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19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA

21 OAKLAND DIVISION

22 ORACLE USA, INC., et al.,

23 Plaintiffs,

24 v.

25 SAP AG, et al.,

26 Defendants.

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

**DEFENDANTS' OPPOSITION TO
 ORACLE'S SUPPLEMENTAL BRIEF
 IN SUPPORT OF ITS MOTION TO
 COMPEL FURTHER RESPONSES TO
 REQUESTS FOR ADMISSION**

Judge: Hon. Elizabeth D. Laporte

1 **I. INTRODUCTION**

2 Plaintiffs' Supplemental Brief in Support of its Motion to Compel Further Responses to
3 Requests for Admissions (Dkt. 661, "Supplemental Motion" or "Supp. Mot.") lacks merit,
4 relevant context and seeks relief beyond what was sought in Plaintiffs' December 11, 2009
5 Motion to Compel (Dkt. 570, "Motion" or "Mot."). Plaintiffs' Motion sought amended responses
6 to 316 separate Requests for Admission ("RFAs") and now their Supplemental Motion seeks
7 different relief relating to only 90 of those RFAs, which represent less than 7% of the total 1,315
8 separately numbered RFAs Plaintiffs served on Defendants in this case.

9 The dispute regarding these remaining 90 RFAs is the logical result of their overly
10 complex wording and substance. To adequately assess Plaintiffs' additional requests for relief,
11 the Court must consider the 90 RFAs at issue in context with Defendants' amended responses to
12 all of the 316 RFAs addressed in the Motion. As the Court has acknowledged, the rulings made
13 from the bench during the January 26, 2010 hearing and in the Court's February 11, 2010
14 Opinion and Order (collectively, the "Orders") were based solely on the five (5) allegedly
15 exemplar RFAs Plaintiffs presented in the Motion, not on a review of any of the intricacies
16 associated with any other of the 311 separately-numbered RFAs addressed by the Motion. 01-26-
17 10 Tr. (Dkt. 629) at 57:13 - 58:25.

18 The Supplemental Motion does not use any of the five exemplar RFAs (*i.e.*, RFAs 501,
19 542 and 597 of set 2, RFA 13 of set 3, and RFA 130 of set 5) on which this Court previously
20 ruled. Moreover, the Supplemental Motion does not even complain about Defendants' amended
21 responses to four of the five exemplars that were both referenced in the Motion and reviewed by
22 the Court in issuing the Orders (*i.e.*, RFA 13 of set 3 and RFAs 501, 542 and 597 of set 2).
23 Instead, the Supplemental Motion uses eight new exemplar RFAs to raise five different issues
24 (*i.e.*, RFA 577 of set 2, RFAs 16 and 18 of set 3, RFAs 4, 6, 11, 34 and 36 of set 5).

25 Defendants' amended responses fully comply with Rule 36 and the Court's Orders.
26 Specifically, Defendants withdrew the objections to the terms "copy," "fix," "update" and
27 "generic environment" and interpreted those terms in a manner consistent with the Court's Orders.
28 Defendants also accepted the Court's recommended phrase "vast majority" in quantifying a large

1 number of their amended responses. In only eleven instances where the qualifier “vast majority”
2 could not in good faith be used in response to a given RFA, Defendants used a different qualifier
3 (*i.e.*, either “majority,” “minority,” or “approximately half”), but then Defendants also used the
4 exact inverse qualifier to admit the eleven applicable mirror RFAs in a way that acknowledges
5 Defendants’ lack of sufficient readily available information to determine the answer for the
6 remaining quantity not accounted for in the first instance. And although Defendants’ used the
7 permission in Rule 36 and the Court’s Orders to qualify their responses, they did so sparingly and
8 only when it was essential. Most of Defendants’ amended responses to the 316 RFAs addressed
9 by the Court’s Orders are one-word admissions or denials. In those limited instances in which
10 Defendants’ amended responses required, in good faith, qualifying language (*i.e.*, something
11 other than a simple “Admitted” or “Denied”) Defendants complied with the Court’s Orders by,
12 among other things, answering those RFAs using the terms in the RFAs themselves.

13 **II. THERE IS NO BASIS FOR THE ADDITIONAL RELIEF PLAINTIFFS SEEK**

14 **A. Plaintiffs created the list of referenced Bundles for the 14 RFAs in Issue A.**¹

15 The exemplar for this issue is RFA 18 of set 3. *See* Cowan Decl., Ex. A at 3. The
16 contested language in this exemplar, and the other 13 RFAs in Issue A that it is intended to typify,
17 is: “**ADMITTED for the vast majority of fix objects that are contained in retrofit bundles**
18 **listed in the first two columns of Exhibit A attached hereto.**”² *Id.* Basic principles of fairness
19 and due process require that the 14 RFAs in Issue A³ be analyzed in context with the other 52
20 RFAs to which they relate. *See* Cowan Decl., Ex. A.

21 _____
22 ¹ For ease of reference, Defendants refer to each of Plaintiffs’ separately lettered issues as
23 Issue “A” through “E,” respectively. For further ease of reference, each of Exhibits “A” through
24 “E” to the attached declaration of Scott W. Cowan (“Cowan Decl.”) correlate to the identically
25 lettered issues in Plaintiffs’ Supplemental Motion. Also, when reviewing Exs. A, B, D and E to
26 the Cowan Declaration, the Court should note that those exhibits contain the RFAs addressed by
27 the Supplemental Motion (the 8 exemplar requests are highlighted in pink and the remaining 82
28 RFAs at issue are highlighted in yellow) as well as the related RFAs and amended responses that
are not contested in the Supplemental Motion, but which are included (with no highlighting) to
permit the Court to analyze the contested responses in context with the non-contested ones.

² Where terms are shown in a **bolded colored font** in this brief, they are, for ease of
reference, shown in the identical way in the referenced Exhibit to the Cowan Declaration.

³ The other 13 RFAs in Issue A are highlighted in yellow in Cowan Decl., Ex. A at 3, 4,
10, 11, 15 and 16 (*i.e.*, RFAs 17, 19, 20, 32, 34, 44 and 47 in set 3 and 134-37, 149, 151 in set 5).

1 When that analysis is done, it shows that where Defendants could in good faith admit the
2 type of request at issue in Issue A as to the vast majority of **all** of the 33,186 objects for a specific
3 request, they did so.⁴ And, where Defendants could in good faith admit the requests as to the vast
4 majority of **specific types** (*i.e.*, .dat, .sql, .sqr and .cbl files) of the 33,186 objects for a specific
5 request, they did so.⁵ Likewise, where Defendants could in good faith admit the requests as to the
6 **vast majority** of a **specific set** (*i.e.*, all objects, regardless of type, that are contained in the
7 **retrofit bundles listed in the first two columns of Exhibit A**) of the 33,186 objects for a
8 specific request, they did so.⁶ Further, where Defendants in good faith could not quantify the
9 admission for specific types (*i.e.*, .dat, .sql, .sqr and .cbl files) of the 33,186 objects for a specific
10 request using the phrase “vast majority,” but could do so using something else (*i.e.*, majority,
11 minority or approximately half), they did so and then also simultaneously admitted, in response to
12 the corresponding mirror request, Defendants’ lack of sufficient readily obtainable information to
13 determine the inverse quantity.⁷

14 This type of request-by-request analysis and related amended response is what is required
15 by both Rule 36 and the Court’s Orders and is exactly what Defendants did. Any fair reading of
16 the rules, interpretative case law and this Court’s Orders indicates that an individual, object-by-
17 analysis for each of the 33,186 objects listed on the 973 page exhibit attached to the 14 RFAs in
18 Issue A is neither required nor necessary.

19 Plaintiffs’ statement that a “jury could not read Defendants’ response and understand what
20 they have admitted or denied” is simply not credible. The phrase “**retrofit bundles listed in the**
21 **first two columns of Exhibit A**” that is referenced in the 14 RFAs in Issue A is a reference to a
22 document that Plaintiffs themselves created for use in their Second Set of RFAs. More
23 specifically, Plaintiffs’ RFA 532 of set 2 states: “Admit that for each Fix or Update listed in **the**
24 **first two columns of Exhibit A**, one step in the process of generating that Fix or Update was to

25 ⁴ *Id.* at 1, 6, 9, 10, 11, 14 and 16 (*i.e.*, RFAs 13-14, 24, 29, 31, 33, 42 and 46 of set 3).

26 ⁵ *Id.* at 2, 3, 6-8 and 12-13 (*i.e.*, RFAs 15, 17, 23, 25, 27, 35 and 38 of set 3).

27 ⁶ *Id.* at 3-4, 10-11 and 15-16 (*i.e.*, RFAs 17-20, 32, 34, 44 and 47 in set 3 and 134-37, 149
and 151 in set 5).

28 ⁷ *Id.* at 2 and 5-8 (*i.e.*, RFAs 15-16, 21-23 and 25-27 in set 3 and RFAs 132-133, 138-140
and 142-144 in Set 5).

1 make a Copy of an existing Generic Environment, and label the Copy as a “TST” Environment.”
2 (emphasis added). The Exhibit “A” referenced in RFA 532 of set 2 (and which is also referenced
3 in each of the 76 separately numbered RFAs 496-571 in set 2) is the **exact same** Exhibit A
4 attached to Defendants’ amended responses to the 14 RFAs at issue here. If the jury does not
5 understand what Defendants’ are referring to, they will also be confused by all 75 of Plaintiffs
6 own RFAs in set 2 that refer to the exact same two columns of the exact same exhibit. Plaintiffs
7 may reply by asserting that the reference to the bundles listed in the first two columns of Exhibit
8 A provides no information as to which specific objects in the list of 33,186 objects are referenced
9 in the 14 RFAs at issue, but that is also not credible. Defendants produced the retrofit bundles
10 listed in the first two columns of Exhibit A. Moreover, the names of those retrofit bundles are
11 contained in the 973 page Exhibit D that is attached to the 14 RFAs in Issue A. Plaintiffs and
12 their experts can easily review the first two columns of Exhibit A along with their own 973 page
13 list of objects to determine which objects are contained within the retrofit bundles.

14 But that is not what Plaintiffs want. Plaintiffs admit that “the purpose of these RFAs is to
15 establish that SAP TN had development and testing processes that were common for many
16 thousands of objects, so that at trial proof of infringement can be presented in an aggregated way,
17 rather than individually for each object.” Supp. Mot. at 2:9-11. Although Defendants do not
18 concede that the responses to the 14 RFAs at issue are “proof of infringement,” there is no better
19 way to aggregate a specific portion of the 33,186 objects at issue than to provide an admission
20 that specifically relates to the “vast majority” of specific collections of those objects (*i.e.*, the
21 retrofit bundles that are identified in the first two columns of Exhibit A). Thus, the “level of
22 granularity” with which Defendants have responded to the 14 RFAs in Issue A actually helps
23 Plaintiffs by providing the very aggregation they claim this set of RFAs ultimately seeks.

24 **B. The wording of the 17 RFAs in Issue B requires a qualified response.**

25 Plaintiffs seriously misquote (twice) Defendants’ response to RFA 577, which actually
26 states: “ADMITTED for at least one component in the majority of the listed fixes or **updates**.”⁸

27 _____
28 ⁸ Plaintiffs misquote the response as: “ADMITTED for at least one component in the majority of the listed fixes or **components**.” Supp. Mot. at 3:22-23 and 4:9.

1 Thus, contrary to Plaintiffs’ assertion, Defendants’ qualified amended response tracks the
2 language of the RFA. The entire set of 185 separately numbered RFAs in which the 17 RFAs in
3 Issue B are contained is RFAs 496-680 of set 2.⁹ When the companion requests (and related
4 amended responses) to these 17 RFAs are considered, certain clear patterns emerge.

5 This set of RFAs is in response to the Court’s suggestion that Plaintiffs should consider
6 seeking admissions from Defendants based on a “bucketing”¹⁰ approach (*i.e.*, requests that seek
7 admissions regarding a described activity for “**each**,” “**the majority**,” “**some**” or “**at least one**” of
8 the fixes or updates identified in the lists attached to the requests at issue). And, as Exhibit B to
9 the Cowan Declaration shows, Defendants admitted without any qualification whatsoever 98 of
10 these 185 requests and admitted on a “vast majority basis” 26 additional requests. Defendants
11 denied, without any qualification whatsoever, 32 of these 185 requests, and denied only 11 of the
12 requests on the basis that Defendants have insufficient information to admit or deny the request.¹¹

13 The primary reason that Defendants were able to simplify their amended responses to this
14 group of RFAs is that during the meet and confer that followed the January 26, 2010 hearing,
15 Plaintiffs indicated that they believed the plain meaning of the phrases “**in part**,” “**as part of**,”
16 “**part of TN’s process**,” “**one step in the process**” and “**at least one**” should be sufficient to
17 address Defendants’ concerns that a response relating to the referenced updates or fixes (which
18 each contain numerous objects) was not necessarily an answer as to every single object contained
19 in the fixes or updates. In other words, at least for the requests that contain these phrases, even if
20 one object in the referenced fixes or updates satisfies the condition of the request, it is Plaintiffs’
21 position that an admission of that request is required. In some instances, even where these

22 _____
23 ⁹ The 17 RFAs in Issue B are highlighted in Cowan Decl., Ex. B at 26, 31, 32, 33, 34, 35,
36 and 50 (*i.e.*, RFAs 577-79, 600-02, 604-606, 608-10, 612-14 and 667-668 in Set 2)..

24 ¹⁰ For certain requests that relate to frequency instead of quantity, Plaintiffs used the terms
25 “**always**,” “**usually**,” “**more often than not**” and “**sometimes**.” These bucketing terms, as in this
brief, are also shown in **bolded blue font** in Ex. B to the Cowan Declaration.

26 ¹¹ To assist the Court in fully understanding and appreciating how seriously Defendants
27 have taken their obligations under both Rule 36 and the Court’s Orders related to Plaintiffs’
28 Motion, directly adjacent to Defendants’ current responses Defendants have included in the far
right column of Exhibit B to the Cowan Declaration the substantive portions of Defendants’ prior
responses to each of these 185 RFAs as they existed before Defendants’ received the Court’s
guidance at the January 26, 2010 hearing.

1 phrases were not included in the requests, Defendants were still able to provide an amended
2 response to the request without the need for any qualification. However, in 17 instances where
3 those phrases were not included, Defendants needed to provide a good faith qualification.

4 The Court recognized Defendants' concern regarding this potential "over inclusiveness"
5 issue for these RFAs during the January 26 hearing and stated that "I don't know whether Oracle
6 could change this to something like 'Admit that for some fixes or updates or the components
7 thereof,' or something like that." Jan. 26, 2010 Transcript at 47:8-11 (emphasis added).
8 Defendants responded by asking "**so, Your Honor, are you suggesting that we work together**
9 **to try to address some of the concerns -- we have and revise their request?"** *Id.* at 47:19-23
10 (emphasis added). And, the Court then responded "**Yes.** But I am telling you I mostly agree with
11 Oracle. I very little agree with you. **I think there's a few grains of correctness that it's not**
12 **exactly as precise as it should be, but** I think mostly what's happening is those are being used to
13 leverage giving evasive and unhelpful answers. That's my view of this." *Id.* at 47:23-48:3.
14 (emphasis added). Plaintiffs then responded, "**We'll take that and work with it, Your Honor.**"
15 *Id.* at 48:4-5 (emphasis added) (Plaintiffs' Supplemental Motion deleted the bolded portions of
16 the hearing transcript quoted above, *see* Supp. Mot. at 4:24-28, n. 1).

17 Defendants met and conferred with Plaintiffs after the January 26 hearing in an attempt to
18 reach an agreement where Plaintiffs would slightly revise their requests for the 17 RFAs in Issue
19 B in a way that would permit an unqualified amended response. Plaintiffs refused to do so. Thus,
20 Defendants then used the permissions provided in Rule 36 and the Court's Order and qualified
21 their amended responses to the 17 RFAs in Issue B. 02-11-10 Order (Dkt. 633) at 11:26-27.

22 Defendants qualified their amended responses using the **exact same** qualifying language
23 the Court suggested (*i.e.*, "components") during the hearing. Although the Court seemed to think
24 the term "components" might be appropriate, and although Plaintiffs own expert, Kevin Mandia,
25 has used the term "components" in the **exact same** context that Defendants used it in their
26 amended responses,¹² Plaintiffs argue that the "jury will not understand the undefined word

27 _____
28 ¹² Plaintiffs' technical expert, Kevin Mandia, defines "Associated Files" meaning "any file
that is a **component** of a specific fix." *See* Cowan Decl. Ex. F (emphasis added).

1 ‘component,’ nor how it relates to the fixes and updates Oracle asked about.” That argument is
2 not credible. Defendants amended responses to the 17 RFAs at issue, especially when taken in
3 context with all of Defendants’ amended responses to the set of 185 RFAs in which these 17
4 RFAs are contained, comply with Rule 36 and the Court’s Orders.

5 **C. Plaintiffs understand the cited testimony for the sole RFA in Issue C.**

6 Issue C involves only one RFA (*i.e.*, RFA 11 in set 5). Defendants’ response to RFA 11 is
7 essentially “DENIED for the vast majority,” except as to the subset of certain downloaded
8 materials that Ms. VonFeldt admitted under Plaintiffs’ cross examination that she placed on the
9 “AS/400 World Partition” (*i.e.*, the piece of hardware that is the subject of RFA 11).

10 Plaintiffs state that “there is no way a **jury** could read Defendants’ response to RFA 11
11 and understand what [Defendants] have admitted or denied.” Supp. Mot. at 5:13-14 (emphasis
12 added). To the extent that is true, then it is also true that there is no way a jury could read the
13 request in RFA 11, without reference to any extrinsic evidence or knowledge, and understand the
14 request that Plaintiffs are making of Defendants. The reality is that Plaintiffs’ RFAs are
15 technical, very complicated requests that will inevitably require extrinsic (most likely expert)
16 evidence before the requests and the related responses will have any significant meaning to a lay
17 jury. Regardless, Plaintiffs and their experts understand exactly what Defendants have admitted
18 in RFA 11 because Plaintiffs cross-examined Ms. VonFeldt on this very issue for almost a half
19 hour and obtained as much information from Ms. VonFeldt as she could remember regarding the
20 specific locations on the AS/400 World Partition where the downloads at issue might be located.
21 *See* Cowan Decl., Ex. C (Apr. 4, 2009 VonFeldt Depo. at 10:14-29:13 and Deposition Ex. 1146
22 cited therein).¹³ During Ms. VonFeldt’s deposition, Plaintiffs even used a document she created

23 ¹³ Only portions of pages 10, 11 and 14 of Ms. VonFeldt’s testimony are cited in
24 Defendants’ amended response because Defendants reasonably believed that Plaintiffs would
25 readily recognize from these short-hand cites exactly what Defendants’ admission is referring to.
26 However, if Plaintiffs really do not understand what the cited testimony in Defendants’ amended
27 response refers to, then Defendants submit that all that is needed to provide Plaintiffs with the
28 relief they request in Issue C is for Defendants to further amend their response to RFA 11 to
reference all of Ms. VonFeldt’s 27 minutes of testimony on this issue, as follows: “DENIED as
to the vast majority, with only one exception, which is that this request is ADMITTED for the
materials that TomorrowNow downloaded and subsequently moved to the AS/400 World
Partition as described by Patti VonFeldt at pages at 10:14-29:13 (and Depo. Ex. 1146 cited
therein) of her April 10, 2009 deposition.”

1 (Depo. Ex. 1146) that details, in a step-by-step fashion, the process she followed in placing the
2 downloads at issue on the AS/400 World Partition. *Id.* Because Ms. VonFeldt is the individual
3 who placed the materials at issue in RFA 11 on the AS/400 World Partition, her testimony is
4 literally Defendants’ “best evidence” as to what those materials are and, to the extent they still
5 exist on that piece of hardware, where they can be located. Thus, even if Defendants were
6 ordered to provide more information in response to RFA 11, they could not do so, because Ms.
7 VonFeldt’s testimony is the best information they have on this issue for the specific piece of
8 hardware at issue in RFA 11.

9 **D. The 55 denials in Issue D are consistent with their mirror admissions.**

10 All of Plaintiffs’ RFAs that have “mirror”¹⁴ RFAs are contained in Exhibit D to the
11 Cowan Declaration, attached hereto. The purpose of the mirror RFAs is best shown by the relief
12 Plaintiffs sought in the Motion: “the Court should order Defendants to substantively answer
13 RFAs Nos. 13-50 in Set Three and 4-33 in Set Five, which asked how the fix objects were created
14 and whether certain files were downloads, **or** to admit without qualification RFAs 34-63 and 130-
15 62 in set Five, which asked them to admit they lack reasonable access to readily obtainable
16 information that would allow them to answer the former RFAs.” Mot. at 30:2-6 (emphasis added).
17 The essence of Plaintiffs argument was “Defendants cannot have it both ways” (*i.e.*, arguing that
18 Defendants cannot deny both the initial and corresponding mirror requests) *Id.* at 29:22. The
19 Court agreed with Plaintiffs and stated that Defendants “have to do one **or** the other” and “I can’t
20 let you have it both ways.” 01-26-10 Tr. (Dkt. 629) at 69:13; 70:10 (emphasis added).

21 Defendants complied with the Court’s Orders on this issue by using the Court’s guidance
22 and providing, where possible, substantive amended responses to RFAs Nos. 13-50 in set 3 and
23 RFAs 4-33 in set 5, and then denying the mirror requests in RFAs 34-63 and 130-62 in set 5.
24 Now, although Defendants responded in a manner that provides the exact relief Plaintiffs sought
25 in the Motion, Plaintiffs are themselves seeking to have it both ways. Plaintiffs’ Supplemental
26 Motion seeks this Court to compel Defendants to substantively respond to the initial requests **and**
27 to admit that Defendants lack information to substantively respond to the initial requests.

28 ¹⁴ “Mirror” is Plaintiffs’ term, not Defendants. *See* Supp. Mot. at 1:22.

1 Plaintiffs' reading of the mirror RFAs in Issue D is illogical. Using the RFA 4 and 34 pair
2 from set 5 as an example, Defendants admitted RFA 4 for the vast majority. RFA 34 states: "**For**
3 **each file** located in DCITBU01_G\JDE\JDE Delivered Updates & Fixes, **admit that** after a
4 reasonable inquiry **Defendants lack sufficient readily obtainable information to determine**
5 that the file was not originally downloaded from an Oracle website by SAP TN." (emphasis
6 added). Defendants' admission to RFA 4 establishes that Defendants do have "sufficient readily
7 obtainable information to determine" the answer for the "vast majority" of the files at issue in the
8 request. Defendants cannot also logically admit that they do not have "sufficient readily
9 obtainable information to determine" the answer for those same files. That is why Defendants
10 denied RFA 34. If Defendants were to answer the mirror requests as Plaintiffs argue they should,
11 then Defendants would be simultaneously admitting that they do and do not have "sufficient
12 readily obtainable information" for the "vast majority" of the files at issue. As shown in Exhibit
13 D to the Cowan Declaration attached hereto, Defendants' amended responses to each companion
14 set of two RFAs, when taken together, logically provide an answer for the vast majority of the
15 fixes and updates at issue in those two RFAs, as required by the Court's Orders.

16 **E. Defendants' responses cover the "vast majority" for the 22 RFAs in Issue E.**

17 The Court did not order Defendants to conduct a file-by-file analysis¹⁵ so long as
18 Defendants' amended responses to the RFAs are more succinct and understandable, and use some
19 quantifiable general approach. *See, e.g.*, 01-26-10 Tr. (Dkt. 629) at 65:14-19. Specifically, in
20 response to Defendants' statement that "what I hear the Court saying is you're not ordering us to
21 go through file by file if we are willing to do it in some quantifiable general order," the Court
22 stated "Some more use – exactly. Something – I think that would be the preferable approach, I
23 mean, for everybody; wouldn't it?" *Id.* And, Plaintiffs replied "Yes, Your Honor." *Id.*

24 _____
25 ¹⁵ Likewise, the Court did not overrule Defendants' burden objections. In fact not only
26 did the Court indicate that it was "concerned about the burden," it noted that it was "very
27 concerned." 01-26-10 Tr. (Dkt. 629) at 68:9-10. And, while reiterating that it was "concerned
28 about the burden," the Court noted that it has provided Defendants with "approaches to deal with
the burden." *Id.* at 71:23-72:2. Finally, the written Order is qualified based on a recognition of
Defendants' burden objections (*i.e.*, "Accordingly, Plaintiffs' Motion to compel is granted, **on the
condition that the parties meet and confer about ways to lessen the burden on Defendants.**"
02-11-10 Order (Dkt. 633) at 14:14-15 (emphasis added)).

