

# **EXHIBIT 106**

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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.

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

**DEFENDANTS' ANSWER AND  
AFFIRMATIVE DEFENSES TO  
FOURTH AMENDED COMPLAINT**

**JURY TRIAL DEMANDED**

**REDACTED VERSION**

1 are properly “copyrighted materials.”

2 17. Defendants admit that TN, on behalf of its customers, downloaded and stored a  
3 large quantity of Software and Support Materials and that TN used those materials for customer  
4 support. Defendants further admit that TN downloaded some materials as to which TN did not  
5 have confirmation that the customer in whose name the downloads were being conducted had  
6 rights to such materials. Defendants deny the remaining allegations of paragraph 17.

7 18. Defendants admit that TN, on behalf of its customers, downloaded and stored a  
8 large quantity of Software and Support Materials and further admit that TN used those materials  
9 for customer support. Defendants further admit that TN downloaded some materials as to which  
10 TN did not have confirmation that the customer in whose name the downloads were being  
11 conducted had rights to such materials. Defendants further admit that at certain times TN  
12 maintained certain locations where TN kept certain downloaded materials that were not  
13 segregated by customer. Defendants deny the remaining allegations of paragraph 18.

14 19. Defendants admit that TN, on behalf of its customers, downloaded and stored a  
15 large quantity of Software and Support Materials and further admit that TN used those materials  
16 for customer support. Defendants further admit that TN downloaded some materials as to which  
17 TN did not have confirmation that the customer in whose name the downloads were being  
18 conducted had rights to such materials. Defendants further admit that TN kept copies of certain  
19 of its customers’ “Oracle” software applications on its systems and that certain development  
20 environments TN used to service certain customers were described internally as “generic  
21 environments.” Defendants further admit that TN delivered numerous fixes and tax and  
22 regulatory updates to certain customers, that certain of those fixes and updates were retrofitted  
23 from certain fixes and updates created by various “Oracle” entities, and that TN provided support  
24 for former Oracle customers who used Oracle’s database relying as necessary on instances of that  
25 database. Defendants deny the remaining allegations of paragraph 19.

26 20. Defendants admit that TN, on behalf of its customers, downloaded and stored a  
27 large quantity of Software and Support Materials and that TN used those materials for customer  
28 support. Defendants further admit that TN downloaded some materials as to which TN did not

38. Defendants admit the allegations in the first sentence of paragraph 38. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 38, and on that basis deny them.

39. Defendants admit the allegations of paragraph 39.

40. Defendants admit the allegations of paragraph 40.

41. Defendants admit the allegations of paragraph 41, except that the entity TomorrowNow has never had or been known by the name "SAP-TN."

42. Defendants deny the allegations of the second sentence of paragraph 42. Defendants are without knowledge or information sufficient to form a belief as to the truth of the remaining allegations in paragraph 42, and on that basis deny them.

43. Defendants admit the allegations of paragraph 43, but aver that as of October 31, 2008, TN ceased operations and is no longer providing third party support in this district or elsewhere.

44. Defendants admit that SAP America is a 100% wholly-owned subsidiary of SAP AG, that TN is a 100% wholly-owned subsidiary of SAP America, and that the two parent companies have all the rights and authorities that are commensurate with that 100% ownership. Defendants deny the remaining allegations of paragraph 44.

45. Defendants deny the allegations of paragraph 45.

46. Defendants admit the allegations of paragraph 46.

47. Defendants admit the allegations of paragraph 47.

48. Defendants admit the allegations of paragraph 48.

49. Defendants do not contest assignment in this division, but are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 49 and on that basis deny them.

50. Defendants admit that the group of "Oracle" companies collectively develops, manufactures, markets, distributes, and services a variety of software products, and has been granted the certification mentioned, but denies the remaining allegations of paragraph 50, including the allegation that "Oracle," as defined by Plaintiffs, is a single entity.

1 and on that basis deny them.

2 92. Defendants deny the allegations of paragraph 92.

3 93. Defendants admit that TN employed an automated downloading tool called  
4 “Titan.” Defendants deny the remaining allegations in the first sentence of paragraph 93.  
5 Because most of the remainder of paragraph 93 refers to the purported level of activity on  
6 Plaintiffs’ customer support website, Defendants lack knowledge, information, or belief sufficient  
7 to admit or deny the allegations of the second, fifth, sixth, and seventh sentences of paragraph 93,  
8 and on that basis deny them. In response to the third sentence of paragraph 93, Defendants admit  
9 that “Oracle” entities permit their customers and their third party service providers to download a  
10 wide array of software and support materials, but deny the remaining allegations of that sentence.  
11 In response to the fourth sentence of paragraph 93, Defendants admit that “Oracle” entities have  
12 spent billions to purchase various companies, but otherwise deny the allegations because they are  
13 without knowledge or information sufficient to form a belief as to the truth of those allegations.  
14 Defendants deny the remaining allegations of paragraph 93.

15 94. Defendants admit the allegations of paragraph 94.

16 95. Defendants admit that customers searching for certain solutions on the Customer  
17 Connection website are asked to click on a button after certain searches to indicate whether the  
18 search result helped solve the customer’s problem. Defendants admit the allegations of the  
19 second sentence of paragraph 95. Defendants are without knowledge or information sufficient to  
20 form a belief as to the truth of the allegations of the last sentence of paragraph 95, and on that  
21 basis deny them. Defendants deny all remaining allegations of paragraph 95.

22 96. Defendants are without knowledge or information sufficient to form a belief as to  
23 the truth of the allegations of paragraph 96, and on that basis deny them.

24 97. Defendants are without knowledge or information sufficient to form a belief as to  
25 the truth of the allegations of paragraph 97, and on that basis deny them.

26 98. In response to paragraph 98, Defendants admit that TN, on behalf of its customers,  
27 downloaded numerous materials from Plaintiffs’ support website and that such downloading was  
28 performed from TN’s facilities in Bryan, Texas. Defendants further admit that TN is a subsidiary

1 of SAP America that has in the past provided support services for a variety of software programs,  
2 including those developed by PeopleSoft and JDE. Defendants lack knowledge or information  
3 sufficient to form a belief as to the truth of the remaining allegations of paragraph 98, and on that  
4 basis deny them.

5 99. Defendants admit that in some instances the Titan download tool or other tools  
6 were used on a 24 hour basis. Defendants deny the remaining allegations in paragraph 99.

7 100. In response to paragraph 100, Defendants admit that TN employees, acting on  
8 behalf of TN's customers, downloaded information from Plaintiffs' support website, and that  
9 TN's employees performed those downloads subject to policies that required that all downloads  
10 be on behalf of customers with current rights to access and download materials and that all  
11 downloads be of materials to which that customer had then-current rights of access. Defendants  
12 admit that the downloads TN performed were on behalf of those who were or were about to  
13 become TN customers, but deny the remaining allegations of the last sentence of paragraph 100.  
14 Defendants are without knowledge or information sufficient to form a belief as to the truth of the  
15 remaining allegations of paragraph 100, and on that basis deny them.

16 101. In response to paragraph 101, Defendants admit that at least some of the  
17 downloading activity alleged in Plaintiffs' complaint was conducted by TN, on behalf of TN's  
18 customers. Defendants are without knowledge or information sufficient to form a belief as to the  
19 truth of the remaining allegations of paragraph 101, and on that basis deny them.

20 102. Defendants admit the allegations of the fourth and seventh sentences of paragraph  
21 102, but deny the remaining allegations of paragraph 102.

22 103. Because the allegations in paragraph 103 are not specific to any TN customer,  
23 Defendants lack knowledge or information sufficient to form a belief as to the truth of the  
24 allegations of paragraph 103, and on that basis deny them. The relevant downloading activities,  
25 maintenance services and contractual arrangements, rights, and responsibilities vary customer by  
26 customer, and must be analyzed on that basis.

27 104. Because the allegations in paragraph 104 are not specific to any TN customer,  
28 Defendants lack knowledge or information sufficient to form a belief as to the truth of the

1 allegations of paragraph 104, and on that basis deny them. The relevant downloading activities,  
2 maintenance services and contractual arrangements, rights, and responsibilities vary customer by  
3 customer, and must be analyzed on that basis.

4 105. Defendants admit that versions of Oracle's developer license speak for themselves.  
5 Defendants deny the remaining allegations of paragraph 105.

6 106. In response to paragraph 106, Defendants admit that the now former TN  
7 employees named in that paragraph are also former employees of either PeopleSoft, JDE or  
8 Siebel, and admit the allegations of the second and fifth sentences of paragraph 106. Defendants  
9 deny the remaining allegations of paragraph 106.

10 107. Defendants admit the allegations of the second sentence of paragraph 107 only  
11 with respect to certain TN customers, but deny all remaining allegations of paragraph 107.

12 108. Defendants deny the allegations of the first and third sentences of paragraph 108.  
13 In response to the allegations of the second sentence of paragraph 108, Defendants admit that  
14 some downloads were performed in rapid succession without real time human review of the  
15 materials being downloaded, but Defendants otherwise deny the allegations of that sentence.

16 109. Defendants admit that certain TN employees thought that at one time the Siebel-  
17 related customer support website went into "failover." Defendants deny the remaining allegations  
18 of paragraph 109.

19 110. Defendants deny the allegations of paragraph 110.

20 111. By its very terms, paragraph 111 is a general statement and makes no specific  
21 allegations except about Plaintiffs' alleged investigation, all the details of which have not been  
22 shared with Defendants. Defendants admit that the majority of the customers listed in paragraph  
23 107 are former TN customers. As to the remaining allegations of paragraph 111, Defendants are  
24 without knowledge or information sufficient to form a belief as to the truth of those allegations,  
25 and on that basis deny them. In addition, to the extent paragraph 111 references TN's customers  
26 who are also referenced in paragraphs 112-117, Defendants incorporate their response to those  
27 paragraphs into this response to paragraph 111.

28 112. In response to paragraph 112, Defendants admit the allegations of the first

1 sentence to the extent that Honeywell was referenced on a former version of TN's website.  
2 Defendants further admit that TN downloaded, on Honeywell's behalf, thousands of materials,  
3 and further admit that some of the downloaded materials relate to applications as to which TN's  
4 records do not show Honeywell stated to TN that it was licensed. Defendants are without  
5 knowledge or information sufficient to form a belief as to the truth of the remaining allegations of  
6 paragraph 112, and on that basis deny them.

7 113. In response to paragraph 113, Defendants admit the allegations of the first and  
8 second sentences. Defendants further admit that TN, on Merck's behalf and at approximately the  
9 time frames alleged, downloaded thousands of materials, and further admit that some of the  
10 materials downloaded relate to applications as to which TN's records do not show Merck stated to  
11 TN that it was licensed. Defendants are without knowledge or information sufficient to form a  
12 belief as to the truth of the remaining allegations of paragraph 113, and on that basis deny them.

13 114. In response to paragraph 114, Defendants admit the allegations of the first  
14 sentence to the extent that OCE was referenced on a former version of TN's website. Defendants  
15 further admit that TN, on OCE's behalf and at approximately the time frames alleged,  
16 downloaded thousands of materials, and further admit that some of the materials downloaded  
17 relate to applications as to which TN's records do not show OCE stated to TN that it was licensed.  
18 Defendants are without knowledge or information sufficient to form a belief as to the truth of the  
19 remaining allegations of paragraph 114, and on that basis deny them.

20 115. In response to paragraph 115, Defendants admit the allegations of the first  
21 sentence. Defendants further admit that TN, on SPX's behalf and at approximately the time  
22 frames alleged, downloaded thousands of materials, and further admit that some of the materials  
23 downloaded relate to applications as to which TN's records do not show SPX stated to TN that it  
24 was licensed. Defendants are without knowledge or information sufficient to form a belief as to  
25 the truth of the remaining allegations of paragraph 115, and on that basis deny them.

26 116. In response to paragraph 116, Defendants admit the allegations of the first  
27 sentence. Defendants further admit that TN, on Metro Machine's behalf and at approximately the  
28 time frames alleged, downloaded thousands of materials. Defendants are without knowledge or



228. As Plaintiffs admitted in responding to Defendants' Motion to Dismiss, and as ordered in the Court's December 15, 2008 Order Granting Motion to Dismiss in Part and Denying It in Part (D.I. 224), Plaintiffs' claim for an accounting is preempted by the Copyright Act to the extent it is based on alleged copyright infringement. For this reason, no response is required to the allegations in paragraph 228 regarding breach of contract, interference with prospective economic advantage, and "taking commercial advantage" of the Software and Support Materials, to the extent these allegations are based on alleged "use," "taking," or "copying" of the Software and Support Materials, which in turn are based on alleged copyright infringement and preempted by the Copyright Act. Without waiver of any defense of preemption or otherwise, Defendants deny the allegations of paragraph 228.

229. Defendants deny the allegations of paragraph 229.

230. Defendants deny the allegations of paragraph 230.

### **AFFIRMATIVE DEFENSES**

As and for affirmative defenses to the claims in Plaintiffs' Fourth Amended Complaint, and based on the knowledge and information available to them to date, Defendants are informed and believe and based thereon allege as follows:

#### **FIRST AFFIRMATIVE DEFENSE**

1. One or more of the copyright registrations that are allegedly infringed by Defendants are invalid for failure to comply with the requirements for copyrightable subject matter set forth in 17 U.S.C. § 102.

#### **SECOND AFFIRMATIVE DEFENSE**

2. Defendants' use of Plaintiffs' copyrighted material is lawful use based on agreements between Plaintiffs and their customers and/or former customers.

#### **THIRD AFFIRMATIVE DEFENSE**

3. Plaintiffs consented to Defendants' use of Plaintiffs' copyrighted material under agreements between the Plaintiffs and their customers and/or former customers.

#### **FOURTH AFFIRMATIVE DEFENSE**

4. Plaintiffs' claims for copyright infringement are barred by the doctrine of

1 copyright misuse, as Plaintiffs' initiation of the instant suit is an attempt to secure an exclusive  
2 right to the maintenance of Plaintiffs' software.

3 FIFTH AFFIRMATIVE DEFENSE

4 5. One or more of Plaintiffs' claims for statutory damages and attorneys' fees under  
5 17 U.S.C. § 504 are barred because some, if not all, of Plaintiffs' copyright registrations were not  
6 made within three months after the first publication of the allegedly infringing works, as required  
7 by 17 U.S.C. § 412.

8 SIXTH AFFIRMATIVE DEFENSE

9 6. Plaintiffs are not entitled to injunctive relief because any alleged injury to  
10 Plaintiffs is not immediate or irreparable, and Plaintiffs have an adequate remedy at law.

11 SEVENTH AFFIRMATIVE DEFENSE

12 7. Plaintiffs' claims for violations of the Computer Fraud and Abuse Act are barred  
13 based on agreements between Plaintiffs and their customers and/or former customers.

14 EIGHTH AFFIRMATIVE DEFENSE

15 8. Plaintiffs' claims for negligent and intentional interference with prospective  
16 economic advantage are barred because Defendants' actions were privileged because they were  
17 taken in a good faith effort to compete with the plaintiff and/or Defendants had an equal or  
18 superior interest in the subject matter of the prospective economic advantage.

19 NINTH AFFIRMATIVE DEFENSE

20 9. Plaintiffs' claims for negligent and intentional interference with prospective  
21 economic advantage are barred because Defendants' actions were reasonable steps to protect  
22 Defendants' own legal rights, including Defendants' own contractual rights and other intangible  
23 business interests.

24 TENTH AFFIRMATIVE DEFENSE

25 10. Plaintiffs' claim for trespass to chattels is barred because Plaintiffs implicitly  
26 consented to Defendants' conduct.

27 ELEVENTH AFFIRMATIVE DEFENSE

28 11. Plaintiffs' claims for breach of contract, intentional and negligent interference with

**DEMAND FOR TRIAL BY JURY**

Pursuant to Rule 38(b) of the Federal Rules of Civil Procedure, Defendants hereby demand a trial by jury on all issues so triable.

Dated: August 26, 2009

JONES DAY

By: /s/ Tharan Gregory Lanier  
Tharan Gregory Lanier

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