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**UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA**

ORACLE USA, INC, <i>et. al.</i> ,	)	Case No. 2:09-cv-01591-KJD-GWF
	)	
Plaintiffs,	)	
	)	
vs.	)	<b><u>ORDER</u></b>
	)	
SAP AG, <i>et. al.</i> ,	)	
	)	
Defendants.	)	

This matter is before the Court on Plaintiffs’ Motion to Compel Non-Party Seth Ravin to Answer Deposition Questions, and to Compel Non-Party Rimini Street, Inc. to Produce Documents in Response to Oracle’s Subpoena (#1), filed on August 21, 2009; Defendants’ Response to Plaintiffs’ Motion to Compel (#25), filed September 14, 2009; Non-Party Seth Ravin’s and Non-Party Rimini Street’s Opposition to Oracle’s Motion to Compel (#26), filed September 14, 2009; Response of Non-Party Seth Ravin and Non-Party Rimini Street to SAP’s Response to Oracle’s Motion to Compel (#31) filed September 17, 2009; and Plaintiffs’ Reply Memorandum in Support of Motion to Compel (#34), filed September 24, 2009. The Court conducted a hearing in this matter on October 6, 2009.

**FACTUAL AND PROCEDURAL BACKGROUND**

The motion before this Court is ancillary to a civil action between Plaintiffs Oracle USA, Inc., et.al. (“Oracle”) and Defendants SAP AG, et.al. (“SAP”) pending in the United States District Court for the Northern District of California, Case No. 07-CV-016547 PJH (EDL). Oracle has sued SAP in that action for copyright infringement, violations of the Computer Fraud and Abuse Act, trespass, intentional and negligent economic interference and other claims. Oracle’s motion in this Court seeks to compel Non-Parties Seth Ravin and Rimini Street to provide testimony and documents relating to

1 whether Rimini Street has infringed or is infringing on Oracle's copyrighted software. Oracle claims  
2 that this discovery is necessary to refute SAP's defense to Oracle's lost profits damages claim.

3 Oracle alleges that it "sells enterprise software which performs many of the business process  
4 functions its customers need to run their businesses. When customers license this software, they also  
5 have the annual option of purchasing support for the software from Oracle." *Motion to Compel (#1)*,  
6 page 3. In 2005, Defendant SAP acquired a company called TomorrowNow, Inc. which competed with  
7 Oracle by providing "third-party" software for Oracle's customers at 50 percent of Oracle's pricing for  
8 such services. Oracle alleges that SAP and TomorrowNow were able to provide such services by  
9 unlawfully infringing on Oracle's copyrighted software.

10 Seth Ravin is the former President of TomorrowNow. Oracle alleges that Mr. Ravin conceived  
11 TomorrowNow's business model that infringes upon Oracle's copyrighted software. Shortly after SAP  
12 acquired TomorrowNow in 2005, Ravin left its employ and started another third party support provider,  
13 Rimini Street, Inc. ("Rimini"). Although Oracle has not sued Rimini or Mr. Ravin for copyright  
14 infringement or related claims, Oracle believes that Rimini uses the same or a substantially similar  
15 business model that TomorrowNow/SAP used. In support of its allegations, Oracle has attached  
16 excerpts from Rimini Street's website, *Motion (#1)*, Exhibit "H", and an April 11, 2008 article about  
17 Mr. Ravin and Rimini from a publication known as *CIO*. According to the author of that article, "[i]n  
18 2002, Ravin and fellow PeopleSoft veteran Andrew Nelson cofounded TomorrowNow, which has the  
19 exact same business model as Rimini Street." *Id.*, Exhibit "G."

20 As part of its damage claims against SAP, Oracle seeks recovery of lost profits for customers  
21 that would have stayed with Oracle if TomorrowNow/SAP had not lured them away through its 50  
22 percent discount price. Oracle alleges that Rimini has attracted many of the same customers who dealt  
23 with TomorrowNow/SAP, by offering a similar discount. According to Oracle:

24 SAP claims that Oracle may not recover lost profits for these customers,  
25 on the grounds that Oracle would not have received maintenance  
26 payments from them even if TomorrowNow had never existed - i.e.,  
TomorrowNow did not *cause* the loss, as evidenced by customers'  
decision to sign up with Rimini.

27 *Motion (#1)*, page 4.

28 . . .

1 Oracle argues that this defense rests on the assumption that Rimini is a lawful competitor. If,  
2 however, Rimini is also an infringer upon Oracle's software, then SAP cannot argue that it is a  
3 legitimate competitor whose availability destroys the causal link in Oracle's lost profits claim.

4 SAP describes its defense to Oracle's lost profits claims as follows:

5 Defendants have several defenses to Plaintiffs' alleged lost profits claims.  
6 Those defenses include the position that Defendants cannot be held liable  
7 for any of Plaintiffs' alleged lost profits attributable to Plaintiffs'  
8 customers once they left TN [TomorrowNow] and either moved to  
Rimini or another third-party support provider, or continued use of their  
software in some other manner without buying maintenance support from  
Plaintiffs.

9 *Defendants' Response to Plaintiffs' Motion to Compel (#25)*, page 3.

10 SAP further asserts that "[t]he details of Rimini's business model and whether Plaintiffs believe  
11 it is legal or not have no bearing on Defendants' loss profits defenses or any other issues in the  
12 underlying case." *Id.*

13 Rimini Street is a Nevada corporation whose headquarters office is located in Nevada. It also  
14 has an office in Pleasanton, California. Mr. Ravin is a Nevada resident. On or about February 2, 2009,  
15 Oracle served Mr. Ravin with a subpoena issued by the United States District Court for the District of  
16 Nevada which commanded him to appear for deposition on March 17, 2009 in Las Vegas. The  
17 subpoena also commanded him to produce records relating to TomorrowNow prior to the deposition.  
18 *Motion (#1)*, Exhibit "K". On March 31, 2009, counsel for Oracle, SAP and Mr. Ravin appeared  
19 before Magistrate Judge LaPorte in the Northern District of California for a discovery conference in the  
20 underlying lawsuit. *See Motion (#1)*, Exhibit "M," "Order Following Discovery Conference." During  
21 that conference, Judge LaPorte authorized an additional three and one-half hours for Mr. Ravin's  
22 deposition. The issue whether Plaintiffs should be permitted to question Mr. Ravin about Rimini Street  
23 was also discussed during the discovery conference. Judge LaPorte stated:

24 [T]he Rimini thing seems to me to have some relevance, not as much as  
25 what happened at TomorrowNow, but enough that I'm not ruling it off  
limits, but I think you have to all discuss what are the sort of trade secret

26 ...

27 ...

28 ...

1 issues. That I haven't thought about and that was just raised today and I  
2 don't have any particular position on that.<sup>1</sup>

3 *Opposition to Motion to Compel* (#28), Exhibit "S," page 18.

4 Judge LaPorte indicated, however, that the protective order already in place between Plaintiffs  
5 and Defendants might be sufficient to cover trade secret concerns arising from inquiry into Rimini's  
6 business. *Id.* Mr. Ravin's counsel also argued that it was not proper for Oracle to question Mr. Ravin  
7 about Rimini's possible infringement since it was not a party to the action. The court responded by  
8 noting that unless Mr. Ravin invoked the Fifth Amendment, "I don't think you have some freedom to  
9 conceal trademark, copyright infringement." *Id.*, page 21. In response to counsel's statement that  
10 Oracle had made threats against Mr. Ravin or Rimini, the court further stated:

11 I don't find that very pervasive (sic) and he is central, but I do think the  
12 bulk of the deposition should be focused on the TomorrowNow part of it.  
13 I mean the damages is much smaller part of it, and its only a small part of  
14 the damages picture as a whole anyway. So I mean if Oracle were to  
suddenly spend, you know, the majority of its time on Rimini, then that  
would suggest to me that they have different motives in the litigation.

15 *Id.*, page 21.

16 The court's subsequent April 2, 2009 discovery order states:

17 Some testimony regarding Rimini Street appears relevant to damages.  
18 The parties shall meet and confer with Mr. Ravin's counsel to address any  
19 issues regarding trade secrets or other potentially confidential information  
which may be well satisfied by the existing protective order in this case.

20 *Motion* (#1), Exhibit "M", pages 1-2.

21 Mr. Ravin's deposition was subsequently taken in California on May 21, 2009. Mr. Ravin  
22 refused to answer certain questions regarding Rimini's business which are set forth at pages 9-11 of  
23 Plaintiffs' Motion. Plaintiffs have redacted those questions in their filed motion, presumably because  
24 they may contain trade secret or confidential proprietary information. Plaintiffs have, however,

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25  
26 <sup>1</sup>This Court has only been provided with the last five pages of the hearing transcript. *See*  
27 *Plaintiff's Motion* (#1), Exhibit "N"; *Non-Party Ravin/Rimini's Opposition to Motion to Compel* (#28),  
28 Exhibit "S." It is not clear to what extent this issue was discussed earlier in the hearing. It does not  
appear, however, that the parties submitted written briefs on the issue prior to the discovery conference.

1 provided the Court, *in camera*, with an unredacted copy of the motion and the excerpts from Mr.  
2 Ravin's deposition testimony. *See Motion (#1)*, pages 9-11.

3 On May 18, 2009, Oracle also served Rimini Street with a subpoena duces tecum issued from  
4 the District of Nevada for production of the following:

- 5 1. Documents sufficient to show Rimini Street's business model,  
6 including whether Rimini Street currently relies on or has ever relied on  
7 copies of customer's licensed Oracle software to provide software  
8 support;
- 9 2. Documents sufficient to show what automated tools Rimini Street has  
10 used to download material from any Oracle customer support website,  
11 including protocols to any automated tools; and
- 12 3. All "checklists" or other Documents drafted, revised, or maintained by  
13 Beth Lester to track [certain redacted information], as testified to by  
14 Beth Lester in her deposition at pages 76:6-771:1 and 77:18-25. . .

15 *Motion (#1)*, Exhibit "L".

16 Rimini Street has also objected to these requests on the grounds that they are irrelevant to the  
17 pending lawsuit, seek pre-litigation discovery from Rimini and are unduly burdensome. *Motion (#1)*,  
18 Exhibit "R". Mr. Ravin and Rimini also argue that the protective order in the underlying lawsuit does  
19 not adequately protect their confidential information and documents.

### 20 DISCUSSION

#### 21 **1. Whether Plaintiffs' Motion to Compel Should be Transferred to the Court in** 22 **Which the Action is Pending.**

23 This Court first addresses whether the Plaintiffs' motion to compel should be transferred or  
24 remitted to the Northern District of California. Rules 37(a) and 45(c) of the Federal Rules of Civil  
25 Procedure provide that motions to compel compliance with a subpoena or to quash a subpoena served  
26 on a non-party in a district other than the one where the action is pending, should be brought in the  
27 issuing district. Federal courts are divided on whether the court that issued the subpoena can transfer  
28 the motion to the district court in which the action is pending. *United States v. Star Scientific, Inc.*, 205  
F.Supp.2d 482, 486 n. 4 (D. Md. 2002) notes that the Eighth and Tenth Circuits support such transfers.  
*See In re Digital Equip. Corp.*, 949 F.2d 228, 231 (8<sup>th</sup> Cir. 1991) and *Peterson v. Douglas County Bank*  
& *Trust Co.*, 940 F.2d 1389, 1391 (10<sup>th</sup> Cir. 1991). The Seventh and District of Columbia Circuits,

1 however, hold that the transfer of discovery disputes is inappropriate under the plain language of the  
2 rules. *See In re Sealed Case*, 141 F.3d 337, 342 (D.C.Cir. 1998) and *In re Orthopedic Bone Screw*  
3 *Prod. Liab. Litig.*, 79 F.3d 46, 48 (7<sup>th</sup> Cir. 1996).

4 Courts which recognize the authority to transfer discovery motions also state that transfer should  
5 only be ordered in certain circumstances. *Melder v. State Farm Mutual Automobile Ins. Co.*, 2008 WL  
6 1899569 \*4 (N.D. Ga. 2008), states that such circumstances “include the non-party's consent to the  
7 transfer, designated Multi-District Litigation (“MDL”), a lack of inconvenience to the non-party, and a  
8 determination that the complexity of the underlying litigation and discovery disputes made it  
9 appropriate for the forum court to handle the dispute.” (citations omitted). In *CMC Interconnect*  
10 *Technologies, Inc. v. Fairchild Semiconductor Corp.*, 2009 WL 539674 (D. Ariz. 2009), the court  
11 transferred a motion to quash subpoena to the district court in which the action was pending because the  
12 dispute concerned the relevancy of the information sought, the information had been a subject of an  
13 injunction hearing in the lawsuit and the parties’ briefs cited extensively to the docket in the lawsuit.  
14 The magistrate judge in the district where the lawsuit was pending had also issued at least one  
15 discovery ruling on the information that was the subject of the subpoena.

16 Most of the foregoing factors support the transfer of this motion to the Northern District of  
17 California. There have been a number of prior discovery disputes between Oracle and SAP relating to  
18 whether Rimini’s business activities are relevant in the pending lawsuit. *See Reply (#34)*, pages 1, 5-8.  
19 The issue whether Mr. Ravin may be questioned about Rimini during his deposition was also addressed  
20 by Judge LaPorte during the March 31<sup>st</sup> discovery conference. She concluded that *some* testimony  
21 about Rimini Street appears relevant to damages and should be permitted. Judge LaPorte is probably  
22 still in a better position than this Court to set the appropriate boundaries for further discovery  
23 concerning Rimini in the pending action. Mr. Ravin and Rimini Street would not be materially  
24 inconvenienced if the motion to compel was transferred to the Northern District of California. Rimini  
25 Street maintains an office in Pleasanton, California and their counsel are located in Palo Alto,  
26 California. Mr. Ravin’s deposition was also taken in the Northern District of California.

27 During the October 6<sup>th</sup> hearing on this Motion, however, Mr. Ravin and Rimini objected to  
28 transferring the Motion to the Northern District of California. Oracle also requested that this Court

1 decide the motion to avoid further delay or re-litigation of the motion. Defendant SAP took no position  
2 on the issue of transfer. Although the Court could arguably transfer this motion notwithstanding the  
3 Non-Parties' objection, transfer is probably not appropriate when the parties in the pending action do  
4 not request transfer. Accordingly, this Court will decide the Motion to Compel on its merits.

5 **2. Relevance of Plaintiffs' Deposition Questions and Requests for Production.**

6 Oracle argues that the deposition testimony it seeks from Mr. Ravin and the documents that it  
7 has subpoenaed from Rimini are relevant to rebut SAP's causation defense to its lost profits claim.  
8 Oracle relies on the general statement in *Polar Bear Products, Inc. v. Timex Corp.*, 384 F.3d 700, 708  
9 (9<sup>th</sup> Cir. 2004), that 17 U.S.C. §504(b) requires a causal link between the infringement and the monetary  
10 remedy sought for recovery of both actual damages and profits. *Polar Bear* reaffirmed the principle  
11 that a plaintiff must establish this causal connection and that the requirement is akin to tort principles of  
12 causation and damages. According to Oracle, SAP is attempting to refute its lost profits claim by  
13 arguing that Oracle cannot show that the customers who did business with TomorrowNow would have  
14 contracted with Oracle instead of with one of the other third party support providers including Rimini.  
15 Oracle contends that SAP cannot rely on Rimini's existence as a third party competitor if it is also an  
16 infringer of Oracle's copyright. Oracle therefore argues that it is entitled to obtain discovery regarding  
17 whether Rimini is also infringing on Oracle's software.

18 Oracle argues that the relevancy of this discovery is supported by *Micro Motion v. Kane Steel*  
19 *Co.*, 894 F.2d 1318 (Fed.Cir. 1990), on which Ravin and Rimini rely in opposing the motion. *Micro*  
20 *Motion* was a patent infringement action in which plaintiff sought recovery for lost profits. The Federal  
21 Circuit noted that where a patentee produces or sells a product or service covered by the patent claims,  
22 it may seek to recover damages on a theory of lost profits. Under this theory, the patentee must show  
23 that, *but for* the infringement, it would have made the infringer's sales. The court noted that causation  
24 is most easily found under this theory where only two companies, the patentee and the infringer, are in  
25 the market. The court further stated:

26 Where there is evidence of a third party competitor, the lost profits theory  
27 would appear to be non-viable inasmuch as the third party could have  
28 made the sale rather than the patentee. Under such circumstances there  
appears to be no possible causation. However, such is not the law.

1 Patentees have successfully urged modifications to the basic damage  
2 theory so as to cover situations other than the simple two-supplier market.  
3 There is precedent for finding causation despite an alternative source of  
4 supply if that source is an infringer or puts out a noninfringing product  
5 that is an unacceptable alternative or has insignificant sales. (citations  
6 omitted).

7 *Micro Motion*, 894 F.2d at 1322.

8 Oracle argues by analogy that a similar analysis should apply in a copyright infringement action  
9 where the plaintiff seeks to recover lost profits and the defendant alleges a causation defense based on  
10 the existence of third party competitors.

11 The plaintiff in *Micro Motion* alleged that the defendant's flow meters infringed on its three  
12 patents. The plaintiff served subpoenas to take the depositions of five other non-party companies which  
13 competed with plaintiff and defendant in selling flow meters. The subpoenas required the non-party  
14 competitors to produce seven categories of documents or things. K-Flow, one of the alleged  
15 competitors, moved to quash the subpoena. The district court denied the motion on the grounds "that  
16 the other courts addressing the same issues against other competitors had generally upheld *Micro*  
17 *Motion's* discovery requests and because "the Federal Circuit had counseled that an ancillary court  
18 should be 'especially hesitant' to pass judgment on relevancy, citing *Truswal Sys. Corp. v. Hydro-Air*  
19 *Eng'g, Inc.*, 813 F.2d 1207, 1212, 2 USPQ2d 1034, 1038 (Fed.Cir. 1987)." *Micro Motion*, 894 F.2d at  
20 1321.

21 In reversing the denial of the motion, the Federal Circuit stated that *even if relevant*, discovery is  
22 not permitted when no need is shown or compliance would be unduly burdensome, or the harm to the  
23 person from whom the discovery is sought outweighs the need of the person seeking discovery of the  
24 information. *Micro Motion*, 894 F.2d at 1323, citing Fed.R.Civ.Pro. 26(b)(1) (other citation omitted).  
25 The court noted that the issues of liability and damages had previously been bifurcated in the patent  
26 infringement case and that a jury had initially found for the defendant on the infringement claim. After  
27 a new trial was granted, the parties agreed to additional discovery to update the evidence on damages.  
28 The Federal Circuit noted that prior to the first jury trial, the plaintiff had apparently been ready to  
proceed to trial on its damages claims without the evidence it now sought from third party competitors.  
In analyzing the discovery sought from the third party competitors, the court stated:

1 How many products will be involved is not calculable precisely from the  
2 record before us, but we note that Micro Motion requested information  
3 about a dozen specifically identified models in its nonparty subpoenas.  
4 Thus, this “complex” suit against Exac could be turned into an absolute  
quagmire of proofs concerning a dozen or so other products that are  
related to the main suit only with respect to damages.

5 *Micro Motion*, 894 F.2d, at 1324.

6 The Federal Circuit noted that there was no evidence that plaintiff had informed the trial court  
7 that it “expected to have the jury resolve additional mini-infringement trials on each competing product  
8 under each of its patents and, if these efforts were unsuccessful, to go on to make findings of their  
9 unacceptability.” *Id.* The court stated that if the trial court had been informed of plaintiff’s intentions,  
10 it “could and, very likely, would have required a preliminary showing of the viability and practicability  
11 of plaintiff’s various theories, particularly before authorizing discovery against a wholly uninvolved  
12 nonparty.” *Id.* Finally, in rejecting the reasonableness of the discovery the court stated:

13 In particular, Micro Motion asserted entitlement to discovery of  
14 information concerning each competitor’s business simply because it may  
15 seek to prove lost profit damages. If this position were correct, a patentee  
16 could, in virtually every infringement suit, immediately obtain discovery  
17 from all possible competitors by merely filing a complaint asking for  
damages against one. And, of course, the alleged infringer in such case  
would have the same right. While we do not suggest that discovery is  
being used in this case simply to harass a competitor, the possibility for  
such abuse of discovery is readily apparent.

18 *Id.*, at 1324-25.

19 Fed.R.Civ.Pro. 26(b) was amended in 2000 to narrow the general scope of discovery to any  
20 nonprivileged matter that is relevant to any party’s claim or defense. In *EEOC v. Caesars*  
21 *Entertainment, Inc.*, 237 F.R.D. 428, 431-32 (D. Nev. 2006), the court stated that the purpose of the  
22 amendment to Rule 26(b) was not only to narrow the scope of discovery, but also to address the rising  
23 costs and delay of discovery. Although the amendments “do not dramatically alter the scope of  
24 discovery,” they require a greater degree of scrutiny by the courts in weighing the relevance versus the  
25 burden of the discovery. In deciding whether to restrict discovery under Rule 26(b)(2), “the court  
26 should consider the totality of the circumstances, weighing the value of the material sought against the  
27 burden of providing it, and taking into account society’s interest in furthering the truth-seeking function  
28 in the particular case before the court. (citations omitted.)” *Id.* The 2000 amendment to the scope of

1 discovery under Rule 26(b) provides further support for limiting discovery against non-parties who are,  
2 at most, only tangentially related to a pending lawsuit.

3 Courts analyzing *Micro Motion* reach different conclusions based on the facts of their respective  
4 cases. In *Heraeus Inc. v. Solar Applied Material Technology Corp.*, 2006 WL 2067859 \*2 (N.D. Cal.  
5 2006), the court quashed a subpoena served on a non-party competitor of the plaintiff and defendant.  
6 The court found that plaintiff's damages theories were no more crystalized than those of the patentee in  
7 *Micro Motion*. There was little information before the court about the market in which plaintiff,  
8 defendant and the non-party movant operated to support a finding of need for the information. The  
9 court noted, for example, that if there are dozens of competitors in the market, then plaintiff's chances  
10 of ever proving causation would be substantially less than if there were only three players. In such  
11 circumstances, the concerns raised by *Micro Motion* would be even more magnified.

12 In *Negotiated Data Solutions LLC v. Dell, Inc.*, 2009 WL 733876 (N.D. Cal. 2009), the plaintiff  
13 sought discovery from a non-party whose computer chips were used in the manufacture of defendant's  
14 allegedly infringing computers. In denying the motion to quash, the court cited *Truswal Sys. Corp. v.*  
15 *Hydro-Air Eng'g, Inc.*, 813 F.2d 1207, 1212, 2 USPQ2d 1034, 1038 (Fed.Cir. 1987) and *Gonzales v.*  
16 *Google, Inc.*, 234 F.R.D. 674, 681 (N.D.Cal. 2006), that the court in the ancillary proceeding should be  
17 hesitant to pass judgment on what constitutes relevant evidence and where relevance is in doubt, the  
18 court should be permissive. In distinguishing *Micro Motion*, the court noted that the discovery sought  
19 from the non-party bore directly on the accused functions in the defendant's computer chips.

20 It is unknown whether the district court in the pending lawsuit will allow Oracle to pursue a lost  
21 profits claim at trial similar to that which the plaintiff in *Micro Motion* asserted. The magistrate judge  
22 in that case has indicated, however, that there is at least a potential basis for such a claim which  
23 justified *some* questioning about Rimini Street during Mr. Ravin's deposition. Mr. Ravin is allegedly  
24 the person who conceived TomorrowNow's infringing business model and he was the president of  
25 TomorrowNow up until shortly after its sale to Defendant SAP. After leaving TomorrowNow, Mr.  
26 Ravin apparently formed Rimini Street which also provides third support services for Oracle's  
27 customers. This evidence suggests that Rimini Street's business model is similar to TomorrowNow's.  
28 Oracle claims that Rimini Street's website and the *CIO* article provide additional reason to believe that

1 Rimini Street engages in the same type of business conduct as TomorrowNow that allegedly infringes  
2 upon Oracle's copyrighted software. Given Mr. Ravin's involvement with both TomorrowNow and  
3 Rimini Street, it cannot be said he and Rimini Street are "wholly uninvolved non-parties" in the same  
4 sense that the competitors in *Micro Motion* or *Heraeus* were.

5 This Court is also not persuaded that Defendant SAP's response to Oracle's Motion  
6 demonstrates that discovery sought by Plaintiffs is irrelevant. SAP has not disavowed an intention to  
7 raise Rimini's position as a "third party supporter" as a defense to Plaintiffs' lost profits claim. *See*  
8 *Defendant's Response (#25)*, page 3. SAP's assertion that the legality of Rimini's business model is  
9 irrelevant to its damages defense does not make it so. The ambivalent nature of SAP's position is also  
10 demonstrated by its statement that if the Court allows Plaintiffs to obtain certain discovery from Rimini,  
11 then SAP will also seek certain unspecified discovery from Rimini.

12 Judge LaPorte clearly did not intend to permit Plaintiffs to engage in "full-blown" infringement  
13 discovery from Rimini as if it was a defendant. While this Court has not been provided with the full  
14 transcript of Mr. Ravin's deposition, the Court infers that the parties, as well as Mr. Ravin and his  
15 counsel, understand the factual elements of Plaintiffs' infringement claim against SAP and  
16 TomorrowNow. Plaintiffs should therefore be allowed to examine Mr. Ravin in regard to whether  
17 Rimini's business model and third party support services to Oracle's customers are substantially similar  
18 or dissimilar from those of TomorrowNow. The questions set forth on pages 9 and 10 of Plaintiffs'  
19 Motion to Compel (#1) appear relevant to this inquiry and are not unduly burdensome. Plaintiffs' and  
20 Defendants' counsel may also have some reasonable follow-up questions in regard to whether Rimini  
21 conducts its business in substantially the same manner as TomorrowNow. The Court will, however,  
22 limit further examination of Mr. Ravin to a period of one hour each by Plaintiffs' and Defendants'  
23 counsel, not including any time that may be expended Mr. Ravin's counsel or the other party in  
24 asserting objections. <sup>2</sup>

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25  
26 <sup>2</sup>The deposition excerpts provided to the Court indicate that Plaintiffs' counsel may have  
27 intended to question Mr. Ravin about the services or support that Rimini provides to each of its 81  
28 customers who were formerly TomorrowNow customers. *See Motion (#1)*, pages 10-11. The deposition  
time authorized by the Court obviously precludes such individualized questioning. In any event,  
Plaintiffs and Defendants are not permitted to engage in such detailed customer-by-customer questioning

1           Following the March 31<sup>st</sup> discovery conference, Plaintiffs served Rimini with a subpoena duces  
2           tecum and request for production for documents. Consistent with Judge LaPorte's decision that  
3           discovery regarding Rimini in the pending lawsuit should be limited, this Court will not require Rimini  
4           to produce documents responsive to Oracle's subpoena requests *unless* Mr. Ravin intends to testify that  
5           Rimini's business model or practices *vis a vis* support for Oracle's customers are materially or  
6           substantially different from TomorrowNow's business model or conduct. In such circumstances,  
7           Rimini should, prior to the deposition, produce documents within the scope of Plaintiffs' requests for  
8           production in the subpoena duces tecum which may either confirm or contradict his testimony. The  
9           Court also finds that those requests are not otherwise unduly burdensome. The Court therefore denies  
10          Plaintiffs' motion to compel production of documents requested pursuant to the subpoena duces tecum,  
11          subject to the foregoing condition.

12           **3.        Whether the Protective Order in the Underlying Case is Sufficient to Protect**  
13           **Rimini's Trade Secrets or Proprietary Information.**

14          Mr. Ravin and Rimini argue that the protective order in the underlying action is insufficient to  
15          protect them from disclosure of their trade secret or proprietary information. During the March 31<sup>st</sup>  
16          hearing, Judge LaPorte indicated that the existing protective order was probably sufficient to protect  
17          Rimini's trade secrets or proprietary information. She instructed the parties' and Mr. Ravin's counsel  
18          to further meet and confer, however, regarding any modification of the protective order that might be  
19          necessary to protect Rimini Street's legitimate rights. She also indicated that the parties could apply to  
20          her for a further protective order as it relates to Rimini, if necessary. *Opposition to Motion to Compel*  
21          (#28), Exhibit "S," page 21.

22          It appears to this Court that Rimini's interests are adequately protected under the protective  
23          order in the underlying case so long as Mr. Ravin and Rimini are timely notified by Plaintiffs or  
24          Defendants of any intention to introduce their testimony or documents that may constitute protected  
25          trade secrets or proprietary information in regard to a motion or at trial. Mr. Ravin and Rimini should  
26          ...

27          \_\_\_\_\_  
28          of Mr. Ravin.

1 be given adequate notice so that they can move for an order in the pending action to protect their trade  
2 secrets or confidential information.

3 **CONCLUSION**

4 Based on the foregoing, this Court concludes that the limited examination of non-party Seth  
5 Ravin regarding Rimini Street is justified in accordance with Magistrate Judge Laporte's verbal orders  
6 in the discovery conference on March 31, 2009 and in her written "Order Following Discovery  
7 Conference", *Motion (#1)*, Exhibit "M." The Court concludes, however, that Rimini Street should not  
8 be required to respond to Plaintiffs' subpoena duces tecum for production of documents unless Mr.  
9 Ravin intends to testify that Rimini Street's business model and the manner in which it provides  
10 support to Oracle customers is substantially different than that provided by Defendants SAP and  
11 TomorrowNow. The Court further finds that the protective order in the underlying action is sufficient  
12 to protect the interests of Mr. Ravin and Rimini Street so long as they are promptly notified by the  
13 parties in that action of any intention to use their testimony or documents. Accordingly,

14 **IT IS HEREBY ORDERED** that Plaintiffs' Motion to Compel Non-Party Seth Ravin to  
15 Answer Deposition Questions, and to Compel Non-Party Rimini Street, Inc. to Produce Documents in  
16 Response to Oracle's Subpoena (#1) is **granted**, in part, and **denied**, in part, as follows:

17 1. Plaintiffs' motion is granted in regard to its request that Seth Ravin be required to  
18 answer questions at deposition concerning Rimini. The examination of Mr. Ravin shall be limited to a  
19 period of one hour each by Plaintiffs' and Defendants' counsel, not including any time that may be  
20 expended by Mr. Ravin's counsel or the other party in asserting objections.

21 2. Plaintiff's motion to compel Rimini Street to produce documents pursuant to the  
22 subpoena duces tecum is denied, subject to the condition that if Mr. Ravin intends to testify that  
23 Rimini's business model or practices *vis a vis* support for Oracle's customers are materially or  
24 substantially different from TomorrowNow's, then Rimini is ordered to produce documents within the  
25 scope of Plaintiffs' requests for production at least seven (7) days prior to the resumption of the  
26 deposition.

27 **IT IS FURTHER ORDERED** that Plaintiffs and Defendants shall promptly notify Mr. Ravin  
28 and/or Rimini Street of any intention to introduce or use Mr. Ravin's testimony regarding Rimini Street

1 or any documents that Rimini Street may hereafter produce in the pending lawsuit in the Northern  
2 District of California so that Mr. Ravin and/or Rimini Street can timely file a motion to intervene in that  
3 case in order to protect their legitimate interests as may appear warranted.

4 DATED this 13th day of October, 2009.

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7 GEORGE FOLEY, JR.  
8 United States Magistrate Judge  
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