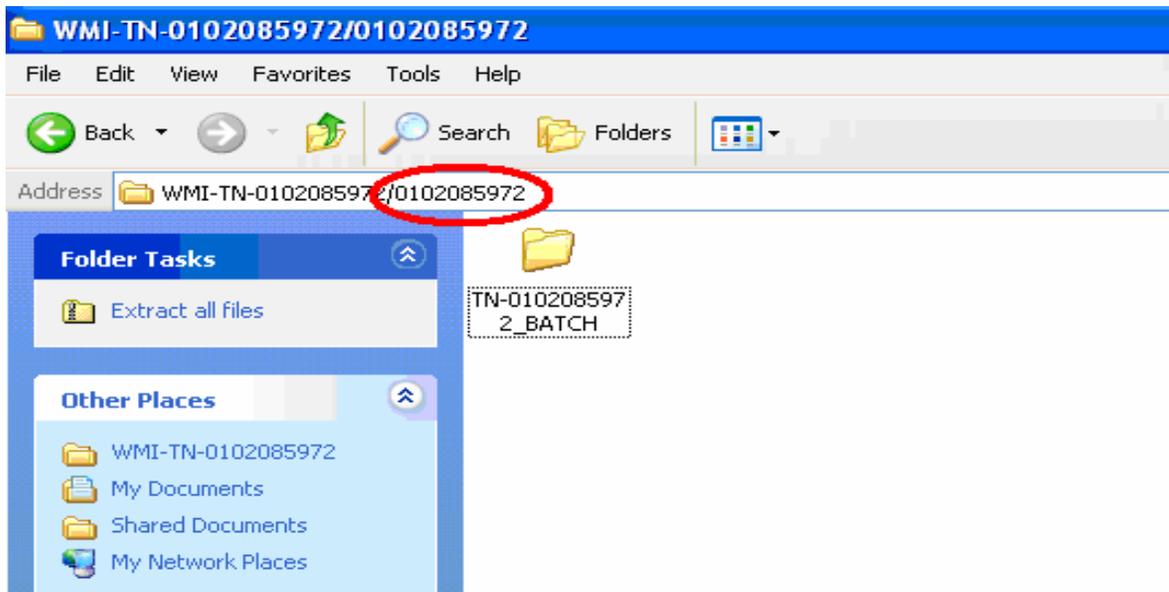
23

24

25

26

27

28

DECLARATION OF JOSHUA L. FUCHS IN SUPPORT OF
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL
Case No.07-CV-1658 PJH (EDL)

- 5 -

1

2

3

4

5

6

7

8

9

10

11

12   20.   The following screenshot shows the sub-folder TN-0102085972_BATCH located

13 in folder 0102085972.

14

15

16

17

18

19

20

21

22

23

24

25   21.   The following screenshot shows the three object folders located in the fix

26 container WMI-TN-0102085972 and specifically in the folder TN-0102085972_BATCH. The

27 objects are: (1) .dat files, (2) .dms files (also referred to as script files), and (3) .sqr files.
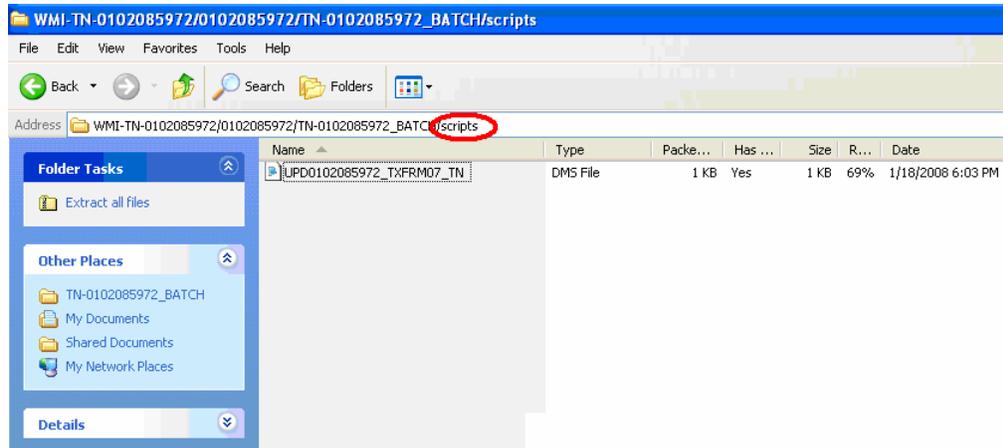
28

1

2

3

4

5

6

7

8

9

10

11
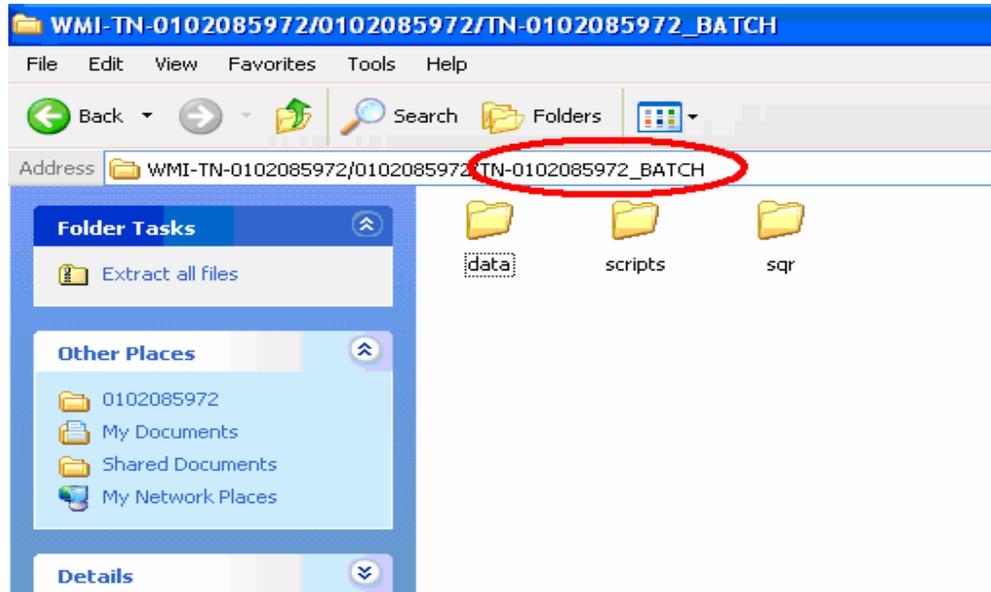
12   22.   The following screenshot shows the single .dat object file that was prepared for

13 delivery to Waste Management as part of the fix container for WMI-TN-0102085972. This .dat

14 object file is located in the data folder shown above.

15

16

17

18

19

20

21

22

23
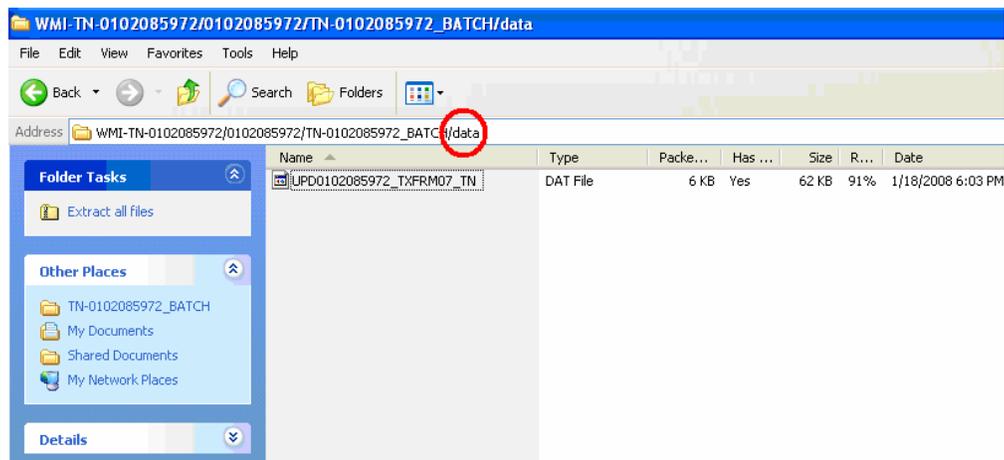
24   23.   The following screenshot shows the single .dms (script) object file prepared for

25 delivery to Waste Management as part of the fix container for WMI-TN-0102085972. This .dms

26 (script) object file is located in the script folder shown above.

27

28

DECLARATION OF JOSHUA L. FUCHS IN SUPPORT OF
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL
Case No.07-CV-1658 PJH (EDL)
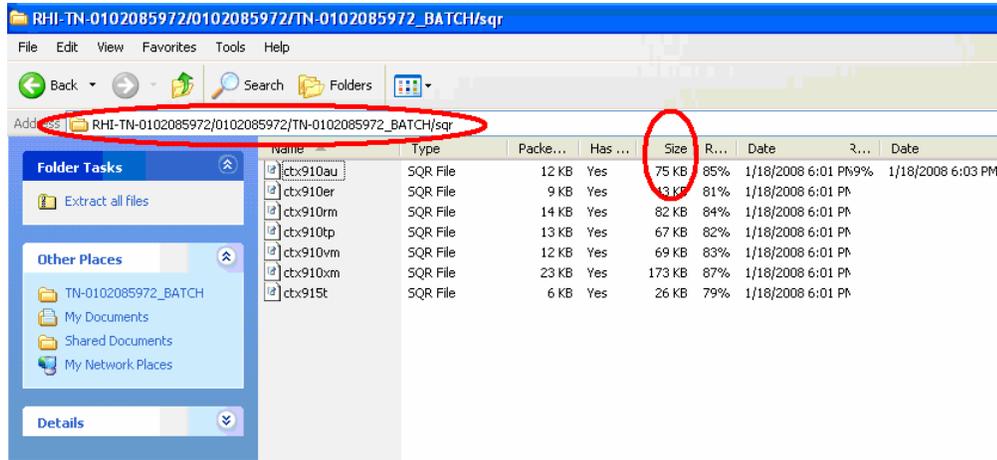
1

2

3

4

5

6

7

8

9

10   24.   The following screenshot shows the seven .sqr object files prepared for delivery to

11 Waste Management as part of the fix container for WMI-TN-0102085972. These seven .sqr

12 object files are located in the sqr folder shown above.

13

14

15

16

17

18

19

20

21
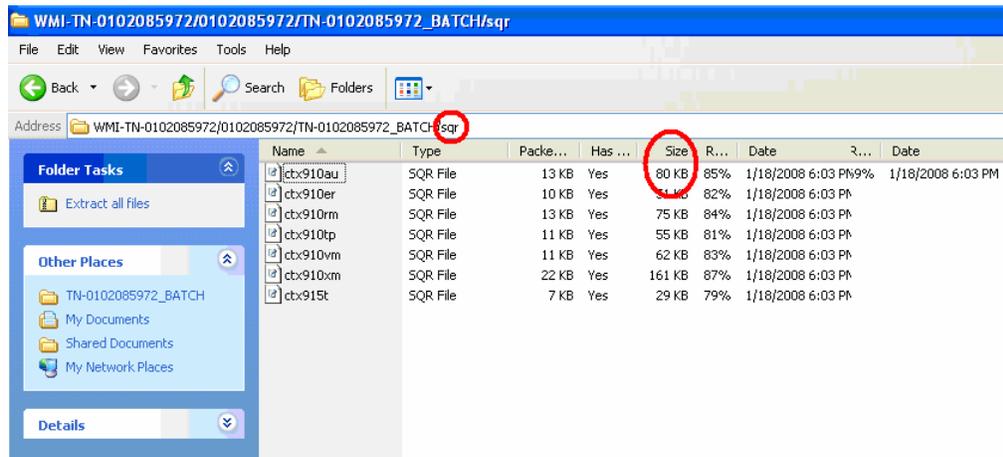
22

23   25.   Therefore, for this single customer-specific fix, there are a total of nine objects.

24   26.   Likewise, the following screenshot shows the seven .sqr object files prepared for

25 delivery to Robert Half International as part of fix container for RHI-TN-0102085972, which is

26 referenced to the master fix CSS-TN-0102085972. These seven .sqr object files are located under

27 Robert Half's sqr folder as highlighted in the file path below. This folder structure is identical to

28 Waste Management's as shown by the file path. These seven .sqr object files have the same name

DECLARATION OF JOSHUA L. FUCHS IN SUPPORT OF
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL
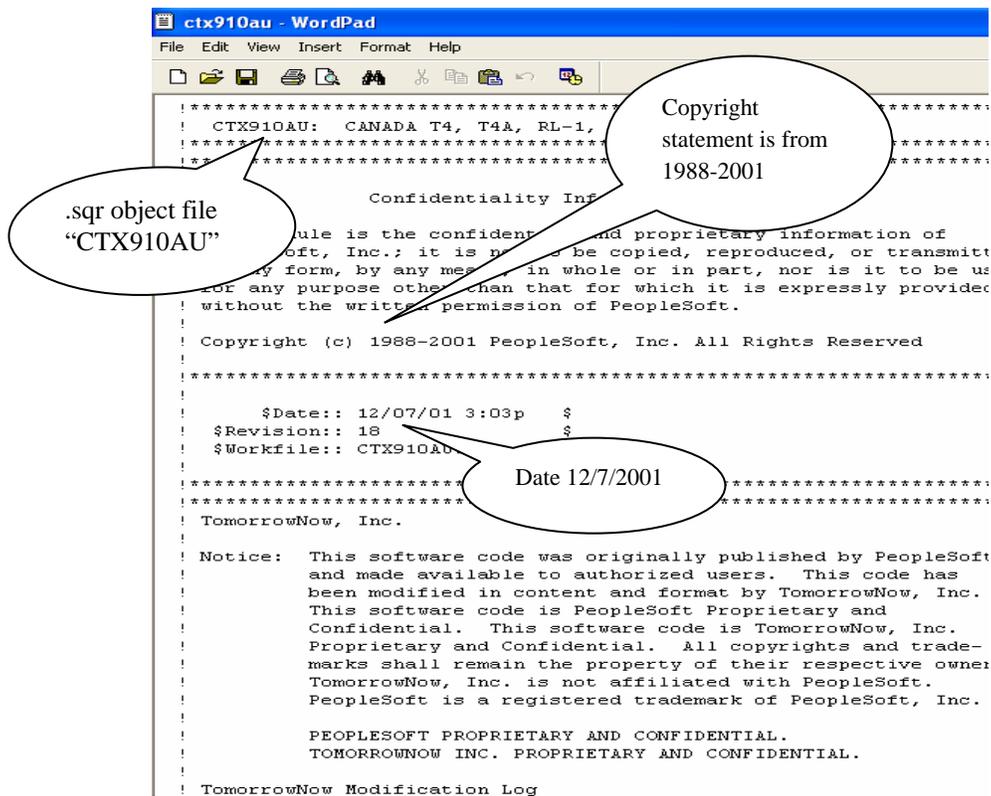Case No.07-CV-1658 PJH (EDL)

- 8 -

1   as the seven .sqr object files shown above for Waste Management; however, they are different.

2   The .sqr object file sizes for each do not match. The sqr "ctx910au" for Waste Management has

3   a file size of 80kb while the same named file for Robert Half is 75kb.

4

12   27.   A comparison of the header portion of the actual files in the screenshot below

13   shows that the objects are not the same. The screenshot below shows the .sqr object file

14   "ctx910au" that was prepared for delivery to Waste Management as part of fix container for

15   WMI-TN-0102085972. This .sqr object file states that it was created for release "HR88SP1" and

16   it states that it is dated 2/13/2005. The screenshot also indicates that the copyright statement has

17   a date of 2005.

18

28
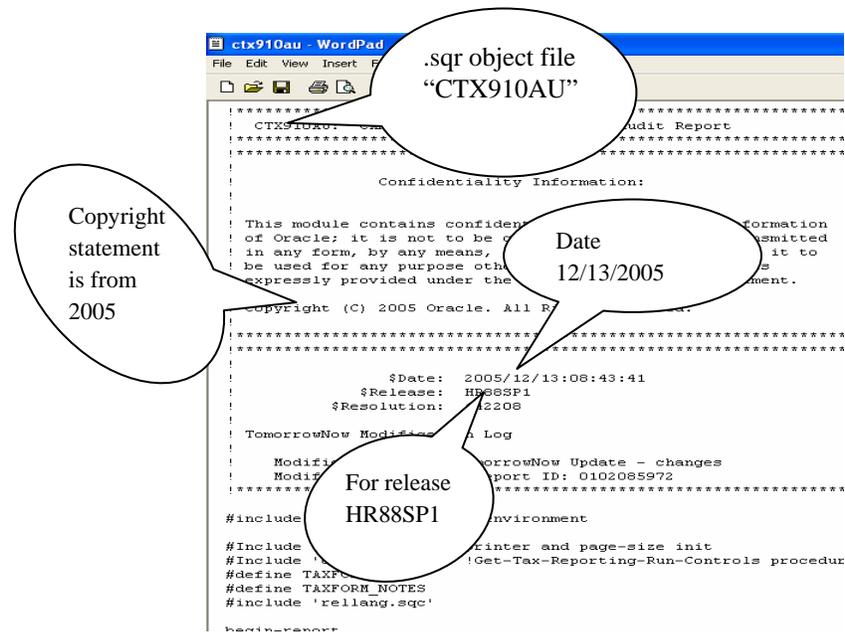
28.   The following screenshot shows that the same named .sqr object file "ctx910au"
that was prepared for delivery to Robert Half as part of fix container RHI-TN-0102085972.
While this .sqr object file has the same name, it is not simply a replica of the "ctx910au" .sqr
object file contained in fix container for WMI-TN-0102085972. This object notes a date of July
12, 2001. Further, it shows a copyright statement date of between 1988 to 2001. This .sqr object
file also does not list "HR88SP1."

29.   The master fix record and the Waste Management fix container referenced in the
paragraphs above are listed in footnote 8 in Oracle's Motion. That footnote states that Oracle
offered to amend Exhibit B to name customer specific fix containers as opposed to the master fix
records and that Defendants stated that doing so would not change Defendants' responses.
Defendants did not state that doing so would not change their answers. Rather, Defendants stated
that it would be necessary to see such a revision before committing to a response, and to the
extent the request would then be written in a way that required Defendants to evaluate the history
of 1000s of objects, Defendants would likely raise a burden argument.

1   30.   There are approximately 96 objects that were prepared for delivery to the ten

2   customers identified as having the issue identified with Master Fix record CSS-TN-0102085972.

3   **Exhibits to Oracle's RFAs and Associated Counts**

4   31.   Oracle's Exhibit A to its Second Set of RFAs contains a printout of a list of the

5   master bundle records from the SAS database. It is not a list of actual bundle containers prepared

6   for delivery to customers.

7   32.   Oracle's Exhibit B to its Second Set of RFAs contains a printout of a list of the

8   master fix records from the SAS database. It is not a list of actual fix containers prepared for

9   delivery to customers.

10   33.   Oracle's Exhibit D to its Third Set of RFAs is a 973 page, small font spreadsheet

11   with 33,186 listings of file paths that contain objects.

12   34.   Oracles' RFAs 13-50 from the third set and RFAs 130-162 from the fifth set all

13   reference Exhibit D and request an admission to either all, or a subset of the, 33,186 objects listed.

14   RFAs 13-44 and 130-159 make requests for each of the 33,186 objects listed. Together, this is 62

15   numbered requests multiplied by 33,186 which equals 2,057,532 number of requests which

16   require an answer. RFAs 45-50 and RFAs 160-162 make requests for 14,725 objects listed.

17   Together, this is 9 numbered requests multiplied by 14,725 which equals 132,525 number of

18   requests which require an answer.

19   **Definition of Fix**

20   35.   Oracles' technical expert, Kevin Mandia, defines a "Fix" as:

21   "Fix" means any software application patch, fix, code change, or Update,
22   including bug fixes, tax or regulatory updates, or Bundles. Fixes typically address
     known or reported issues with the functionality of the software that can be
23   corrected by applying new or modified code or other data, in the form of Fix
     Objects, for example to address new regulatory requirements that affect payroll
24   software. They can be delivered individually, or grouped with other Fixes and
     delivered as Updates or bundles. With respect to the PeopleSoft product family,
25   Fixes typically included one or more of the following types of files: COBOL
     source code files, SQR files, SQC files, DAT files, DMS files (Data Mover Script
26   files), Project Files, Online Objects, and documentation.

27

28

DECLARATION OF JOSHUA L. FUCHS IN SUPPORT OF
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL
Case No.07-CV-1658 PJH (EDL)

- 11 -

1   **Interrogatory 14**

2   36.   Defendant TomorrowNow, Inc.'s Third Amended and Supplemental Response to

3   Plaintiff Oracle USA, Inc.'s Second Set of Interrogatories No. 14 ("Interrogatory 14") and RFAs

4   13-50 and 130-162 all request detailed descriptions for how environments at TN were used to

5   create, develop and test objects. In response to Interrogatory 14 and this Court's August 31, 2009

6   Order limiting Defendants response to 10 specific master fix records, Defendants provided Oracle

7   a 136 page response. A true and correct copy of the request and response is attached to this

8   declaration as **Exhibit C.**

9   37.   To provide the narrative responses in Interrogatory 14, TomorrowNow, reviewed

10   extensive records including data from the SAS and BakTrak databases, TomorrowNow's servers,

11   produced documents, deposition testimony, and either communicated with or attempted to

12   communicate with numerous former TomorrowNow employees that appeared to be involved in a

13   substantive way with each master fix record for which a response was provided. *See* Exhibit C at

14   137-146.

15   38.   Defendants' response contained a description of approximately 1,772 objects

16   reasonably believed to be made available to specific customers in relation to the ten identified fix

17   records. *See* Exhibit C.

18   39.   To provide that response Defendants expended over 500 attorney hours. *See*

19   Exhibit C at 137-138.

20   40.   Based on the prior time and costs associated with Interrogatory 14, if Defendants'

21   objections were overruled and were compelled to respond to RFAs Nos. 13-50 in Set No. 3 and 4-

22   63 and 130-162 in Set No. 5 in the manner in which Oracle seeks a response, Defendants

23   anticipate having to spend literally thousands of attorney hours, costing millions of dollars, to

24   respond to the literally millions of requests contained in those RFAs.

25   **Interrogatory 11**

26   41.   RFAs 4 - 63 from the fifth set relate to file paths identified in Defendants'

27   response to Defendant TomorrowNow, Inc.'s Eighth Amended and Supplemental Response to

28   Plaintiff Oracle Corporation's First Set of Interrogatories (Set One) No. 11 ("Interrogatory 11").

DECLARATION OF JOSHUA L. FUCHS IN SUPPORT OF
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL
Case No.07-CV-1658 PJH (EDL)

- 12 -

1   A true and correct copy of the Interrogatory 11 request and response is attached to this declaration

2   as **Exhibit D.** The response to Interrogatory 11 contains 84 distinct file paths in all amended and

3   supplemental responses. One of those file paths is DCITBU01_G\PeopleSoft.

4   DCITBU01_G\PeopleSoft was produced on four hard drives bates numbered TN-OR 02989991,

5   TN (Hard drive).27; TN-OR 02989992, TN (Hard drive).28; TN-OR 02989993, TN (Hard

6   drive).29; and TN-OR 02989994, TN (Hard drive).30 on October 25, 2008 date. At my direction,

7   a file count for each hard drive was obtained using the software program EnCase. For TN-OR

8   02989991, TN (Hard drive).27, there were approximately 731,537 files listed. For TN-OR

9   02989992, TN (Hard drive).28, there were approximately 1,037,144 files listed. For TN-OR

10 02989993, TN (Hard drive).29, there were approximately 1,030,937 files listed. For TN-OR

11 02989994, TN (Hard drive).30, there were approximately 940,636 files listed. This totals

12 approximately 3,740,254 files. RFAs 5 and 35 specifically ask about DCITBU01_G\PeopleSoft.

13   42.   For the DCITBU01_G\PeopleSoft example listed above, assuming it only 30

14 seconds to click and evaluate each of the 3,740,254 files it would take one person approximately

15 1,870,127 minutes which is approximately 31,169 hours or 1,299 days. Based on these estimates,

16 and if Defendants' objections were overruled and were compelled to respond to RFAs Nos. 13-50

17 in Set No. 3 and 4-63 and 130-162 in Set No. 5 in the manner in which Oracle seeks a response,

18 Defendants anticipate having to spend literally thousands of attorney hours, costing millions of

19 dollars, to respond to the literally millions of requests contained in those RFAs.

20   I declare under penalty of perjury under the laws of the United States and the State of

21 California that the foregoing is true and correct.

22   Executed this 5th day of January, 2010 in Houston, Texas.

23

24

25   /s/ Joshua L. Fuchs
         Joshua L. Fuchs

26

27

28

DECLARATION OF JOSHUA L. FUCHS IN SUPPORT OF
DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL
Case No.07-CV-1658 PJH (EDL)

- 13 -