EXHIBIT B

Robert A. Mittelstaedt (SBN 060359)
Jason McDonell (SBN 115084)
Elaine Wallace (SBN 197882)
JONES DAY
San Francisco Office
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
Silicon Valley Office
1755 Embarcadero Road
Palo Alto, CA 94303
Telephone: (650) 739-3939
Facsimile: (650) 739-3900
tglanier@jonesday.com
jfroyd@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

SAN FRANCISCO DIVISION

ORACLE CORPORATION, et al.,

Plaintiffs,

v.

SAP AG, et al.,

Defendants.

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

DEFENDANTS' OPPOSITION TO PLAINTIFFS' MOTION TO COMPEL PRODUCTION OF CLAWED BACK DOCUMENTS

Date: N/A
Time: N/A
Courtroom: E, 15th Floor
Judge: Hon. Elizabeth D. LaPorte

Third, Oracle's shield and sword argument lacks a sword. It is undisputed that the Rules of Engagement ("ROE")[1] were drafted by lawyers, just as many rules, policies and procedures in large corporations routinely are. However, Defendants have not and will not use as a defense in this case the fact or substance of their lawyers' contemporaneous legal analysis or legal advice relating to the creation, content, implementation, or application of the ROE. Notwithstanding the lawyers' involvement in drafting the ROE, the operative fact is that the rules were adopted by SAP's Executive Board and implemented by TN's and SAP's business executives based on the business decision to create a figurative "firewall" between SAP and TN in an effort to prevent the physical passing from TN to SAP of any Oracle intellectual property that TN handled on behalf of its customers on a daily basis.

[1] There are two versions of the ROE dated March 9, 2005 and March 15, 2006. Given that Oracle did not provide the Court with a copy of the ROE, those two documents have been attached for the Court's review as Exhibits 3 and 4 to the Declaration of Elaine Wallace in Support of Defendants' Opposition to Plaintiffs' Motion to Compel Production of Clawed Back Documents ("Wallace Decl."). And, given that the ROE are confidential, non-public business documents, Defendants have filed with this Opposition a separate Administrative Request to file them under seal.

1. Defendants are Using the AC Privilege Only as a Shield.

There is no dispute that "the privilege which protects attorney-client communications may not be used both as a sword and a shield." *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992). Oracle's reliance on this principle fails, however, because the "sword" Oracle refers to does not exist. Defendants have not and will not use as a defense in this case the fact or substance of their lawyers' contemporaneous legal analysis or legal advice relating to the creation, content and interpretation of the ROE. Thus, no matter how the implied waiver standard is articulated and applied to this case (*i.e.*, either the "*Hearn* test," the "shield and sword doctrine," the "fairness principle," etc.), the result is the same—no waiver. Underpinning all of the relevant jurisprudence regarding implied waiver is the fundamental premise that it is unfair for the party asserting the privilege to simultaneously rely on privileged information to advance its claims or defenses (sword) and withhold that same information from the opposing party under a claim of privilege (shield). In this case, Defendants are using only the shield, not the sword.

Dated: August 13, 2008

Respectfully submitted,

JONES DAY

By: */s/ Scott W. Cowan*
Scott W. Cowan

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