

EXHIBIT 95

Robert A. Mittelstaedt (SBN 060359)
Jason McDonell (SBN 115084)
Elaine Wallace (SBN 197882)
JONES DAY
555 California Street, 26th Floor
San Francisco, CA 94104
Telephone: (415) 626-3939
Facsimile: (415) 875-5700
ramittelstaedt@jonesday.com
jmcdonell@jonesday.com
ewallace@jonesday.com

Tharan Gregory Lanier (SBN 138784)
Jane L. Froyd (SBN 220776)
JONES DAY
1755 Embarcadero Road
Palo Alto, CA 94303
Telephone: (650) 739-3939
Facsimile: (650) 739-3900
tglanier@jonesday.com
jlfroyd@jonesday.com

Scott W. Cowan (Admitted *Pro Hac Vice*)
Joshua L. Fuchs (Admitted *Pro Hac Vice*)
JONES DAY
717 Texas, Suite 3300
Houston, TX 77002
Telephone: (832) 239-3939
Facsimile: (832) 239-3600
swcowan@jonesday.com
jlfuchs@jonesday.com

Attorneys for Defendants
SAP AG, SAP AMERICA, INC., and
TOMORROWNOW, INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ORACLE USA, INC., et al.,

Plaintiffs,

v.

SAP AG, et al.,

Defendants.

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

**DEFENDANTS' RESPONSE TO
PLAINTIFFS' FIFTH SET OF
REQUESTS FOR ADMISSION TO
DEFENDANTS TOMORROWNOW,
INC., SAP AG, AND SAP AMERICA,
INC.**

**CONFIDENTIAL PURSUANT TO
PROTECTIVE ORDER**

REQUESTS FOR ADMISSION

REQUEST NO. 1:

Admit that Defendants know of no technical way to determine which Customer's Customer Connection credentials were used to download any given Software and Support Material on SAP TN's systems.¹

RESPONSE TO REQUEST NO. 1:

Defendants object to this request on the grounds stated in the General Objections and Responses. Defendants further object to this request as vague and ambiguous due to the phrases "technical way" and "SAP TN's systems." Moreover, Defendants object that the request is unduly burdensome and improperly attempts to shift the burden to Defendants to evaluate each and every file on TomorrowNow's systems where the effort associated with responding to this request is substantially similar for the parties, especially because the available documents, data and other information sought from which the answer, if any, could be derived in response to this request have been produced by Defendants in response to Plaintiffs' other discovery requests and thus any relevant, available information is now as equally accessible to Plaintiffs as it is to Defendants. Defendants object that this request calls for information within the control, custody, or possession of Plaintiffs. Subject to, and without waiving the foregoing objections, Defendants respond as follows:

ADMITTED on the following qualified basis: Defendants ADMIT that Defendants have always acknowledged that there is no known technical way to specifically tie a downloaded item on TomorrowNow's systems to a Customer Connection ID and password. As far as Defendants have been able to determine, the downloaded files neither contain any physical electronic tagging in the file itself, nor any file-based metadata associated with each file that provides both the exact username and password that was used to download each file. It was TomorrowNow's policy to

¹ See, e.g., Defendants' Opposition to Plaintiffs' Motion to Compel Production of documents Related to Damages Model and Interrogatory Responses Related to Use of Plaintiffs' Intellectual Property, July 14, 2009, Dkt. 334, p. 7, fn. 9

1 only download materials for customers before their maintenance end dates using a Customer
2 Connection ID and password provided by that customer and to only download materials for that
3 customer that were related to those products for which the customer had informed TomorrowNow
4 they were licensed. To the extent this request is not admitted, it is DENIED.

5 **REQUEST NO. 2:**

PROOF OF SERVICE

I, Laurie Paige Burns , declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 California Street, 26th Floor, San Francisco, California 94104. On November 23, 2009, I served a copy of the attached document(s):

DEFENDANTS' RESPONSES TO PLAINTIFFS' FIFTH SET OF REQUESTS FOR ADMISSIONS TO DEFENDANTS

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- ☒ by placing the document(s) listed above in a sealed envelope and causing such envelope to be hand delivered to the office of the addressee on the date specified above.
- ☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Donn Pickett, Esq.
 Geoffrey M. Howard, Esq.
 Holly House, Esq.
 Zachary J. Alinder, Esq.
 Bree Hann, Esq.
 BINGHAM McCUTCHEN LLP
 Three Embarcadero Center
 San Francisco, CA 94111-4067
donn.pickett@bingham.com
geoff.howard@bingham.com
zachary.alinder@bingham.com
bree.hann@bingham.com

Executed on November 23, 2009, at San Francisco, California.

By: 

LAURIE PAIGE BURNS

HUI-121280