

EXHIBIT J

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 Systems, Inc.

17 UNITED STATES DISTRICT COURT
 18 NORTHERN DISTRICT OF CALIFORNIA
 19 OAKLAND DIVISION

21 ORACLE USA, INC., *et al.*,
 22 Plaintiffs,
 23 v.
 24 SAP AG, *et al.*,
 25 Defendants.

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

**PLAINTIFFS' THIRD SUPPLEMENTAL
 AND AMENDED INITIAL DISCLOSURES**

Date: n/a
 Time: n/a
 Judge: The Honorable Phyllis J. Hamilton
 Courtroom: TBD

**CONTAINS INFORMATION
 DESIGNATED HIGHLY
 CONFIDENTIAL PURSUANT TO
 PROTECTIVE ORDER**

1 Discovery and Oracle's investigation are ongoing. If, as the case develops,
2 Oracle identifies additional documents or categories of documents that support its position, it
3 will identify them in supplemental disclosures as required under Fed. R. Civ. P. 26(e).

4 **III. COMPUTATION OF DAMAGES¹**

5 In connection with its Fourth Amended Complaint, Oracle seeks damages against
6 Defendants SAP AG, SAP America, Inc., and TomorrowNow, Inc. (collectively referred to as
7 "Defendants") resulting from Defendants' reproduction, distribution, public display, and
8 preparation of derivative works from copyrighted Oracle works, including its software, Software
9 and Support Materials ("SSMs"), software containing SSMs or other copyrighted works,
10 fraudulent access to, theft of, and further misuse of Oracle's underlying software applications as
11 well as SSMs and non-copyrightable support materials, as well as related unfair business
12 practices, interference with Oracle's business relationships, breaches of contract, and unjust
13 enrichment at the expense of Oracle. Based on Oracle's investigation to date, Defendants'
14 actions have resulted in the following categories of harm:

- 15 • Lost, diminished, or delayed current and prospective customer revenues and
16 profits, including as they relate to support and maintenance and software
17 applications licensing;
- 18 • Harmed current and prospective customer relationships, even where they did
19 not result in a loss of a customer support contract or software licensing;
- 20 • Devaluation of Oracle's intellectual property and other intangible assets and
21 Oracle's investment in the development and/or purchase of the same,
22 including downward pressure on the value of licenses for, harm to the
23 confidential nature of, minimized competitive advantages regarding,
24 destruction of Oracle's exclusive exploitation of and remuneration of, and the
25 denial of Oracle's licensing rights and revenues regarding the same;

27 ¹ Oracle also seeks injunctive relief.

- 1 • Loss of goodwill, including reputational harm and costs associated with
- 2 addressing Defendants' illegal conduct;
- 3 • Harm to Oracle's overall market cap;
- 4 • Harm and impairment to Oracle's customer support websites and underlying
- 5 customer support data, including impaired access to the same by Oracle and
- 6 its legitimate customers, harm to Oracle's control of and the ability to use the
- 7 same by Oracle and its customers for the purposes for which they were
- 8 intended, including to improve Oracle's customer support processes, and harm
- 9 to the functionality of these systems; and,
- 10 • Costs associated with investigating, mitigating (including for example
- 11 lowered prices, time and effort to retain customers, or to address reputational
- 12 harm) and litigating against all these activities.
- 13 • The host of other damages attested to by Oracle witnesses, including, e.g.,
- 14 Juergen Rottler, such as the abandonment of existing PeopleSoft customer
- 15 contract step-up renewal price escalations, the early adoption and generous
- 16 terms of Oracle's Lifetime Support and Applications Unlimited programs, and
- 17 additional spends on customer support enhancements.

18 Some of the above types of damage include elements that are irreparable in
 19 nature.

20 Oracle is still in the process of gathering and culling down the evidence relevant
 21 to its damages internally, from third parties (e.g., customers) and from Defendants. For instance,
 22 the scope of Defendants' infringement and misuse of Oracle property is still being determined
 23 because of the ongoing and late production of Data Warehouse and other voluminous technical
 24 materials and Defendants' unwillingness to stipulate to exactly what they did. Defendants have
 25 yet to provide requested evidence relevant to Siebel, Oracle's Database products, and other
 26 Oracle applications – and indeed, have opposed such discovery. While the Parties agreed on a
 27 case extension that allowed the inclusion of Siebel claims, Defendants opposed the inclusion of
 28 Oracle's Database-related claims. The Court has now ruled that these claims should be included

1 in this case, leading to Oracle's Fourth Amended Complaint and the further supplementation
2 regarding Siebel and Database claims below. Further, Oracle's ability to calculate its damages
3 obviously is hampered by not knowing the full scope of the unlawful conduct related to the
4 allegations in Oracle's Fourth Amended Complaint. Defendants have not provided relevant
5 requested Safe Passage information or information about their valuation of IP acquired legally –
6 information that bears on the value of TN and of TN's IP-theft based business model to SAP,
7 which may be relevant to the fair market value of what SAP should have paid for a hypothetical
8 license. Moreover, Defendants' use of the attorney/client privilege to shield the actions and
9 knowledge of SAP and its officers and directors continues to hamper assessment of punitive
10 damages. Extensive meet and confers on these issues and other damages-related discovery are
11 ongoing and motions to compel may be required and/or are scheduled for briefing and hearing.
12 In addition, both sides are still responding to and even serving new discovery relevant to
13 damages. Thus, there is ongoing relevant discovery that could and likely will affect assessing
14 and computing appropriate damages.

15 To complete their analysis and computations, Oracle's damages experts are
16 waiting for the additional factual material yet to be produced and analyzed; moreover, they have
17 not finalized their methodologies or computations of Oracle's damages. In addition, legal
18 rulings (such as on Defendants' pending summary judgment motion on Oracle's fair market
19 value license measure of infringement damages and on Oracle's objections to Magistrate
20 Laporte's Rule 37 Order) may affect the final damages methodologies and computations.
21 Oracle's damages report and expert opinions will be provided in accordance with whatever
22 schedule is then in place in the action. Thus, the following description does not constitute
23 Oracle's damages analysis or demand and does not in any way bind Oracle, but merely provides
24 Oracle's current understanding of the damages here.

25 Oracle has ten causes of action; some of the damages described overlap and
26 different plaintiffs bring different causes of action. Oracle would not seek or be entitled to
27 duplicate recovery, though it will likely seek damages in the alternative.

28 A. In connection with its Copyright Infringement cause of action, Oracle has

1 alternative measures of its damages available to it under the law. Oracle reserves its right to
2 elect statutory damages for Defendants' infringement at the appropriate time, but currently does
3 not envision that it will do so. Rather, it currently seeks from Defendants the value of the
4 copyrighted material Defendants infringed both through the fair market value of license(s) and,
5 in the alternative, through lost profits and/or infringers' profits analyses.

6 Oracle expects to seek to recover damages based on the fair market value
7 license(s) for the PeopleSoft, J.D. Edwards, Siebel, and Database applications and support
8 material infringement by Defendants. The legal tests and the authorities in support are set out in
9 detail in Oracle's September 23, 2009 Opposition to Defendants' pending Motion for Partial
10 Summary Judgment Re Oracle's [Fair Market Value] Hypothetical License Damages Claims. In
11 summary, the value of the PeopleSoft, J.D. Edwards, Siebel, and Database hypothetical licenses
12 are determined by the objective fair market value of the rights being licensed or received, as
13 evidenced by the circumstances at the time (*e.g.*, for Oracle – the fact that Oracle had just paid
14 significant amounts for the companies, the anticipated value to Oracle of the PeopleSoft, J.D.
15 Edwards, and Siebel acquisitions, Oracle's cross-sell and up-sell and service renewal history; for
16 Defendants – the fact that the acquisitions significantly increased Oracle's threat to SAP, the
17 anticipated value to SAP of the TN acquisition, the amount that would not have to be expended
18 by Defendants to legitimately create what they would instead license (which will also be the
19 subject of expert analysis and relied upon by Oracle's damages experts), SAP's cross-sell and
20 up-sell and service renewal history). Based on the evidence to date, Oracle anticipates valuing
21 the hypothetical licenses in total in the billions of dollars. While no formal computation has
22 been completed, it is being finalized.

23 Oracle's alternative lost profits and infringers' profits analyses for its copyright
24 infringement claims against Defendants are ongoing and incomplete. The lost profits and
25 infringers' profits measurements overlap in part with the lost profits measurements stemming
26 from Oracle's alternative claims (described below). The combined lost profits and infringers'
27 profits analyses currently will encompass all the lost profits associated with the parties' long
28 agreed upon list of support customers who left Oracle, PeopleSoft, J.D. Edwards, or Siebel for

1 SAP and TN, including lost license sales and other cross-sell and up-sell lost profits. Based on
2 Defendants' representations – upon which Oracle is relying – and Oracle's review of the scant
3 evidence produced by Defendants concerning their infringement of Oracle's Database software,
4 Oracle is not currently aware of any additional lost customer-related Database license or support
5 revenue due to Defendants' infringement of Oracle's Database software or Defendants' use of
6 that software to support Oracle's Database customers or to transition those customers to
7 competing database products. Accordingly, while Defendants infringed Oracle's Database
8 software to support the PeopleSoft, J.D. Edwards, and Siebel software customers referred to
9 above and below, Oracle does not currently expect to value any additional customer-specific lost
10 profits or infringers' profits (beyond those customers already lost due to the PeopleSoft, J.D.
11 Edwards, and Siebel infringement), though Oracle does expect to seek the fair market value of a
12 license from Defendants for their infringement of Oracle's Database products as described in
13 accordance with the fair market license value analysis described above. Evidence relevant to
14 Oracle's lost profits/infringers' profits analyses is contained, for example, in Defendants'
15 multiple internal and external reports of the revenues taken away from Oracle by TN and by the
16 Safe Passage program and in requested productions from Defendants concerning gross revenues,
17 expenses, and margins associated with those programs and with the list of relevant customers, in
18 the voluminous customer contracts and related files produced by the parties, in the customer
19 financial reports that the parties have created and produced, in Oracle's At Risk reports and TN
20 win-back spreadsheets, and in the extensive documents on support renewal cancellations and
21 license wins and losses against SAP and TN. Oracle will also be providing additional analysis
22 relied upon by its experts in conjunction with its damages expert report, including analysis of
23 the purchasing history of its PeopleSoft, J.D. Edwards, and Siebel customer base post-
24 acquisition. Based on the evidence to date, Oracle anticipates that the lost revenues associated
25 with support losses and with lost cross-sell and up-sell opportunities as to the agreed upon list of
26 TomorrowNow customers exceed \$150 million dollars. Oracle's infringers' profits analysis
27 includes the profits on the revenues SAP and TN made from their copyright infringement,
28 including some or all of the approximately \$40 million TN reported as revenues, and a portion of

1 the approximately \$500 million in license revenue associated with SAP's leverage of TN and
2 Safe Passage in the sale of license applications. Further evidence in support of this aspect of
3 Oracle's damages is described in section E below and Defendants owe Oracle information to
4 analyze the same.

5 B. Portions of Oracle's damages from Defendants' violations of the Federal
6 Computer Fraud and Abuse Act, of the Computer Data Access and Fraud Act, and in connection
7 with Defendants' Trespass to Chattels were testified to by Dr. Koehler in his Fed. R. Civ. Proc.
8 30(b)(6) deposition. He also provided a written outline of harm and damages to Oracle's
9 computer systems, databases, data, and network, Ex. 167, from which he testified. Oracle refers
10 Defendants to that testimony and the accompanying exhibits. Further, Defendants have set a
11 Rule 30(b)(6) deposition related to the harm to the Siebel computer systems and data for October
12 15, 2009, and Oracle refers Defendants to that testimony. Further, Defendants own extensive
13 records of their computer access and fraud, and their own deposition testimony related to these
14 issues confirms the damage to Oracle's computers, data, and systems. In addition, Defendants'
15 actions adversely impacted Oracle's goodwill and caused it to lose business. These damages
16 overlap in large measure with those described below related to Defendants' breach of contract
17 and interference with Oracle's prospective economic advantage; they are not bounded by
18 Defendants' infringement of copyrighted materials. While no formal computation has been
19 completed, it is being finalized. Any additional evidence in support (e.g., salary information
20 associated with members of the investigations team, the cost of the associated laptops) will be
21 provided in connection with Oracle's expert report or before. In addition, as allowed by statute
22 or law, Oracle will seek its tens of millions of dollars of associated attorneys' fees and other
23 litigation costs, as well as punitive damages, in an amount to be proved at trial.

24 C. Oracle's damages from Defendants' breaches of contract overlap with its
25 lost profits analysis, described below. Moreover, the breach of contract damages are distinct
26 from Defendants' infringement of copyrighted materials, as described in Oracle's responses to
27 Defendants' Fifth Set of Interrogatories. While no formal computation has been completed, it is
28 being finalized.

1 D. The harm from Oracle's interference claims overlaps in part with its
2 alternative infringement lost profits analysis, described above, albeit with different plaintiffs.
3 However, as described in detail in Oracle's responses to Defendants' Fifth Set of Interrogatories
4 (and as highlighted in a number of the bullet points above), Defendants have interfered with
5 Oracle's current or prospective customer relationships, in ways that do not solely involve
6 copying, distribution, public display, or creation of a derivative work, causing further and
7 additional lost profit damages and other types of harm like harm to goodwill and other
8 reputational harm. While no formal computation has been completed, other than as built into the
9 analysis above, it is being finalized. Because of the willfulness of Defendants' interference,
10 including TN and SAP's knowledge of the illegality of TN's method of service delivery and their
11 lengthy failure to correct and make legal that business delivery despite knowing of its existence
12 from due diligence and continuing that illegal business model for over a year and a half after
13 being sued by Oracle, Oracle will also be seeking significant punitive damages, in an amount to
14 be proved at trial.

15 E. Defendants were also unjustly enriched and received ill-gotten gains at the
16 expense of Oracle, other than as described in its copyright infringement action, by all the illegal
17 conduct and other unfair business practices listed in Oracle's Fourth Amended Complaint and as
18 described in Oracle's responses to Defendants' Fifth Set of Interrogatories. These include gains
19 and/or profits SAP and TN made from those unjust, unfair, illegal, and deceptive activities,
20 including some or all of the approximately \$40 million TN reported as profits, and a portion of
21 the approximately \$500 million in license revenue associated with SAP's leverage of TN in the
22 sale of license applications, reputational harm, and the amount that Defendants saved in taking
23 from Oracle the above-described material rather than legitimately creating it (which will also be
24 the subject of expert analysis and relied upon by Oracle's damages experts), and attorneys' fees
25 as provided by statute or law. While no formal computation has been completed, it is being
26 finalized. Evidence relevant to Defendants' unjust enrichment and the ill-gotten gains received
27 through their unfair business practices is primarily contained in Defendants' internal analyses
28 and presentations on Safe Passage and SAP TN and the customer contracts and related files and


1 sequentially by its respective attachment or attachments and the attachment's metadata. For all
2 electronic documents, including email and email attachments, Oracle will provide black/white
3 group IV single page TIFF images with a standard Summation DII delimited load file. For any
4 color documents, Oracle will initially produce documents in black/white format, but will at
5 Defendants' request provide color JPEG images when the color is necessary to decipher the
6 document. Oracle will provide Microsoft Excel and similar files (ones that are only reasonably
7 usable in their native format) in native format with the original un-modified metadata. Oracle
8 will not provide corresponding TIFF images for files produced in native format, such as
9 Microsoft Excel files. A placeholder image will be inserted in the electronic production for any
10 native format documents.

11 **VI. CERTIFICATION**

12 Pursuant to Fed. R. Civ. P. 26(g)(1), counsel for Oracle certifies that to the best of
13 its knowledge, information, and belief, formed after an inquiry that is reasonable under the
14 circumstances, these supplemental and amended Initial Disclosures are complete and correct as
15 of the time Oracle makes them.

16 DATED: November 2, 2009

17 Bingham McCutchen LLP

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19 By: 
20 Bree Hann
21 Attorneys for Plaintiffs
22 Oracle USA, Inc., Oracle International Corporation,
23 Oracle EMEA Limited, and Siebel Systems, Inc.
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