

1 BINGHAM McCUTCHEM LLP
 DONN P. PICKETT (SBN 72257)
 2 GEOFFREY M. HOWARD (SBN 157468)
 HOLLY A. HOUSE (SBN 136045)
 3 ZACHARY J. ALINDER (SBN 209009)
 BREE HANN (SBN 215695)
 4 Three Embarcadero Center
 San Francisco, CA 94111-4067
 5 Telephone: (415) 393-2000
 Facsimile: (415) 393-2286
 6 donn.pickett@bingham.com
 geoff.howard@bingham.com
 7 holly.house@bingham.com
 zachary.alinder@bingham.com
 8 bree.hann@bingham.com

9 BOIES, SCHILLER & FLEXNER LLP
 DAVID BOIES (Admitted *Pro Hac Vice*)
 10 333 Main Street
 Armonk, NY 10504
 11 Telephone: (914) 749-8200
 dboies@bsflp.com
 12 STEVEN C. HOLTZMAN (SBN 144177)
 1999 Harrison St., Suite 900
 13 Oakland, CA 94612
 Telephone: (510) 874-1000
 14 sholtzman@bsflp.com

15 DORIAN DALEY (SBN 129049)
 JENNIFER GLOSS (SBN 154227)
 16 500 Oracle Parkway, M/S 5op7
 Redwood City, CA 94070
 17 Telephone: 650.506.4846
 Facsimile: 650.506.7114
 18 dorian.daley@oracle.com
 jennifer.gloss@oracle.com
 19

20 Attorneys for Plaintiffs
 Oracle USA, Inc., *et al.*

21 UNITED STATES DISTRICT COURT
 22 NORTHERN DISTRICT OF CALIFORNIA
 23 OAKLAND DIVISION

24 ORACLE USA, INC., *et al.*,

25 Plaintiffs,

26 v.

27 SAP AG, *et al.*,

28 Defendants.

JONES DAY
 ROBERT A. MITTELSTAEDT (SBN 060359)
 JASON McDONELL (SBN 115084)
 ELAINE WALLACE (SBN 197882)
 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

JONES DAY
 THARAN GREGORY LANIER (SBN 138784)
 JANE L. FROYD (SBN 220776)
 1755 Embarcadero Road
 Palo Alto, CA 94303
 Telephone: (650) 739-3939
 Facsimile: (650) 739-3900
 tglanier@jonesday.com
 jfroyd@jonesday.com

JONES DAY
 SCOTT W. COWAN (Admitted *Pro Hac Vice*)
 JOSHUA L. FUCHS (Admitted *Pro Hac Vice*)
 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.

Case No. 07-CV-01658 PJH (EDL)

JOINT PRETRIAL STATEMENT

Date: September 30, 2010
 Time: 9:00 am
 Place: 3rd Floor, Courtroom 3
 Judge: Hon. Phyllis J. Hamilton

1 Pursuant to the Court’s standard Pretrial Instructions, stipulated Revised Case
2 Management and Pretrial Order of June 11, 2009 (D.I. 325) and Order of July 21, 2010 (D.I.
3 726), plaintiffs Oracle USA, Inc. (“Oracle USA”), Oracle International Corporation (“OIC”),
4 Oracle EMEA Limited (“OEMEA”) and Siebel Systems, Inc. (“SSI”) (collectively “Oracle” or
5 “Plaintiffs”) and defendants SAP AG, SAP America (together “SAP”) and TomorrowNow, Inc.
6 (“TomorrowNow” or “TN”) (collectively “Defendants”) submit this Joint Pretrial Statement.

7 **I. BRIEF DESCRIPTION OF THE SUBSTANCE OF THE CLAIMS AND**
8 **DEFENSES**

9 **A. Oracle’s Brief Summary of Its Claims**

10 This case concerns TomorrowNow’s extensive and unlawful downloading, copying, and
11 use of Oracle’s copyrighted software and related support materials, and the efforts by SAP AG
12 and SAP America to leverage TomorrowNow’s unlawful conduct to harm Oracle and benefit
13 SAP. As explained in more detail below, Plaintiffs will prove that Defendants made a library of
14 *thousands* of copies of Oracle’s copyrighted software and *millions* of copies of Oracle’s
15 downloadable software support materials in violation of U.S. copyright law, U.S. computer fraud
16 law and the applicable licensing and Terms of Use. Oracle will also prove that Defendants then
17 used this library of Oracle intellectual property to – as a member of SAP AG’s Executive Board
18 put it soon after SAP acquired TomorrowNow – “inflict pain” on Oracle by enabling Defendants
19 to enter into “extraordinary deals” with support customers and eventually migrate them to SAP
20 enterprise software. Oracle will prove that SAP AG and SAP America knew of, enabled, and
21 benefited from that extensive infringement. In the words of SAP AG’s then CEO, SAP
22 “knowingly undertook” the risk involved in acquiring this unlawful enterprise, and then
23 expanded that enterprise, continuing to operate it for years after the acquisition.

24 Plaintiffs have ten claims, all of which are asserted against all three defendants:

- 25 (1) copyright infringement; (2) violations of the Federal Computer Fraud and Abuse Act
26 (“CFAA”); (3) violations of the California Computer Data Access and Fraud Act (“CDAFA”);
27 (4) breach of contract; (5) intentional interference with prospective economic advantage; (6)
28 negligent interference with prospective economic advantage; (7) violations of California

1 Business & Professions Code § 17200; (8) trespass to chattels; (9) unjust enrichment; and, (10)
2 an accounting. As explained below, Oracle will ask the jury to award in excess of \$2 billion in
3 damages against Defendants, and punitive damages, and Oracle will seek equitable relief in the
4 form of restitution and an injunction against further misconduct.

5 At summary judgment, Defendants conceded both direct and vicarious liability on
6 significant portions of Oracle’s copyright and computer fraud claims. Of the four Oracle
7 software brands at issue in the case – PeopleSoft, J.D. Edwards, Siebel and Oracle Database,
8 Defendants have conceded they made 295 illegal copies of PeopleSoft software (covering three
9 copyright registrations) and have conceded essentially all of Oracle’s Database software
10 copyright claim.¹ The PeopleSoft family of software was the primary focus of SAP and its
11 internal and public statements of the expected benefits for its TomorrowNow acquisition. The
12 same or similar evidence that led Defendants to concede the 295 PeopleSoft copies in the
13 summary judgment motion should lead to additional concessions regarding thousands of
14 additional copies, and many additional copyrights. The concession concerning Oracle Database
15 Software programs is also significant because TomorrowNow supported at least 40% – and
16 likely almost all – of its customer base on illegal copies of Oracle’s Database software.

17 Oracle will prove that TomorrowNow directly, and SAP indirectly, infringed additional
18 copyrighted works for PeopleSoft and Oracle Database software beyond those for which SAP
19 conceded liability on Summary Judgment (as well as copyrighted works in the other product
20 families at issue, J.D. Edwards and Siebel). Defendants elected not to pursue a license defense to
21 these copies on summary judgment. This election signals the lack of any license defense at all.
22 Defendants made and have the copies. And no license protects them, individually or as a whole.

23 In addition, SAP conceded a portion of Oracle’s CFAA and CDFA claims related to
24 SAP’s unauthorized downloading from Oracle’s customer support websites.² Other variations of
25

26 ¹ See SAP’s Opposition to Oracle’s Motion for Summary Judgment, Dkt. No. 670 at 4:28-
5:5.

27 ² See SAP’s Opposition to Oracle’s Motion for Summary Judgment, Dkt. No. 670 at 14
n.5.

1 these claims remain, but the concessions on summary judgment should apply with equal force to
2 those.

3 At the May 5, 2010 summary judgment hearing, the Court encouraged the parties to
4 spend significant time meeting and conferring in an effort to streamline the case for trial. This
5 concern was well-founded. In its current form, given the extent of Defendants' wrongdoing and
6 the voluminous evidence necessary to prove it without stipulations of fact as well as Defendants'
7 late production of massive new evidence and their persistent refusal to streamline liability,
8 Oracle anticipates that trial will require approximately 12 weeks (rather than the 6 weeks
9 currently scheduled).

10 Taking the Court's guidance seriously, on May 14, Oracle initiated the pre-trial meet and
11 confer process in an effort to streamline the case and arrive at a realistic estimate for length of
12 trial. Despite having just admitted in summary judgment to 295 unauthorized application copies
13 and more than 1,000,000 unauthorized downloads, Defendants refused to discuss specifics until
14 Oracle made a written proposal. They promised to promptly respond to a written proposal if
15 Oracle made one. During approximately the same period, beginning on March 15, 2010 and
16 continuing through June 30, 2010, Defendants produced over 500,000 files previously withheld
17 from production. These files included copies of Oracle's software and support materials
18 downloaded by Defendants, and over 26,000 instant message chats from key TomorrowNow
19 witnesses.³ This late production was in violation of multiple provisions of the pretrial order in
20 this case, and the new materials bear directly on the core liability issues in the case. For
21 example, some are flat admissions of copyright infringement previously denied under oath.
22 After an initial review of these new materials, on July 2, 2010, Oracle submitted two extensive
23 proposals to Defendants for streamlining trial of the copyright claims. The stipulations reflect
24

25 ³ Defendants contend that they told Oracle all along they would withhold these files. That is
26 incorrect. They represented on multiple occasions, including to the Court, that they were
27 producing all responsive documents for all produced custodians, including documents responsive
28 to the parties' agreed search terms (which these are). Defendants never said they would withhold
entire categories of files, particularly ones that include some of the most responsive,
incriminating documents in the case.

1 Oracle’s view of the most basic, indisputable liability facts and legal issues related to Oracle’s
2 copyright claims. Oracle designed the stipulations to reduce the length and complexity of trial,
3 focusing on the most important copyright registrations, the admitted copies of Oracle’s software
4 on Defendants’ systems and other basic elements of proof. The stipulations also involved
5 substantial compromise by Oracle on its core copyright claims. Thus, contrary to Defendants’
6 suggestion (below) that the approach proposed by Oracle would “never really focus the trial,”
7 Oracle’s careful, detailed proposals would do precisely that, by eliminating the need for
8 redundant, time-consuming proof of myriad facts relevant to Oracle’s copyright claims that
9 should not be contested. For the Court’s reference, these stipulations are attached to this
10 statement as Exhibits A and B. A month after Oracle provided the proposed stipulations,
11 Defendants rejected them in their entirety without explaining if there were any specific aspects -
12 in the nearly 50 pages of proposals - to which Defendants would stipulate.

13 The parties continue to negotiate over proposals to streamline the trial. Oracle’s latest
14 proposal, based on mutual concessions regarding both the claims at issue and the required proof,
15 would result in a trial of 5 weeks. Absent a successful conclusion to those discussions, as noted
16 above, the parties will need approximately 12 weeks to try the complex, multiple issues raised in
17 this action. The parties anticipate over 100 witnesses and have marked thousands of exhibits.
18 Defendants’ conduct transpired for a period of over three years and involved one of the most
19 intrusive and voluminous copyright infringements ever. Their conduct violated numerous state
20 and federal laws and makes Defendants liable for at least ten claims. The Court’s admonition
21 that the parties work to simplify the issues and shorten the trial was certainly proper, but it takes
22 both sides to make that happen. In Oracle’s view, Defendants have, so far, fallen woefully short,
23 insisting at every turn that they intend to put Oracle to its full burden of proof – all despite the
24 obvious existence of many facts and elements of the claims that could and should readily be
25 stipulated. Defendants’ proposed verdict form alone would run, when populated as contemplated
26 by Defendants, 171 pages.

27 Until two days ago, Defendants had made just two proposals related to possibly
28 streamlining the case. The first is to bifurcate (actually quadricate) the trial into four pieces.

1 That proposal would result in an even longer trial. The usual advantage of bifurcation is that the
2 result of the first proceeding may eliminate any need for the second. Here, given the summary
3 judgment concessions, the first three of the separate proceedings -- all but the punitive damages -
4 - would be required in any event. Defendants' second "streamlining" idea is for Oracle
5 unilaterally to drop certain claims. Defendants must recognize there is a quid pro quo for
6 dropping claims. Oracle's proposed attached stipulations, which Defendants rejected out of hand
7 after a month, as well as other proposals Oracle has made more recently, involve mutual
8 concessions.

9 In addition to these proposals, Defendants also made a proposal two days ago to shorten
10 the trial in a variety of ways. Although that proposal would unacceptably shift all blame to TN
11 and fundamentally change the substance of the trial, it contains elements that could form the
12 basis of a joint effort to streamline the case. Oracle has provided a counterproposal to SAP's
13 new proposal that would accept many features of SAP's proposal, while retaining the ability for
14 the parties to contest the critical issue of SAP's contributory infringement at trial. Oracle's
15 proposal, which involves mutual concessions, would substantially reduce liability issues and
16 shorten the trial to 5 weeks.

17 Against this backdrop, Oracle expects trial to focus on the following issues:

18 **Copyright:** Oracle will prove that Defendants infringed Oracle's copyrights by illegally
19 copying, distributing and modifying Oracle's software and related support materials in violation
20 of the Copyright Act, 17 U.S.C. § 101, *et seq.*⁴ Defendants used these copies to convince
21 Oracle's current, former and prospective customers to purchase support for existing Oracle
22 products from SAP and then used support relationships with Oracle customers to convert them to
23 SAP software altogether. Oracle will prove that TomorrowNow made copies of entire software

24 ⁴ As Oracle explained to the Court in its motion to amend its Third Amended Complaint to
25 add additional copyright registrations (which the Court granted), Oracle has pled some
26 registrations defensively due to discovery positions SAP has taken. These defensively-pled
27 registrations do not affect the amount of Oracle's damages and, subject to SAP's agreement that
28 the remaining copyrights cover the relevant software and support materials, Oracle does not
intend to pursue those registrations at trial. Oracle has also offered to dismiss other registrations
in an effort to streamline the trial and awaits SAP's response to that proposal.

1 programs and related support materials owned and registered by Oracle, and its predecessors-in-
2 interest PeopleSoft, J.D. Edwards and Siebel Systems, and that TomorrowNow is therefore liable
3 for copyright infringement. *See, e.g., Triad Sys. Corp. v. Southeastern Ex. Co.*, 64 F.3d 1330,
4 1335 (9th. Cir. 1995), *cert. denied*, 516 U.S. 1145 (1996) (protectable expression plainly copied
5 where accused infringer’s “service activities involved copying entire programs”); *Stenograph*
6 *L.L.C. v. Bossard Assocs., Inc.*, 144 F.3d 96, 100, 102 (D.C. Cir. 1998) (in case of “wholesale
7 copying” of source code, plaintiff need not show which software elements were protectable).

8 Further, Oracle will prove that SAP AG and SAP America are vicariously and
9 contributorily liable for copyright infringement of all the copyrighted works at issues in the case.
10 *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1170-74 (9th Cir. 2007); *Ellison*
11 *v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004); *Gershwin Publ’g Corp. v. Columbia Artists*
12 *Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). SAP AG and SAP America bought
13 TomorrowNow based on the SAP AG Executive Board’s and key employees’ full knowledge
14 that TomorrowNow’s operating procedures created a “serious liability” that would “likely” result
15 in legal action by Oracle. Both the Board and key employees knew about the specific infringing
16 activities and permitted them to continue for over three years when, by their own admission, they
17 could easily have ended the infringement on day one. In fact, SAP has conceded that it had
18 control over TomorrowNow, and that it received direct financial benefit from TomorrowNow’s
19 operations. Thus, the focus at trial will be on the Board’s knowing undertaking of, and its
20 conscious and willing acceptance of the risk of being found liable for, a plan to harm Oracle
21 through TomorrowNow’s infringing business model, which SAP allowed to continue even long
22 after the litigation began.

23 **Computer Fraud and Trespass Claims:** Oracle will prove that TomorrowNow
24 illegally accessed and downloaded millions of electronic support materials, including terabytes
25 of data, from Oracle’s customer support websites in violation of the federal Computer Fraud and
26 Abuse Act (“CFAA”) and California’s Computer Data Access and Fraud Act (“CDAFA”). *See*
27 18 U.S.C. § 1030 (CFAA); Cal. Penal Code § 502 (CDAFA). These illegal downloads also
28 constitute common law trespass to chattels. *See, e.g., eBay, Inc. v. Bidder’s Edge, Inc.*, 100 F.

1 Supp. 2d 1058, 1069-70 (N.D. Cal. 2000). Oracle will show that these violations were knowing
2 and intentional. They caused damage to Oracle, including through harm to Oracle’s computer
3 systems and its data. TomorrowNow employees questioned the legality of this mass
4 downloading. They compared the effect to a denial of service attack on Oracle. TomorrowNow
5 management instructed them to continue or lose their jobs. Similar to the copyright claims,
6 Oracle will show that SAP AG and SAP America are liable for the computer fraud violations
7 based on their complete control of TomorrowNow, knowledge of the unlawful conduct, and the
8 benefits that they received as a result of that conduct.

9 **Interference:** Oracle will prove that SAP intentionally interfered with Oracle’s
10 prospective economic advantage in connection with the specific TomorrowNow customers who
11 would not otherwise have left Oracle for SAP. *See, e.g., Korea Supply Co. v. Lockheed Martin*
12 *Corp.*, 29 Cal. 4th 1134, 1164-66 (2003) (standard for intentional interference).⁵ It was this set
13 of customers that the SAP Board targeted in its deliberate effort to harm Oracle by funding a
14 known illegal enterprise in TomorrowNow and expanding it globally. TomorrowNow supported
15 the vast majority of its customers by using information obtained by accessing Oracle’s customer
16 support websites. This information included downloads illegally taken from Oracle’s website in
17 violation of the computer fraud and trespass laws. This downloading was considered, and
18 advertised by TomorrowNow to its customers, as an “urgent step” in establishing the foundation
19 for future support of each customer. SAP AG and SAP America then used TomorrowNow to
20 convince customers to switch to SAP enterprise software.

21 **Other claims:** Oracle will also prove that Defendants breached Terms of Use on
22 Oracle’s customer support websites to effectuate their plan of taking Oracle’s customers, that
23 Defendants’ conduct constituted unfair competition under California Business and Professions
24 Code § 17200, that Defendants were unjustly enriched by their illegal conduct at the expense of
25 Oracle, and that Defendants should be held to account for the money they received at Oracle’s

26 _____
27 ⁵ This interference will also be shown to have been negligent. *See, e.g. Avago*
28 *Technologies U.S., Inc. v. Venture Corp. Ltd.*, 2008 WL 5383367, *7-8 (N.D. Cal. 2008)
(standard for negligent interference).

1 expense as a result of their illegal conduct. Oracle expects that certain of these claims and
2 requests for relief may be decided by the Court, although the Court may wish to obtain an
3 advisory verdict from the jury as to those claims and requests for relief.

4 **B. Oracle's Statement of Relief Sought**

5 As compensation for the harm that SAP's copyright violations caused, Oracle seeks
6 actual damages in the amount of \$2.15 billion as the fair market value of the licenses for the
7 infringed PeopleSoft, J.D. Edwards, Siebel and Oracle Database software and related support
8 materials. Oracle's expert witnesses, including its damages expert, Paul Meyer, have estimated
9 that the fair market value of licenses for the infringed software and related support materials,
10 negotiated at the time of the infringement, would have been approximately \$2 billion for
11 PeopleSoft/J.D. Edwards, \$100 million for Siebel and \$56 million for Oracle Database. Oracle
12 anticipates that SAP will ask the Court or jury to award lost profits in lieu of Oracle's fair market
13 value licenses. Such an award alone would not provide adequate compensation for the
14 infringement and theft of Oracle's property and would reward SAP's calculated decision in 2005
15 to take the business risk of being found liable for infringement. In that instance, Oracle will also
16 seek SAP's infringers' profits, which Oracle's damages expert has estimated as being up to \$288
17 million.

18 As compensation for the harm caused by SAP's computer fraud, Oracle will seek the
19 damages to its systems and in responding to the violations, as well as the lost business from the
20 computer fraud. Oracle's damages expert has estimated these damages as being up to \$277.4
21 million.

22 As compensation for the harm caused by SAP's interference, Oracle will seek the lost
23 profits associated with the lost business relationships that SAP disrupted through its illegal
24 conduct. Oracle's damages expert estimated that Oracle's lost profits from these disrupted
25 relationships were up to \$318.1 million.

26 As compensation for SAP's breach of contract, Oracle will seek the lost profits that
27 Oracle USA suffered from the customers it lost due to SAP's illegal conduct. Oracle's damages
28 expert has estimated that Oracle USA lost profits due to SAP's contractual breaches up to \$156.4

1 million.

2 As compensation for SAP's unjust enrichment at the expense of Oracle, Oracle will seek
3 restitution from SAP in the amount of the development costs that SAP avoided and saved
4 through its illegal business model, rather than competing fairly. Oracle's damages expert has
5 estimated that the avoided costs SAP saved and that Oracle expended are up to \$3.5 billion.⁶

6 In addition, Oracle seeks an award of attorneys' fees and costs and an injunction
7 permanently enjoining Defendants from continuing or resuming the unlawful conduct at issue in
8 the case. Oracle also intends to seek an award of punitive damages. Finally, Oracle will seek
9 appropriate pre-judgment interest on any damages awards as allowed by law.

10 C. Defendants' Brief Summary of Their Defenses

11 Four Plaintiffs assert ten legal and equitable claims against three Defendants.⁷ Plaintiffs'
12 ten claims resolve into three basic allegations: (1) TomorrowNow improperly copied Plaintiffs'
13 (or their predecessors') software; (2) TomorrowNow improperly accessed and downloaded from
14 Plaintiff's computers; and (3) SAP AG and SAP America are responsible for TomorrowNow's
15 alleged misconduct. Defendants have substantial defenses to all of these claims, briefly
16 described here.

17 The most important "defense" is that *Plaintiffs Cannot Meet Their Burden Of Proof*.
18 This case has lasted years and has cost the parties tens of millions of dollars, or more, in great
19 part because Plaintiffs have insisted on pursuing infringement claims for 120 copyright
20 registrations (now 111 registrations, and the number yet may change). Yet, when Plaintiffs' lead
21 technical expert presented his report and was deposed, he was unable to establish that there had
22 been copying, much less more than *de minimis* copying, of software purportedly covered by

23

24 ⁶ Oracle does not seek duplicative damages, but Oracle's damages for certain claims
25 present overlapping amounts of harm, lost profits and/or restitutionary amounts. These amounts
26 are easily separable by Plaintiff and claim, as clarified by Oracle's damages expert, Dr. Paul
27 Meyer, in Ex. 2017 to his deposition.

28 ⁷ What follows is necessarily a brief summary of Defendants' defenses, supplemented by
Defendants' Trial Brief filed concurrently, and is subject to the parties' ongoing meet and confer
and the Court's rulings to come on the pending motions for summary judgment, motions in
limine filed concurrently, Daubert motions to be filed, and other pretrial issues.

1 dozens of the asserted registrations. There cannot be a copyright infringement case without
2 proof of impermissible copying.

3 Similarly, Plaintiffs brought their pending motion for summary judgment as a so-called
4 “template” for how Plaintiffs would try this case. That “template” relied on several registrations
5 for which no Plaintiff had the right to sue and focused on conduct that happened mostly before
6 SAP America bought TomorrowNow or at the margins of TomorrowNow’s service. If that is
7 Plaintiffs’ template for trial, they will not prevail.

8 It is also notable that much of *TomorrowNow’s Conduct Was Proper Under Customer*
9 *Licenses*. Plaintiffs have publicly conceded that third party support can be conducted consistent
10 with the relevant customer licenses. As explained in Defendants’ opposition to Plaintiffs’
11 pending motion for summary judgment, many provisions in those customer licenses permit
12 specific conduct about which Plaintiffs complain.

13 Additionally, most of *Plaintiffs’ State Law Claims Are Preempted By The Copyright*
14 *Act*. While the Court denied that part of Defendants’ Rule 12(b)(6) motion to dismiss raising
15 this issue, in so doing the Court specifically stated that the motion was denied except to the
16 extent that Plaintiffs’ claims were preempted. That extent is vast, as most of Plaintiffs’ claims
17 focus on alleged misconduct exclusively covered by the Copyright Act. In fact, Plaintiffs’
18 damages expert was unable to distinguish most of the state law damage claims and underlying
19 conduct from the alleged copyright damages. And, if they are not preempted, Plaintiffs’ claims
20 for unfair competition and intentional and negligent interference (as to Oracle EMEA) are barred
21 for lack of standing, and plaintiffs’ claim for an “accounting” is moot in view of extensive
22 damages discovery and the fact that TomorrowNow’s operations ceased long ago. This is
23 primarily a copyright case, and it should be resolved under the Copyright Act.

24 Beyond preemption, many of *Plaintiffs’ Claims Are Barred By The Statutes Of*
25 *Limitations, Laches or Waiver*. Plaintiffs and their predecessors knew of TomorrowNow’s
26 support activities for many years. Plaintiffs’ predecessors first sent letters to TomorrowNow
27 about its third party support in 2002, almost five years before this case was filed. Plaintiffs
28 assisted TomorrowNow in some of the very downloading activities and “local environments”

1 about which they now complain. Plaintiffs even provided additional advice and updates to
2 TomorrowNow after this case was filed. Plaintiffs knew too much, for too long, for their claims
3 to entirely survive the various statutes of limitations and defenses of laches and waiver.

4 To the extent any claims survive past these hurdles, **SAP AG And SAP America Are Not**
5 **Secondarily Liable For TomorrowNow's Alleged Misconduct.** The pending motion for
6 summary judgment illustrates the point well. Plaintiffs could not prove that SAP AG or SAP
7 America knew anything about TomorrowNow's alleged misconduct, much less induced or
8 encouraged TomorrowNow to commit acts of copyright infringement or the other alleged torts.
9 To the contrary, as to the one alleged copyright infringement about which SAP AG and SAP
10 America did know in part (that TomorrowNow had some customer software on its computers to
11 expedite customer service), SAP specifically directed the conduct to stop. Plaintiffs cannot
12 properly hold SAP AG and SAP America secondarily liable for conduct of which they were
13 unaware or they ordered be stopped.

14 Finally, **There Is No Basis To Lengthen The Trial.** Plaintiffs contend that the trial
15 should be lengthened to 12 weeks because of the complexity of the issues and complaints about
16 pretrial meet and confer and untimely production of a small volume of documents. None of
17 these points have merit or justify such an extreme burden on the Court and the jury.

18 To start with, when this trial was scheduled for six weeks, there were at least as many
19 facts in dispute, more copyright registrations at issue and, depending on summary judgment,
20 more parties, claims and damages theories in play. Nothing has changed since then that would
21 justify increasing the length of trial. In fact, and as explained in Defendants' Trial Brief, trial can
22 and should be shortened.

23 And, Plaintiffs' complaints notwithstanding, the parties have actually worked hard to
24 focus this case for trial. The problem is that the parties have taken radically different approaches
25 to that challenging problem. Plaintiffs have proposed that Defendants agree to hundreds of
26 alleged facts (on which Plaintiffs also insist they have the right to put in evidence at trial even if
27 the facts are stipulated). Many of those facts were stipulated through the meet and confer
28 process (leaving aside those that were simply argumentative assertions from Plaintiffs' trial

1 brief), but given the mass of information at issue in this case, that approach would never really
2 focus the trial. By contrast, Defendants have made proposals that would logically organize the
3 trial (bifurcation) or eliminate issues that need not be tried (dropping claims seeking duplicative
4 damages). These approaches, and others discussed in Defendants’ Trial Brief, will lead to a trial
5 that is shorter, more efficient, and more likely to lead to a fair and timely resolution of this case.⁸

6 Finally, Plaintiffs’ claim that discovery issues should lead to a lengthened (or delayed)
7 trial should be rejected outright. Over three and one half years Defendants have produced
8 staggering volumes of information (over 10 million numbered pages of documents and multiple
9 terabytes of data). Several months ago Defendants produced some additional materials,
10 including files containing “IMs” (instant messages), representing a tiny fraction of the overall
11 production in this case. These files were preserved but not previously produced because they
12 were included in “file types” that Defendants had made clear for years they were not searching.
13 Compared to the volumes of data Defendants have already produced, this marginal, albeit later,
14 production, made months ago, is cumulative of previous productions and has no impact on the
15 length of trial. The additional production proves mostly that there comes a point when turning
16 over more stones only reveals more of the same. (Plaintiffs excitement over these “IMs” also
17 begs an important question – where are Oracle’s IMs? None were produced.)

18 **D. Defendants’ Response to Oracle’s Statement of Relief Sought.**

19 SAP purchased TomorrowNow for \$10 million. It never made a profit. Before filing
20 suit, Plaintiffs publicly dismissed TomorrowNow’s impact on their business, and never disclosed
21 any material impairment or loss attributable to TomorrowNow. Now, Plaintiffs seek billions.

22 For the reasons set forth in Defendants’ pending motion for summary judgment, Plaintiffs
23 multi-billion dollar claim for “saved acquisition costs” is legally impermissible and should be
24

25 ⁸ Plaintiffs propose above that trial be shortened by one week, to five weeks. They would
26 accomplish this by essentially by eliminating all defenses to liability. Reading Plaintiffs’ own
27 description of how they would prove their claims, or recalling the complexity of their effort to
28 obtain summary judgment on only 6 of 120 registrations, demonstrates that Plaintiffs’ proposal is
not intended as a compromise. No one could credibly contend that eliminating most or all
liability issues from this case would shorten its length by only 1/6.

1 struck from the case. Plaintiffs’ other multi-billion dollar damage claim, for a so-called “fair
2 market value license,” survived summary judgment on a threshold issue (whether proof of
3 causation was required), but was not “rubber-stamped” by the Court, which expressly cautioned
4 that any such damages would have to be reasonable and not speculative. There is, of course, no
5 precedent for the license Plaintiffs seek here. For many reasons, it is both unreasonable and
6 wildly speculative to assert that any “willing buyer” would have agreed to pay billions to run
7 TomorrowNow. Plaintiffs’ license claim should not survive.

8 What is left is Plaintiffs’ claim for alleged lost maintenance profits and disgorgement of
9 SAP’s alleged license sales profits to which TomorrowNow supposedly contributed. These
10 claims are also grossly exaggerated. Plaintiffs seek hundreds of millions of dollars for lost
11 profits, but Plaintiffs cannot prove the required causation of damages, that but for
12 TomorrowNow’s conduct these profits would not have been lost. This is because Plaintiffs’ own
13 extensive internal records, and customer testimony, confirm that because of Plaintiffs’ poor and
14 expensive maintenance service, most customers that came to TomorrowNow were going to leave
15 Plaintiffs’ maintenance service anyway, if not for TomorrowNow then for someone else or for
16 “self support” (no vendor-provided maintenance service at all). Similarly, the evidence is
17 abundant that no SAP customers chose SAP software because of TomorrowNow support; the
18 important decision to pick a business software platform was never driven by the chance of saving
19 a few dollars on interim maintenance and support.

20 Plaintiffs’ claim for punitive damages should not get substantial attention. As Oracle’s
21 own Mr. Ellison confirmed at his deposition, competition for customers is “the American Way.”
22 This case is a business dispute about the proper boundaries of third party support, against the
23 backdrop of licenses that permit much of TomorrowNow’s conduct and Plaintiffs’ own statement
24 that third party support can be legal. This is not a case where punitive damages are appropriate.

25 **II. STATEMENT OF ALL RELEVANT UNDISPUTED FACTS**

26 The following facts are undisputed, and the Parties will stipulate to them for
27 incorporation into the trial record without the necessity of support testimony or exhibits, subject
28 to the Court’s ruling on pending motions for summary judgment, motions in limine, anticipated

1 *Daubert* motions and other pretrial issues:

2 1. OIC is a California corporation duly authorized to do business in the State of
3 California, with its principal place of business in Redwood City, California.

4 2. OIC owns and licenses certain Oracle intellectual property including copyrighted
5 enterprise application and Database software programs.

6 3. OIC is the owner or exclusive licensee of certain copyrights in suit, except for
7 carve-outs in the EMEA (Europe, the Middle East and Africa) region.

8 4. As part of Oracle's acquisition of PeopleSoft, Inc., ownership of certain
9 PeopleSoft and J.D. Edwards copyrights and other intellectual property (with carve-outs related
10 to J.D. Edwards) was transferred to OIC on March 1, 2005.

11 5. OIC is the owner of certain PeopleSoft and J.D. Edwards intellectual property
12 developed after March 1, 2005.

13 6. Siebel Systems, Inc. provided OIC with an exclusive license to its copyrights and
14 other intellectual property, including rights to enforce intellectual property rights, effective
15 March 1, 2006.

16 7. OIC is also the owner of all Siebel intellectual property developed after March 1,
17 2006.

18 8. OIC's claims include copyright infringement, violations of the Computer Fraud
19 and Abuse Act, violations of the Computer Data Access and Fraud Act, intentional and negligent
20 interference with prospective economic advantage, unfair competition, unjust enrichment, and an
21 accounting.

22 9. Oracle USA is a Colorado corporation duly authorized to do business in the State
23 of California, with its principal place of business in Redwood City, California.

24 10. Oracle USA develops and licenses certain intellectual property, including the
25 copyrighted enterprise software programs owned and licensed by OIC, and provides related
26 services.

27

28

1 11. Oracle USA is the successor in interest to certain PeopleSoft, J.D. Edwards, and
2 Siebel entities.⁹

3 12. Oracle USA's claims include violations of the Computer Fraud and Abuse Act,
4 violations of the Computer Data Access and Fraud Act, breach of contract, intentional and
5 negligent interference with prospective economic advantage, unfair competition, trespass to
6 chattels, unjust enrichment, and an accounting.

7 13. OEMEA is an Irish private limited company with its principal place of business in
8 Dublin, Ireland.

9 14. Directly and through its subsidiaries, OEMEA licenses certain intellectual
10 property, including the copyrighted enterprise applications software programs used around the
11 world and owned and licensed by OIC.

12 15. OEMEA is a successor in interest to certain PeopleSoft and J.D. Edwards entities.

13 16. OEMEA's claims include intentional and negligent interference with prospective
14 economic advantage, unfair competition, unjust enrichment, and an accounting.

15 17. SSI is a Delaware corporation duly authorized to do business in the State of
16 California, with its principal place of business in Redwood City, California.

17 18. SSI developed, owned, and licensed certain intellectual property, including
18 copyrighted enterprise software programs.

19 19. SSI is the owner of Siebel intellectual property developed prior to March 1, 2006.

20 20. SSI's claims include unfair competition, unjust enrichment, and an accounting.

21 21. The software products at issue here are from the PeopleSoft, J.D. Edwards, Siebel
22 and Oracle Database software product families.

23 22. As is typical in the enterprise software industry, Oracle does not sell ownership
24 rights to this software or the related support products Oracle provides to its paying customers.

25 23. Instead, Oracle's customers purchase licenses that grant them limited rights to use
26

27 ⁹ On February 15, 2010, Oracle USA, Inc. merged into Sun Microsystems, Inc., which was
28 concurrently renamed Oracle America, Inc.

1 specific Oracle software programs.

2 24. Separate from the license to the underlying software, Oracle also charges an
3 annual maintenance fee that entitles customers to receive support for the software, including
4 fixes, patches and updates typically made available for download from Oracle's password-
5 protected websites.

6 25. Oracle offers licensed customers with active support contracts the option to access
7 and download updates and support materials from Oracle's customer support websites.

8 26. The primary customer support websites accessed by TN were named Customer
9 Connection (including through the Change Assistant tool) and SupportWeb (together the "Oracle
10 Websites").

11 27. The computer systems associated with the operation of the Oracle Websites
12 generally resided in California, Colorado and Utah and were used in interstate commerce and
13 communication.

14 28. Customers across the United States and around the world regularly accessed and
15 downloaded licensed materials from Oracle's Websites.

16 29. Oracle's computer systems accessed by SAP TN to download to its own
17 computers were protected computers within the meaning of 18 U.S.C. § 1030(e)(2).

18 30. To access certain portions of the Oracle Websites, Oracle provides a unique
19 username and password ("login credentials") to licensed customers with active support contracts.

20 31. SAP AG is a German corporation with its principal place of business in Walldorf,
21 Germany.

22 32. SAP AG sells enterprise software applications programs that compete with
23 Oracle's programs.

24 33. SAP America, Inc. is a Delaware corporation with its principal place of business
25 in Newtown Square, Pennsylvania.

26 34. SAP America is a wholly-owned subsidiary of SAP AG.

27 35. TN is a Texas corporation with its principal place of business in Bryan, Texas.

28 36. TN became a wholly-owned subsidiary of SAP America and an indirect wholly-

1 owned subsidiary of SAP AG on January 19, 2005.

2 37. As of January 19, 2005, SAP AG and SAP America (together “SAP”) became the
3 parent companies of TN.

4 38. TN supported PeopleSoft and J.D. Edwards products when acquired by SAP.

5 39. TN expanded its service offerings to the Siebel line of products.

6 40. As the parent corporation, SAP had ultimate control over TN.

7 41. Two months after acquiring TN, SAP AG Board member Leo Apotheker told
8 SAP America president Bill McDermott to “inflict some pain on oracle” by “clos[ing] a few TN
9 deals at extraordinary conditions.”

10 42. The following is a list of Oracle copyright registrations issued by the Copyright
11 Office, including the Title of the Work, the Date that the Registration issued, and the Copyright
12 Registration Number (the “Registered Works”):

13	Row	Title of Work	Date of Registration	Registration Number
14	1	Oracle Relational Database Management System (RDBMS): Release 8.0.4	November 21, 2001	TX 5-392-842
15	2	Oracle Relational Database Management System (RDBMS), Release 8.0.5	November 21, 2001	TX 5-392-861
16	3	Oracle 8i Enterprise Edition, release 2 (8.1.6)	February 2, 2001	TX 5-222-106
17	4	Oracle9i Database Enterprise : Edition Release 1	June 13, 2003	TX 5-673-281
18	5	Oracle9i Database Enterprise : Edition Release 2	June 13, 2003	TX 5-673-282
19	6	Oracle Database 10g: Release 1	January 16, 2009	TX 6-938-648
20	7	Oracle Database 10g: Release 2	June 29, 2009	TX 6-942-003
21	8	PeopleTools 7.5	November 20, 1998	TX 4-792-578
22	9	PeopleSoft 7.0 financials, distribution & manufacturing 7.0	December 15, 1998	TX 4-792-576
23	10	PeopleSoft HRMS 7.0	December 15, 1998	TX 4-792-577
24	11	PeopleSoft HRMS 7.5	December 15, 1998	TX 4-792-575
25	12	PeopleSoft Financials, Distribution & Manufacturing 7.5	December 15, 1998	TX 4-792-574
26	13	PeopleTools 8.0	September 5, 2000	TX 5-266-222
27	14	PeopleSoft Financials and Supply Chain Management (FIN/SCM) 8.0	November 20, 2000	TX 5-291-439
28	15	PeopleSoft HRMS 8.0	November 20, 2000	TX 5-291-440

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Row	Title of Work	Date of Registration	Registration Number
16	PeopleTools 8.10	September 5, 2000	TX 5-266-221
17	PeopleSoft 8 HRMS SP1	March 26, 2001	TX 5-501-312
18	PeopleSoft 8 FIN/SCM SP1	March 26, 2001	TX 5-501-313
19	PeopleSoft 8 EPM SP3	March 30, 2001	TX 5-345-698
20	PeopleSoft 8 Customer Relationship Management	September 27, 2001	TX 5-456-777
21	PeopleSoft 8 Financials and Supply Chain Management: Service Pack 2	September 27, 2001	TX 5-456-780
22	PeopleSoft 8 Student Administration Solutions	November 30, 2001	TX 5-431-289
23	PeopleSoft 8.3 HRMS	February 1, 2002	TX 5-469-032
24	PeopleSoft 8.3 Enterprise Performance Management	March 11, 2002	TX 5-485-839
25	PeopleSoft 8.1 Customer Relationship Management	March 20, 2002	TX 5-493-450
26	PeopleTools 8.4	August 5, 2002	TX 5-586-248
27	PeopleSoft 8.4 Financials and Supply Chain Management	August 5, 2002	TX 5-586-247
28	PeopleSoft 8.8 Enterprise Performance Management	June 11, 2004	TX 5-993-616
29	PeopleSoft 8.8 HRMS	June 11, 2004	TX 6-093-947
30	PeopleSoft 8.8 Customer Relationship Management	June 11, 2004	TX 6-015-317
31	PeopleSoft Payroll 7	June 22, 1999	TX 4-501-140
32	PeopleSoft Payroll Interface 7	June 22, 1999	TX 4-501-138
33	PeopleSoft Pension Administration 7	June 21, 1999	TX 3-772-290
34	PeopleSoft Time and Labor 7.0	June 28, 1999	TX 4-994-866
35	PeopleSoft Benefits Administration 7.0	June 15, 1999	TX 4-258-824
36	PeopleSoft Human Resources 7	June 28, 1999	TX 4-994-865
37	PeopleSoft Payroll Interface 7 Higher Education	June 28, 1999	TX 5-013-124
38	PeopleSoft Time and Labor 7	June 28, 1999	TX 5-013-128
39	PeopleSoft Benefits Administration 7.50	June 14, 1999	TX 5-072-090
40	PeopleSoft Human Resources 7.50	June 28, 1999	TX 5-013-123
41	PeopleSoft Payroll 7.50	June 28, 1999	TX 5-013-125
42	PeopleSoft Payroll Interface 7.50	June 21, 1999	TX 3-772-292
43	PeopleSoft Pension Administration 7.50	June 21, 1999	TX 3-772-291
44	PeopleSoft Time and Labor 7.50	June 28, 1999	TX 4-994-867
45	PeopleSoft Application Update Installation Instructions (UPD595817)	May 2, 2008	TX 6-838-544
46	PeopleSoft Payroll 1200457000 - User Documentation	May 2, 2008	TX 6-838-537
47	PeopleSoft 8.01 & 8.31 Payroll Tax Update 05-F Year-End Processing: Canada	May 2, 2008	TX 6-838-549
48	EAP WTHD06: 1099 IRS changes for the year 2006	April 26, 2007	TX 6-541-023

Row	Title of Work	Date of Registration	Registration Number
49	ECRM89: Common Errors on Mobile Sales	April 26, 2007	TX 6-541-020
50	GM--Grants issues resolved by FMS ESA 8.9 Bundle #10-653723 (Oct 06)	April 26, 2007	TX 6-541-021
51	PeopleTools Third Party Daylight Saving Time Required Modifications	April 26, 2007	TX 6-541-019
52	PeopleTools Third Party Daylight Saving Time Required Modifications (Revised)	April 26, 2007	TX 6-541-018
53	Database of Documentary Customer Support Materials for PeopleSoft Software	July 1, 2009	TXu1-607-454
54	Initial release of JD Edwards World A7.3	April 26, 2007	TX 6-541-029
55	Initial release of JD Edwards World A8.1	April 26, 2007	TX 6-541-047
56	Initial release of JD Edwards World A9.1	April 26, 2007	TX 6-541-030
57	Accounts Payable program	March 7, 1995	TXu 619-320
58	Accounts Receivable program	March 7, 1995	TXu 619-312
59	Capacity Requirements Planning program	March 7, 1995	TXu 619-307
60	Configuration Management program	March 7, 1995	TXu 619-305
61	EDI Interface (6) program	March 7, 1995	TXu 619-304
62	Enterprise Facility Planning program	March 7, 1995	TXu 619-311
63	Equipment Management (5) program	March 7, 1995	TXu 619-309
64	Financial Modeling, Budgeting & Allocations program	March 7, 1995	TXu 619-321
65	Financial Reporting (FASTR) program	March 7, 1995	TXu 619-318
66	General Ledger & Basic Financial program	March 7, 1995	TXu 619-310
67	Inventory Management program	March 7, 1995	TXu 619-314
68	Master Production Scheduling program	March 7, 1995	TXu 619-306
69	Product Data Management program	March 7, 1995	TXu 619-317
70	Purchase Order Processing program	March 7, 1995	TXu 619-316
71	Sales Order Processing/Sales Analysis program	March 7, 1995	TXu 619-315
72	Shop Floor Control program	March 7, 1995	TXu 619-303
73	Warehouse Management program	March 7, 1995	TXu 619-313
74	WorldCASE Development Environment program	March 7, 1995	TXu 619-308
75	WorldCASE Foundation Environment (3) program	March 7, 1995	TXu 619-319
76	Cumulative Update 6 for JD Edwards World A8.1	May 1, 2007	TX 6-545-421
77	Cumulative Update 16 for JD Edwards World A7.3	April 26, 2007	TX 6-541-031
78	Code Change for JD Edwards World A7.3	April 26, 2007	TX 6-541-043

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Row	Title of Work	Date of Registration	Registration Number
79	Code Change for JD Edwards World A8.1	April 26, 2007	TX 6-541-044
80	JD Edwards World -- 1099 Changes for Tax Year 2006	April 26, 2007	TX 6-541-026
81	Changes to Daylight Savings Time for 2007 (DST)	April 26, 2007	TX 6-541-025
82	Initial release of JD Edwards EnterpriseOne XE	April 26, 2007	TX 6-541-033
83	Initial release of JD Edwards EnterpriseOne 8.0	April 26, 2007	TX 6-541-050
84	Initial release of JD Edwards EnterpriseOne 8.9	April 26, 2007	TX 6-541-049
85	Initial release of JD Edwards EnterpriseOne 8.10	April 26, 2007	TX 6-541-038
86	Initial release of JD Edwards EnterpriseOne 8.11	April 26, 2007	TX 6-541-028
87	Initial release of JD Edwards EnterpriseOne 8.11 SP1	April 26, 2007	TX 6-541-040
88	Initial release of JD Edwards EnterpriseOne 8.12	April 26, 2007	TX 6-541-041
89	Cumulative Update 8 for JD Edwards EnterpriseOne Xe	April 26, 2007	TX 6-541-048
90	Cumulative Update 1 for JD Edwards EnterpriseOne 8.0	April 26, 2007	TX 6-541-034
91	Cumulative Update 2 for JD Edwards EnterpriseOne 8.10	April 26, 2007	TX 6-541-032
92	Cumulative Update 1 for JD Edwards EnterpriseOne 8.11 SP1	April 26, 2007	TX 6-541-039
93	Cumulative Update 1 for JD Edwards EnterpriseOne 8.12	April 26, 2007	TX 6-541-042
94	ESU for JD Edwards EnterpriseOne Xe	May 3, 2007	TX 6-541-051
95	ESU for JD Edwards EnterpriseOne 8.0	April 26, 2007	TX 6-541-046
96	ESU for JD Edwards EnterpriseOne 8.9	April 26, 2007	TX 6-541-036
97	ESU for JD Edwards EnterpriseOne 8.10	April 26, 2007	TX 6-541-037
98	ESU for JD Edwards EnterpriseOne 8.11	April 26, 2007	TX 6-541-035
99	ESU for JD Edwards EnterpriseOne 8.11 SP1	April 26, 2007	TX 6-541-027
100	ESU for JD Edwards EnterpriseOne 8.12	April 26, 2007	TX 6-541-045
101	E1: 1099: Year 2006 1099 ESUs	April 26, 2007	TX 6-541-024
102	E1: 07/77: Quantum for Payroll Tax v.280	April 26, 2007	TX 6-541-022
103	Database of Documentary Customer Support Materials for J.D. Edwards Software	July 1, 2009	TXu1-607-455
104	Siebel 6.3 Initial Release and Documentation	June 29, 2009	TX 6-941-989

Row	Title of Work	Date of Registration	Registration Number
105	Siebel 7.0.5 Initial Release and Documentation	June 29, 2009	TX 6-941-988
106	Siebel 7.5.2 Initial Release and Documentation	June 29, 2009	TX 6-941-990
107	Siebel 7.7.1 Initial Release and Documentation	June 29, 2009	TX 6-941-993
108	Siebel 7.8 Initial Release and Documentation	June 29, 2009	TX 6-941-995
109	Siebel 8.0 Initial Release and Documentation	June 29, 2009	TX 6-942-000
110	Siebel 8.1.1 Initial Release and Documentation	June 29, 2009	TX 6-942-001
111	Database of Documentary Customer Support Materials for Siebel Software	July 1, 2009	TXu1-607-453

Table 1: Registered Works in Suit

43. For the registrations described in rows 1-53, 56-81, 83-103, and 107-111 of Table 1, the effective date of the registration is before or within five years after first publication of the Registered Work.

44. For the registrations described in rows 1-5, 8-44, and 57-75 of Table 1, the effective date of the registration predates the first alleged infringement of those registrations by any Defendant.

45. For the registrations described in rows 14-16, 20-22, 24-25, 52, 56 and 91 of Table 1, the work is registered as published and the effective date of the registration was within three months of first publication of the work.

46. Since March 1, 2002, OIC has held all exclusive rights under the Copyright Act for each registration described in rows 1-4 of Table 1.

47. Since March 1, 2006, OIC has held all exclusive rights under the Copyright Act for each registration described in rows 104-108 of Table 1, save for the rights to reproduce, create derivative works, and distribute the registered software in Europe, the Middle East and Africa.

48. TN copied J.D. Edwards World version A7.3 by installing the software onto TN's systems in Bryan, Texas.

1 49. TN copied J.D. Edwards EnterpriseOne version XE by installing the software
2 onto TN's systems in Bryan, Texas.

3 50. TN installed J.D. Edwards World version A7.3 and J.D. Edwards EnterpriseOne
4 version XE local environments using software obtained from TN's first two J.D. Edwards
5 customers.

6 51. TN copied portions of PeopleSoft Customer Relationship Management (CRM)
7 8.0-8.9, Enterprise Performance Management (EPM) 8.8 SP1-8.9, Financials and Supply-Chain
8 Management (FSCM; also Financials, Distribution and Manufacturing (FDM)) 7.5-8.9,
9 PeopleSoft Human Resources Management Software (HRMS) 7.0-8.9, and Student
10 Administration (SA, also Campus Solutions and HRMS for Higher Education) 7.0-8.0 SP1 by
11 installing the software onto TN's systems in Bryan, Texas.

12 52. TN copied the PS_HOME component, database component, or both components
13 of PeopleSoft CRM, EPM, FSCM, HRMS, SA and PeopleTools software thousands of times by
14 backing up, "cloning" and restoring components of existing environments.

15 53. TN copied some portions of PeopleSoft CRM, EPM, FSCM, HRMS, SA and
16 PeopleTools software by placing electronic copies of some of the installation software into "CD
17 Client Jukebox" folders on TN's servers.

18 54. TN copied some portions of Siebel software by placing electronic copies of some
19 of the installation software into "CD Client Jukebox" folders on TN's servers.

20 55. TN copied some components of some versions of PeopleSoft CRM, EPM, FSCM,
21 HRMS, SA, and PeopleTools software by burning them onto CDs.

22 56. TN retained many of these CDs in CD binders.

23 57. TN directed that some of its customers apply modifications distributed by TN to
24 the environments located on the customers' servers. TN applied to local environments on TN's
25 servers copies of the same modification to which it directed its customers.

26 58. TN distributed copies of some of the PeopleSoft local environments and
27 environment backups that are or were located on TN's systems to TN's customers.

28 59. TN created local environments using Oracle installation software received from or

1 through Oracle's customers.

2 60. In some instances, TN used local environments to support multiple customers.

3 61. TN used some local environments to develop and test fixes it sent to multiple
4 customers in some instances.

5 62. Defendants cannot identify the customer whose software was used to create at
6 least 95 different local environments.

7 63. TN copied the Oracle Database software program versions 8.1.6, 9.2 and 10.2 by
8 downloading the installation software for Oracle Database 8.1.7, 9.2 and 10.2 onto TN's systems
9 in Bryan, Texas.

10 64. TN copied the Oracle Database software program versions 8.1.6, 9.2 and 10.2 by
11 installing the software for Oracle Database 8.1.7, 9.2 and 10.2 onto TN's systems in Bryan,
12 Texas.

13 65. TN made further copies of certain of the Oracle Database software programs by
14 copying both the installation software and the installations of the Oracle Database software from
15 one TN system to another TN system.

16 66. TN did not install or run Oracle Database software on any single processor
17 servers.

18 67. TN copied PeopleSoft and Siebel database components by backing up the
19 contents of database instances containing PeopleSoft or Siebel database components and
20 restoring the contents of those instances.

21 68. TN copied millions of updates and support materials for J.D. Edwards World, J.D.
22 Edwards EnterpriseOne, PeopleSoft and Siebel by downloading them from the Oracle Websites
23 onto TN's computers. It then further copied certain portions of those materials between TN's
24 servers.

25 69. Over the course of its use, Titan incremented through the URL addresses for
26 millions of support materials available on the Oracle Websites and copied all requested items to
27 TN's computer systems.

28 70. TN counted approximately 5 million Oracle support files on its systems in 2008.

1 71. At least hundreds of thousands of these files contain portions of Oracle’s updates
2 and support materials.

3 72. TN made additional copies of downloaded updates and support materials for
4 PeopleSoft software when TN applied the updates and support materials to PeopleSoft
5 environments on TN’s servers.

6 73. TN made additional copies of certain updates and support materials for J.D.
7 Edwards World, J.D Edwards EnterpriseOne, and PeopleSoft by burning them onto CDs.

8 74. Some of these CDs were retained by TN in CD binders; others were distributed to
9 some of TN’s current and former customers.

10 75. Certain updates and support materials for J.D. Edwards World and J.D. Edwards
11 EnterpriseOne were stored in a generic master folder until 2006, when they were copied into
12 customer-labeled folders.

13 76. Some updates and support materials for PeopleSoft were stored in a generic
14 master folder.

15 77. Some updates and support materials were stored in folders labeled with the names
16 of prospects who never became TN customers, or with the names of entities that were no longer
17 TN customers.

18 78. In 2006, the J.D. Edwards World and J.D. Edwards EnterpriseOne updates and
19 support materials kept in a prospect’s folder were copied into several other customer-labeled
20 folders.

21 79. TN modified some of the downloaded Oracle fixes and updates to be applied to
22 J.D. Edwards World, J.D. Edwards EnterpriseOne and PeopleSoft enterprise software, made
23 subsequent copies of the modified Oracle fixes and updates, and distributed the modified Oracle
24 fixes and updates to some of TN’s customers.

25 80. TN used information downloaded from the Oracle Websites to help support
26 customers in competition with Oracle.

27 81. TN considered downloading updates and support materials from Oracle’s
28 websites an “urgent step” in the initial process for bringing on a customer for TN support, called

1 “on-boarding.”

2 82. TN developed software tools to automate the downloading of Oracle updates and
3 support materials from the Oracle Websites.

4 83. These software tools, including Titan, would automatically transmit requests from
5 TN’s computer systems.

6 84. Titan would increment through the URL addresses for thousands of support
7 materials available on the Oracle Websites and copy requested items to TN’s computer systems.

8 85. TN also performed some downloading using customer login credentials to
9 complete on-boarding for particular customers that no longer had a valid support contract with
10 Oracle.

11 86. TN also tested Titan using login credentials from a customer that no longer had a
12 valid support contract with Oracle.

13 87. One TN employee informed management that he had legal concerns regarding
14 TN’s downloading activity.

15 88. He had concerns about whether the downloading activity could violate Oracle’s
16 Terms of Use.

17 89. This former TN employee says he was instructed to continue.

18 90. The former TN employee also says he was instructed not to put any concerns that
19 he had about downloading into writing.

20 91. In their Answer, Defendants first admitted that some of their downloads were
21 “inappropriate.”

22 92. Oracle sells software licenses and support contracts for PeopleSoft, J.D. Edwards
23 World, J.D. Edwards EnterpriseOne, Oracle Database and Siebel enterprise software.

24 93. TN contracted with a total of 358 customers to provide support for PeopleSoft,
25 J.D. Edwards World, J.D. Edwards EnterpriseOne and/or Siebel enterprise software between
26 2002 and 2008.

27 94. Each of TN’s customers licensed PeopleSoft, J.D. Edwards World, J.D. Edwards
28 EnterpriseOne and/or Siebel enterprise software from Oracle or from Oracle’s predecessors.

1 95. Defendants were aware that each of TN’s customers was a current or former
2 customer of Oracle and/or its predecessors.

3 96. TN competed for support contracts for PeopleSoft, J.D. Edwards World, J.D.
4 Edwards EnterpriseOne and/or Siebel enterprise software directly with Oracle.

5 97. Starting prior to July 2003 and continuing thereafter, TN downloaded, installed,
6 copied and accessed versions of Oracle’s Database software to provide TN maintenance services
7 through the wind-down of TN’s business in October 2008.

8 98. TN installed and ran Oracle Database software on certain servers with multiple
9 processors.

10 99. Plaintiffs and Defendants SAP America and SAP AG are competitors in the
11 market for development and sale of Enterprise Resource Planning (“ERP”) software and related
12 services and support.

13 100. In June 2003, Plaintiffs initiated an unsolicited tender offer for PeopleSoft.

14 101. The acquisition of PeopleSoft by Oracle caused fear, uncertainty and doubt
15 (“FUD”) among some PeopleSoft and JDE customers over the future of PeopleSoft and JDE
16 products and support.

17 102. Plaintiffs acquired PeopleSoft on January 7, 2005.

18 103. During Oracle’s approximately 18 month attempt to acquire PeopleSoft, SAP saw
19 a competitive opportunity to win PeopleSoft and JDE customers. SAP initiated a marketing
20 program called Safe Harbor intended to take advantage of that competitive opportunity.

21 104. On January 19, 2005, SAP America acquired TN for approximately \$10 million.

22 105. TN had been in the business of providing third party support services for
23 PeopleSoft products since early 2002, and JDE products since early January 2005.

24 106. TN had approximately 50 customers at the time of the acquisition.

25 107. Also on January 19, 2005, SAP announced Safe Passage, a successor marketing
26 program to Safe Harbor.

27 108. SAP’s Safe Passage campaign had several components. These included a license
28 credit of up to 75% on a customer’s previous license, to be applied against the price of a new

1 SAP license.

2 109. One component of SAP's Safe Passage program was the offer of support for
3 PeopleSoft and JDE products at approximately 50% of the fee previously paid to Oracle or
4 PeopleSoft for support, with the support services to be provided by TN.

5 110. The TN support offering was an optional part of the Safe Passage program;
6 customers could purchase SAP products without purchasing support from TN, purchase TN
7 support without purchasing products from SAP, or continue to purchase products from SAP or
8 support from TN without participating in the Safe Passage program at all.

9 111. In January 2006, Oracle acquired Siebel Systems, Inc. ("Siebel").

10 112. TN began providing support to Siebel customers in September 2006.

11 113. Beginning in approximately 2004, PeopleSoft, Inc. began tracking customers it
12 considered to be at risk of cancelling PeopleSoft support services.

13 114. TN wound down its business operations on October 31, 2008.

14 115. Between January 2002 and October 31, 2008, TN had a total of 358 customers, of
15 which 16 were Siebel customers. TN signed its first Siebel customer in September 2006.

16 116. Before March 1, 2005, certain PeopleSoft and JDE entities owned the PeopleSoft
17 and JDE registrations asserted in the Fourth Amended Complaint.

18 117. On March 1, 2005, these PeopleSoft and JDE entities transferred ownership of
19 their copyrights to OIC, after which they merged with and into OSC (then known as Oracle
20 Corporation).

21 118. For the registrations described in rows 6-7, 45-56, and 76-111 of Table 1, the
22 effective date of the registration post-dates the first alleged infringement of those registrations by
23 any defendant.

24 119. For the registrations described in rows 1-13, 17-19, 23, 26-51, 54-55, 76-90, 92-
25 102, and 104-110 of Table 1, the effective date of the registration is not within three months of
26 first publication of the work covered by the registration.

27 120. The registrations described in rows 53, 57-75, 103 and 111 of Table 1 were
28 registered as unpublished works.

1 121. The registrations identified in rows 54-55, 82, and 104-106 of Table 1 were not
2 registered within five years of first publication.

3 122. In an eWeek article entitled “Oracle Warns SAP to Step Lightly,” dated January
4 26, 2005, Oracle CEO Larry Ellison was quoted as saying in response to SAP’s acquisition of
5 TN, “That’s our intellectual property, and they should be cautious.”

6 123. PeopleSoft tracked the customers and revenues lost to TomorrowNow.

7 124. On January 11, 2005, Richard Blotner, Vice President, North America Operations
8 at Oracle, stated in an e-mail: “what i’m really concerned with is this is tomorrow now
9 taking advantage of the situation by getting updates from their most recent new customers, and
10 applying them to their older ones? i have no evidence and no one has said this, but i have a
11 suspicious little mind. worst case, it might be worth sending them a legal letter, ensuring they
12 know that they cannot do something like this.”

13 125. PeopleSoft retained Crimson Consulting Group in October 2004 to research third
14 party support providers, one of which was TomorrowNow.

15 126. OEMEA is not registered to do business in California.

16 127. Oracle’s acquisition of PeopleSoft significantly increased Oracle’s share of the
17 enterprise application software market.

18 128. SAP believed that the acquired PeopleSoft customer base was vulnerable to
19 defection from Oracle because of the Fear, Uncertainty and Doubt (“FUD”) associated with
20 Oracle’s effort to acquire PeopleSoft.

21 129. SAP decided to acquire TN to coincide with the closing of Oracle’s acquisition of
22 PeopleSoft.

23 130. Prior to Plaintiffs filing this lawsuit Plaintiffs did not contact any Defendant to
24 discuss the allegations.

25 131. TN continues to exist as a Texas corporation.

26 **III. STATEMENT OF ALL RELEVANT DISPUTED FACTS WHICH**
27 **REMAIN TO BE DECIDED**

28 The following facts are disputed and will be subject to proof at trial, subject to the

1 Court's rulings on pending motions for summary judgment, motions-in-limine, anticipated
2 *Daubert* motions and other pretrial issues. The parties have provided basic header information
3 for various categories of facts for the convenience of the Court. However these headers are not
4 intended to limit the applicability of those facts only to the subject matter of the header.

5 **DIRECT LIABILITY - COPYRIGHT**

- 6 1. OIC is the owner or exclusive licensee of all copyrights in suit.
- 7 2. OIC is owner of all PeopleSoft and J.D. Edwards intellectual property developed
8 after March 1, 2005.
- 9 3. As part of Oracle's acquisition of PeopleSoft, Inc., ownership of all PeopleSoft
10 and J.D. Edwards copyrights and other intellectual property was transferred to OIC on March 1,
11 2005.
- 12 4. PeopleSoft's and J.D. Edwards' rights to sue for pre-transfer infringement were
13 transferred to OIC on March 1, 2005. As of March 1, 2005, OIC held the right to sue for pre-
14 March 1, 2005 infringement of PeopleSoft and J.D. Edwards intellectual property.
- 15 5. After merging with and into OSC, the PeopleSoft and JDE entities ceased to exist.
- 16 6. Each row in Table 1 above lists a valid and enforceable copyright in software or
17 updates and support materials that has been registered with the United States Copyright Office.
- 18 7. Since March 1, 2005, OIC has held all exclusive rights under the Copyright Act
19 for each registration described in rows 8-46, 54-55 and 57-76 of Table 1.
- 20 8. Since March 1, 2005, OIC has held all exclusive rights under the Copyright Act
21 for each registration described in rows 82-86, 89-90, and 94-95 of Table 1, save for the right to
22 distribute the registered software in Europe, the Middle East and Africa.
- 23 9. OIC has held all exclusive rights under the Copyright Act for each registration
24 described in rows 5-7, 47-53, 56, 77-81, 87-88, 91-93, 96-103, and 109-111 of Table 1 ever since
25 the registered software was first created.
- 26 10. Since March 1, 2002, OIC has held the right to sue for any infringement of each
27 registration described in rows 1-4 of Table 1, regardless of when or where the infringement
28 occurred.

1 11. Since March 1, 2005, OIC has held the right to sue for any infringement of each
2 registration described in rows 8-46, 54-55 and 57-76 of Table 1, regardless of when or where the
3 infringement occurred.

4 12. Since March 1, 2005, OIC has held the right to sue for any infringement of each
5 registration described in rows 82-86, 89-90, and 94-95 of Table 1, regardless of when or where
6 the infringement occurred, save for the right to sue for unauthorized distribution of the registered
7 software in Europe, the Middle East and Africa.

8 13. Since March 1, 2006, OIC has held the right to sue for any infringement of each
9 registration described in rows 104-108 of Table 1, regardless of when or where the infringement
10 occurred, with respect to infringement that occurred on or after March 1, 2006, save for the right
11 to sue for unauthorized reproduction, creation of derivative works, or distribution of the
12 registered software in Europe, the Middle East and Africa.

13 14. OIC has held the right to sue for any infringement of each registration described
14 in rows 5-7, 47-53, 56, 77-81, 87-88, 91-93, 96-103, and 109-111 of Table 1 ever since the
15 registered software was first created.

16 15. OIC has rights to enforce Oracle's PeopleSoft, J.D. Edwards and Siebel
17 copyrights to protect Oracle from alleged infringers such as Defendants.

18 16. Prior to their merger with and into OSC, the PeopleSoft and JDE entities did not
19 expressly transfer the right to sue for pre-March 1, 2005 infringement to OIC.

20 17. Prior to their merger with and into OSC, the PeopleSoft and JDE entities did not
21 expressly transfer the right to sue for pre-March 1, 2005 infringement to OSC.

22 18. OIC holds the right to sue for infringement of PeopleSoft and J.D. Edwards
23 intellectual property that post-dates the transfer of PeopleSoft's and J.D. Edwards' copyrights to
24 OIC (with carve-outs related to J.D. Edwards).

25 19. Neither SAP nor TN were licensed or otherwise authorized by Oracle to
26 reproduce, modify or distribute any version of J.D. Edwards World, J.D. Edwards
27 EnterpriseOne, PeopleSoft or Siebel enterprise software.

28 20. Neither SAP nor TN were licensed or otherwise authorized by Oracle to

1 reproduce, modify, distribute or publicly display any version of J.D. Edwards World, J.D.
2 Edwards EnterpriseOne, PeopleSoft, or Siebel updates and support materials.

3 21. No relevant customer's license allowed SAP or TN to reproduce, modify or
4 distribute the enterprise software copies described herein.

5 22. The limited use rights in the Oracle licenses did not allow Defendants to maintain
6 their own copies of the software and did not allow software to be cross-used or copied between
7 customers.

8 23. TN was not licensed or otherwise authorized by Oracle to reproduce or distribute
9 Oracle Database software for use in commercial and production environments. Neither SAP's
10 Oracle Database reseller agreement nor any relevant customer's license allowed TN to reproduce
11 or distribute the Oracle Database software copies described above.

12 24. No relevant customer's license allowed SAP or TN to reproduce, modify,
13 distribute or publicly display the copies of updates and support materials described above.

14 25. Each TN installation of J.D. Edwards World software supported multiple J.D.
15 Edwards World environments.

16 26. A fully-functional PeopleSoft environment requires both a PS_HOME component
17 and a PeopleSoft database component, run in conjunction with an installation of PeopleTools.

18 27. TN could perform substantial testing and development with use of only a
19 PS_HOME component or a PeopleTools database component, with or without PeopleTools.

20 28. TN copied J.D. Edwards World versions A7.2 and A8.1 by installing the software
21 onto TN's systems in Bryan, Texas.

22 29. Each TN installation of J.D. Edwards EnterpriseOne software supported multiple
23 J.D. Edwards EnterpriseOne environments.

24 30. TN copied J.D. Edwards EnterpriseOne versions XE, 8.0, 8.10, 8.11 and 8.12 by
25 installing the software on the computers controlled by TN in the custody of TN employee Ashis
26 Ghosh.

27 31. Each installation supported multiple J.D. Edwards EnterpriseOne environments.

28 32. TN copied PeopleSoft Customer Relationship Management (CRM) 8.0-8.9,

1 Enterprise Performance Management (EPM) 8.8 SP1-8.9, Financials and Supply-Chain
2 Management (FSCM; also Financials, Distribution and Manufacturing (FDM)) 7.5-8.9, Human
3 Resources Management Software (HRMS) 7.0-8.9, Student Administration (SA, also Campus
4 Solutions and HRMS for Higher Education) 7.0-8.0 SP1, and PeopleTools 7.06-8.48 by
5 installing the software onto TN's systems in Bryan, Texas. Each of the hundreds of installations
6 created an environment.

7 33. TN copied PeopleSoft CRM, EPM, FSCM, HRMS, SA and PeopleTools
8 thousands of times by backing up, "cloning" and restoring existing environments.

9 34. Each PeopleSoft local environment created by TN contained all or almost all
10 modules of that product in one or more languages.

11 35. A PeopleSoft local environment comprises one or more of the following: a
12 PS_HOME component and a PeopleSoft database component.

13 36. The true number and nature of the environment backups cannot be known,
14 because TN deleted many of the backups from TN's servers; at least some of these copies were
15 not backed up prior to deletion.

16 37. The true number, nature and extent of the installation software copied into "CD
17 Client Jukebox" folders on TN's servers cannot be known, because TN's regular practice was to
18 delete the copies of installation software from TN's servers after using the installation software
19 to create local environments.

20 38. The modifications to Oracle's code that TN applied to its local environments
21 included fixes and updates created by Oracle.

22 39. TN used most local environments for a variety of purposes not permitted by any
23 license, such as training and research. This allowed TN to better support its customers.

24 40. Each instance of Oracle Database contained a copy of a PeopleSoft or Siebel
25 database component.

26 41. The true number and nature of copies of the updates and support materials cannot
27 be known because TN downloaded and then deleted millions of files containing updates and
28 support materials as part of its testing and development of automated downloading tools.

1 42. The true number of such updates and support materials cannot be known because
2 TN later deleted the generic master library.

3 43. The true number and nature of the updates and support materials copied into
4 multiple other customer folders cannot be known, because TN later deleted the prospects' and
5 former customers' folders.

6 44. Some of the downloaded and subsequently copied updates and support materials
7 were fixes and updates created by Oracle to be applied to J.D. Edwards World, J.D. Edwards
8 EnterpriseOne and PeopleSoft enterprise software.

9 45. Starting prior to July 2003 and continuing thereafter, TN downloaded, installed,
10 copied, accessed and otherwise used versions of Oracle's Database software to provide TN
11 maintenance services through the wind-down of TN's business in October 2008.

12 46. TN copied Siebel versions 5 through 7.8 by installing the software onto TN's
13 systems in Bryan, Texas. Each installation created a Siebel environment.

14 47. TN copied Siebel multiple times by backing up existing environments.

15 48. TN modified J.D. Edwards World, J.D. Edwards EnterpriseOne, and PeopleSoft
16 local environments by modifying Oracle's code (including source code and application database
17 schemas and contents) to change the features and functionality of Oracle's software, by copying
18 portions of one TN customer's code into a second TN customer's code, and by combining code
19 from multiple TN customers into one environment.

20 49. TN publicly displayed updates and support materials covered by one or more of
21 Oracle's copyright registrations described in 51-52 of Table 1 by making the updates and support
22 materials freely available on TN's website.

23 50. Each installation, backup, restore, electronic copy and creation of a CD containing
24 PeopleSoft, J.D. Edwards World, J.D. Edwards EnterpriseOne and Siebel installation software
25 resulted in one or more reproductions of all or virtually all of the PeopleSoft, J.D. Edwards
26 World, J.D. Edwards EnterpriseOne and Siebel enterprise software covered by one or more of
27 Oracle's copyright registrations described in rows 8-44, 54-77, 82-93 and 104-110 of Table 1.

28 51. TN's modifications of J.D. Edwards World, J.D. Edwards EnterpriseOne, and

1 PeopleSoft local environments constituted the creation of derivative works based on all or
2 virtually all of the PeopleSoft, J.D. Edwards World and J.D. Edwards EnterpriseOne enterprise
3 software covered by one or more of Oracle’s copyright registrations described in rows 8-44, 54-
4 77 and 82-93 of Table 1.

5 52. The distribution of modifications to PeopleSoft, J.D. Edwards World and J.D.
6 Edwards EnterpriseOne enterprise software, by TN, to its customers constituted contributory
7 infringement and inducement of infringement of one or more of Oracle’s copyright registrations
8 described in rows 8-44, 54-77 and 82-93 of Table 1.

9 53. TN’s distribution of PeopleSoft environments, environment backups and
10 modifications constituted the distribution of all or virtually all of the PeopleSoft enterprise
11 software covered by one or more of Oracle’s copyright registrations described in rows 8-44 of
12 Table 1.

13 54. All or substantially all fixes to which customers were directed by TN were
14 actually distributed to customers.

15 55. In May 2009 Defendants contended that it would be “impossible” to provide “a
16 detailed description of the support provided with each local environment.” In October 2009,
17 Defendants contended that it required over 500 hours of attorney time to describe in narrative
18 form the local environments used for just 10 master fixes delivered by TN. Defendants further
19 contended the narratives resulting from that 500 hours of work did not imply “that the activities
20 associated with any other master fix record were the same or even similar to the activities
21 described” for the 10 master fixes.

22 56. TN used local environments to develop and test fixes it sent to multiple
23 customers.

24 57. According to Oracle’s expert, Kevin Mandia, TN provided over 890 fixes to TN’s
25 customers.

26 58. Each of the fixes that TN provided to TN’s customers contained more than a de
27 minimis amount of protected expression from the PeopleSoft, J.D. Edwards World and J.D.
28 Edwards EnterpriseOne enterprise software covered by the registrations described in 8-44, 54-77

1 and 82-93 of Table 1.

2 59. Each installation, copy, backup and restore of Oracle Database software resulted
3 in one or more reproductions of all or virtually all of the Oracle Database software covered by
4 one or more of Oracle's copyright registrations described in rows 1-7 of Table 1.

5 60. Each installation supported multiple instances of the Oracle Database software.

6 61. TN made further copies of the Oracle Database software programs by copying
7 both the installation software and the installations of the Oracle Database software from one TN
8 system to another TN system.

9 62. TN copied the Oracle Database software programs by creating instances of Oracle
10 Database software programs, by backing up the contents of the instances of the Oracle Database
11 software programs and by restoring the contents of those instances.

12 63. The distribution of certain PeopleSoft environments and environment backups
13 from TN's servers to TN's customers resulted in one or more reproductions or distributions of
14 more than a de minimus amount of protected expression from the Oracle Database software
15 covered by the registrations described in rows 1-7 of Table 1.

16 64. Each installation of J.D. Edwards World software onto TN's systems created at
17 least one local environment. Each environment constitutes a copy of the software.

18 65. Each installation of J.D. Edwards EnterpriseOne software onto TN's systems
19 created at least one local environment. Each environment constitutes a copy of the software.

20 66. Each installation of PeopleSoft CRM, EPM, FSCM, HRMS or SA software onto
21 TN's systems created a local environment. Each environment constitutes a copy of the software.

22 67. TN copied PeopleTools 7.06-8.48 by installing the software onto TN's systems in
23 Bryan, Texas. Each installation of PeopleTools constitutes a copy of the software.

24 68. TN copied some versions of PeopleSoft CRM, EPM, FSCM, HRMS, SA and
25 PeopleTools installation software by burning them onto CDs.

26 69. TN copied some versions of PeopleSoft CRM, EPM, FSCM, HRMS, SA and
27 PeopleTools software by placing electronic copies of the installation software into "CD Client
28 Jukebox" folders on TN's servers.

1 70. TN copied some versions of Siebel software by placing electronic copies of the
2 installation software into “CD Client Jukebox” folders on TN’s servers.

3 71. TN sometimes downloaded for some prospective customers before they had
4 signed any contract and without their permission.

5 72. TN, with the prospective customer’s permission, downloaded for some
6 prospective customers before they had signed any contract.

7 73. In 2006, the J.D. Edwards World and J.D. Edwards EnterpriseOne updates and
8 support materials kept in a prospect’s folder to support other customers were copied into several
9 other customer-labeled folders.

10 74. In analyzing the computer systems produced by TN, Oracle’s expert Kevin
11 Mandia determined that approximately 9 million Oracle support files remained on TN’s systems.

12 75. All files, including updates and support materials, on TN’s server DCITBU01
13 were copied there from other TN computers.

14 76. TN’s downloading and subsequent copying of Oracle’s updates and support
15 materials for PeopleSoft, J.D. Edwards World, J.D. Edwards EnterpriseOne and Siebel resulted
16 in one or more reproductions of updates and support materials covered by one or more of
17 Oracle’s copyright registrations described in rows 45-53, 78-81, 94-103 and 111 of Table 1.

18 77. TN’s downloading and subsequent copying of Oracle’s updates and support
19 materials for J.D. Edwards World and J.D. Edwards EnterpriseOne resulted in one or more
20 reproductions of all or virtually all of the J.D. Edwards World and J.D. Edwards EnterpriseOne
21 software covered by one or more of Oracle’s copyright registrations described in rows 54-77 and
22 82-93 of Table 1.

23 78. TN’s downloading and subsequent copying of Oracle’s updates and support
24 materials for PeopleSoft, J.D. Edwards World and J.D. Edwards EnterpriseOne contained more
25 than a de minimis amount of protected expression covered by the registrations described in 8-44,
26 54-77 and 82-93 of Table 1.

27 79. The Oracle Websites are maintained on protected computer systems owned by
28 Oracle.

1 80. The Terms of Use on Oracle’s Websites describe how the data, including the
2 updates and support materials on them, may be accessed and downloaded.

3 81. The Terms of Use and license agreements varied slightly over time. In all
4 instances they prohibited Defendants from using the Oracle Websites and the data, including the
5 updates and support materials on them, for Defendants’ own commercial purposes.

6 82. Oracle’s updates and support materials are copyrighted materials.

7 83. Each of Oracle’s updates and support materials contained with Oracle’s
8 automated database registrations are covered by that registration.

9 84. Every JD Edwards Code Change and ESU is covered by one or more copyright
10 registrations described in rows 54-79 and 82-100 of Table 1.

11 85. The true number and nature of the updates and support materials TN downloaded
12 cannot be known, including because TN deleted millions of them without keeping backups.

13 86. For each customer or potential customer, TN generally attempted to download all
14 customer support materials available on the Oracle Websites in that customer’s product family.

15 87. TN also accessed and downloaded updates and support materials from Oracle
16 related to Oracle’s Database software.

17 88. TN’s downloaded PeopleSoft updates and support materials were stored in a
18 generic master library (folder) from at least 2002-2007.

19 89. TN employees informed management that that they believed that TN’s access and
20 downloading were illegal.

21 90. These TN employees believed that the downloading violated copyright laws,
22 Oracle’s license agreements and Terms of Use.

23 91. These TN employees were instructed to continue.

24 92. TN employees were also instructed not to put any concerns that they had about
25 downloading into writing.

26 93. TN knew that the login credentials it used to test Titan were no longer valid, even
27 for the customer who originally provided the credential.

28 94. In developing later versions of Titan, TN downloaded approximately a million

1 files from the Oracle Websites using the login credential supplied by a TN employee who had it
2 from a prior employer.

3 95. Of the approximately 5 million Oracle support files that TN counted on its
4 systems in 2008, at least hundreds of thousands of these files contain Oracle's updates and
5 support materials.

6 96. After downloading millions of updates and support materials for J.D. Edwards
7 World, J.D. Edwards EnterpriseOne, PeopleSoft and Siebel, TN copied all or almost all of the
8 updates and support materials between TN's servers.

9 97. TN's business model required it to access and download from the Oracle
10 Websites.

11 98. TN shared downloads among customers to provide support.

12 99. All Titan testing downloads were later deleted.

13 100. Defendants represented to Oracle that they would no longer download from
14 Oracle's websites to TN systems after August 23, 2007 at the latest.

15 **INDIRECT LIABILITY - COPYRIGHT**

16 101. SAP AG acquired TN through SAP America.

17 102. SAP AG and SAP America had the right and ability to supervise, control, and
18 stop TN from copying Oracle's software, updates and support materials without a license.

19 103. SAP also could stop TN from accessing and downloading from Oracle Websites
20 without authorization.

21 104. SAP provided TN with the site and facilities for TN's business operations, and
22 expanded TN across the globe.

23 105. SAP AG and SAP America anticipated direct financial gains to ultimately result
24 from TN's business model through cooperative marketing and sales programs, like SAP's Safe
25 Passage program.

26 106. As parent corporations of TN, SAP AG and SAP America received a direct
27 financial benefit from the business activities

28 107. SAP subsequently attempted to "ring-fence" the intellectual property issues with

1 TN as a separate company as a “liability shield.”

2 108. After it acquired TN, SAP knew or should have known, through regular
3 communications between SAP AG, SAP America and key TN personnel, of TN’s ongoing
4 copying of Oracle software and further access to and downloading from Oracle Websites.

5 109. SAP directed TN to expand its service offerings to the Siebel line of products.

6 110. In expanding TN to the Siebel product line, SAP knew that TN required
7 additional unlicensed copies of Oracle software and additional unauthorized access to and
8 downloading from Oracle Websites.

9 111. SAP did not prevent TN from engaging in these activities. Instead, it encouraged
10 TN to rapidly grow its Siebel support services business.

11 112. TN informed SAP of the headcount increases and other resources that TN would
12 need to stop its infringing activities.

13 113. SAP refused to provide these resources, ensuring that TN would continue to
14 infringe Oracle’s copyrights.

15 114. SAP gave substantial assistance and encouragement to TN. As examples:

16 a) SAP chose not to evaluate TN’s performance based on any Key Performance
17 Indicator (“KPI”) related to stopping the software copying and downloading that
18 SAP knew was occurring.

19 b) SAP created “Rules of Engagement” that approved TN’s unlicensed software
20 copying and unauthorized downloading.

21 c) SAP supported and financed TN’s geographic and product expansion.

22 d) SAP repeatedly failed to address TN’s requests for Oracle Database software
23 licenses, despite its knowledge that TN was improperly using the Oracle Database
24 Software.

25 e) SAP engaged with TN’s salespeople and TN’s customers as part of the Safe
26 Passage marketing program to convince customers that TN’s business model was
27 operating legally and that they should leave Oracle. This assistance and
28 encouragement were substantial factors in sustaining and increasing the harm that

1 TN caused to Oracle

2 f) Though it had the right and ability to do so, SAP failed to take steps sufficient to
3 prevent or correct the unlicensed copying and unauthorized downloading until
4 TN's wind-down on October 31, 2008.

5 115. SAP knew that unlicensed Oracle software copies and unauthorized updates and
6 support materials were on TN's systems.

7 116. SAP knew when it bought TN that TN required both to support the customers that
8 they took from Oracle.

9 117. The SAP AG executive board of directors approved the purchase of TN with
10 knowledge that TN's operations created a "serious liability" that would "likely" result in legal
11 action.

12 118. Throughout SAP and TN's corporate relationship, SAP intended that TN act on
13 SAP's behalf, TN accepted that undertaking, and SAP knew of TN's acceptance.

14 119. SAP management knew of and approved TN's reproduction, modification,
15 distribution and use of local environments to support multiple customers.

16 120. SAP management knew of and approved TN's distribution of fixes to TN's
17 customers.

18 121. SAP management knew of and approved TN's reproduction and distribution of
19 Oracle Database software.

20 122. SAP management knew of and approved TN's reproduction, modification,
21 distribution, public display and use of Oracle's updates and support materials.

22 123. As examples of SAP's ultimate control over TN: SAP changed TN's management
23 and board and controlled TN's headcount and purchasing decisions, including for computer
24 hardware and software.

25 124. SAP acquired TN to "inflict pain" on Oracle.

26 125. It intended to use TN to harm Oracle's share price.

27 126. SAP used TN's illegal business as a "strategic weapon" to take customers and
28 market share from Oracle, all to SAP's benefit.

1 138. The SAR Legal Restrictions constituted an agreement offered by Oracle
2 Corporation to customers with a valid license agreement with Oracle.

3 139. The Oracle Legal Download Agreement constituted an agreement offered by
4 Oracle Corporation to customers with a valid license agreement with Oracle.

5 140. The SupportWeb Terms of Use in effect between February 20, 2006 and February
6 19, 2007 constituted an agreement offered by Siebel Systems, Inc. to customers with a valid
7 license agreement with Siebel.

8 141. The SupportWeb Terms of Use in effect between February 19, 2007 and January
9 2008 constituted an agreement offered by Oracle Corporation to customers with a valid license
10 agreement with Oracle.

11 142. Oracle owned all of the computer hardware associated with the operation of the
12 Oracle Websites and the data and documents, including the updates and support materials, that
13 resided on those computer

14 143. Defendants have conceded that Oracle's computer systems constitute protected
15 computers within the meaning of 18 U.S.C. § 1030(e)(2).

16 144. TN knew about Oracle's Terms of Use and customer license restrictions, but TN
17 downloaded from the Oracle Websites without regard for these rules or restrictions.

18 145. TN's access to and downloading from Oracle's websites was unauthorized and
19 unlicensed.

20 146. SAP knew or should have known of TN's downloading and Oracle's
21 downloading restrictions by virtue of the due diligence performed prior to SAP's acquisition of
22 TN in January 2005, and the pervasive and continuing control SAP exercised over TN.

23 147. In their Opposition to Oracle's summary judgment motion, Defendants further
24 admitted that over a million of these downloads constituted computer fraud under the CFAA and
25 CDAFA.

26 148. TN gained access to Oracle's customer support website using a login credential
27 from a former Oracle employee working at TN.

28 149. TN management and corporate officers instructed its employees to develop, test

1 and use automated downloading software tools regardless of the impact to Oracle, the Oracle
2 Websites, and authorized Oracle customers.

3 150. These TN employees were instructed to continue by management or lose their
4 jobs.

5 151. In early 2007, SAP IP attorneys examined TN's downloading practices.

6 152. TN management attempted to keep their downloading hidden from Oracle. For
7 example:

8 a) TN requested that customers provide login credentials that hid TN's identity from
9 Oracle.

10 b) TN instructed customers to request that Oracle send software to TN using the
11 pretense that TN's office location was a new customer office location.

12 c) TN used fake and misleading contact information in performing downloads from
13 Oracle.

14 d) TN modulated its volume of downloading in an attempt to avoid detection by
15 Oracle.

16 153. TN continued its automated downloading until at least two weeks after Oracle
17 filed its Complaint, and continued some form of unauthorized downloading into 2008, over a
18 year after Oracle filed its Complaint.

19 154. TN's downloading caused damage and harm to Oracle.

20 155. Through its automated downloading, TN constructed its own library of Oracle
21 support materials to support its customers.

22 156. Oracle discovered TN's unauthorized downloading in late 2006 when it noticed
23 suspicious download requests coming from TN's IP address in Bryan, Texas.

24 157. Oracle began a related investigation beginning in January 2007, after an Oracle
25 employee noticed unusual items related to TN downloading in a report created to summarize
26 customer feedback.

27 158. Using Titan, TN crashed portions of the Oracle Websites and impaired the ability
28 of customers to access the Oracle Websites. TN's employees informed TN management and

1 corporate officers of the crashes on the Oracle Websites.

2 159. In addition to crashes, system impairments and damaged data, the large amount of
3 downloads imposed a bandwidth drain and used Oracle computing resources.

4 160. These impacts decreased the ability of Oracle and its authorized customers to
5 access and download from the Oracle Websites.

6 161. The false and misleading data entered by TN also became co-mingled with
7 legitimate customer data, altering the data set as a whole and rendering much of that customer
8 data useless for its intended purposes.

9 162. TN also compromised the integrity of Oracle's confidential, internal and private
10 data through its use of automated downloading tools.

11 163. Oracle spent over \$300,000 in preliminary investigation costs during the first year
12 to assess the damage to the systems and related issues.

13 164. The parties dispute whether TN caused any slowdowns, disruptions in service,
14 crashes, or other impairment to the availability or accessibility of the systems or data on
15 Plaintiffs' customer support websites alleged to have been improperly accessed by TN.

16 165. The parties dispute whether TN's access or downloading activities ever changed,
17 altered, deleted, or destroyed any data, programs, systems, or other information on Plaintiffs'
18 customer support websites, or resulted in any other type of damage to the computer systems or
19 data contained thereon.

20 166. The parties dispute whether TN intended to damage Plaintiffs' computer systems.

21 167. The parties dispute whether Oracle USA, Inc. is a party to all of the Terms of Use
22 agreements TN is alleged to have breached.

23 168. The parties dispute whether TN is a party to any of the Terms of Use agreements
24 TN is alleged to have breached.

25 **OTHER LIABILITY FACTS**

26 169. Oracle's past and existing relationships with customers often yield future
27 economic benefit through ongoing sales of both software licenses and support contracts.

28 170. Oracle's customers rarely cancel their software support contracts with Oracle.

1 171. Those few customers that do typically choose to return to Oracle support at a later
2 time.

3 172. SAP AG, SAP America and TN conspired to interfere with Oracle's ongoing and
4 prospective relationships with Oracle's customers.

5 173. SAP AG, through its subsidiary SAP America, bought TN to take away Oracle's
6 support contract revenue stream, lower Oracle's share price, get a "public relations win" and
7 disrupt Oracle's business operations.

8 174. TN ceased operation on October 31, 2008, but continues to exist as a Texas
9 corporation.

10 175. The support for PeopleSoft, J.D. Edwards World, J.D. Edwards EnterpriseOne
11 and Siebel that TN offered to its customers was predicated on wrongful activity, including but
12 not limited to, CFAA and CDAFA violations, violations of California Business & Professions
13 Code § 17200, trespass to chattels, breach of contract and inducement of breach of contract.

14 176. For PeopleSoft, J.D. Edwards World, J.D. Edwards EnterpriseOne and Siebel, TN
15 regularly accessed the Oracle Websites in unauthorized ways, as described above. As examples:

- 16 a) TN regularly used a customer's login credentials after that customer's support
17 contract had expired, in violation of the Terms of Use.
- 18 b) TN regularly used a customer's login credentials to access software and support
19 materials on the Oracle Websites that were not licensed to the customer whose
20 login credentials were used, in violation of the Terms of Use.
- 21 c) TN regularly accessed the Oracle Websites using a customer's login credentials for
22 purposes other than supporting the authorized use of that customer's licensed
23 enterprise software, in violation of the customer license agreements and the Terms
24 of Use.

25 177. For PeopleSoft, J.D. Edwards World, J.D. Edwards EnterpriseOne and Siebel, TN
26 regularly breached, or induced customers to breach, the Oracle Websites' Terms of Use, the
27 customers' contract terms and customers' support renewal agreements. As examples:

- 28 a) TN used software and support materials downloaded with one customer's

1 credential as a reference in supporting other customers' enterprise software, in
2 violation of the Oracle Websites' Terms of Use.

3 b) TN used software and support materials downloaded with one customer's
4 credential to train TN employees in the use and support of PeopleSoft, J.D.
5 Edwards World, J.D. Edwards EnterpriseOne and Siebel enterprise software, in
6 violation of the Oracle Websites' Terms of Use.

7 c) TN reviewed software and support materials downloaded with one customer's
8 credential to support other customers, in violation of the Oracle Websites' Terms
9 of Use.

10 d) TN used local environments created from one customer's licensed enterprise
11 software as a reference in supporting other customers, in violation of the
12 customer's license agreements.

13 e) TN used local environments created from one customer's licensed enterprise
14 software to train TN employees on that software, in violation of the customer's
15 license agreements.

16 f) TN reviewed local environments created from one customer's licensed enterprise
17 software to support other customers, in violation of the customer's license
18 agreements.

19 g) TN misrepresented to Oracle's current and former customers the manner in which
20 customers' login credentials for the Oracle Website and customers' enterprise
21 software would be used by TN.

22 h) To the extent that some or all DAT files, project files or any other object files
23 relating to Oracle's PeopleSoft enterprise software are determined to be
24 uncopyrightable subject matter, TN downloaded, copied, generated, modified and
25 distributed such files in violation of applicable customer license agreements and
26 the Terms of Use.

27 178. TN relied upon the improper activity described above, as well as upon copyright
28 infringement, to provide support for any and all PeopleSoft, J.D. Edwards World, J.D. Edwards

1 EnterpriseOne and Siebel products.

2 179. Defendants' marketing of TN's support offering included the marketing of illegal
3 activity – such as half price service and the use of customers as references who were being
4 supported illegally – as a way to take new customers from Oracle.

5 180. Through its wrongful conduct, including Defendants' advertising or marketing,
6 Defendants actually interfered with or disrupted Oracle's existing or prospective economic
7 relationships with Oracle's customers for each of the 297 customers who entered into support
8 contracts with TN instead of with Oracle or its predecessors because TN's support was
9 predicated on wrongful activity.

10 181. Without the ability to market and sell its services that were based on illegal access
11 to and use of Oracle's materials, TN could not have taken customers away from Oracle.

12 182. TN's use of its customers' login credentials for Oracle's support website and
13 customers' enterprise software caused customers to breach their license agreements with Oracle.

14 183. By so doing, TN gained unauthorized access to Oracle's updates and support
15 materials, including Oracle's enterprise software.

16 184. Oracle lost revenue for each customer that entered into a support contract with TN
17 in lieu of a support contract with Oracle.

18 185. Oracle and TN entered into contracts regarding the Terms of Use of the Oracle
19 Websites.

20 186. As described in more detail above, Defendants reviewed and agreed to the terms
21 and conditions in the Terms of Use on the Oracle Websites.

22 187. Defendants accepted these Terms of Use when they accessed and downloaded
23 updates and support materials from Oracle Websites.

24 188. Oracle performed all conditions, covenants and promises required on its part to be
25 performed, in accordance with the terms and conditions of the Terms of Use on the Oracle
26 Websites.

27 189. By way of example, and as described in more detail above, in violation of the
28 Terms of Use on the Oracle Websites:

- 1 a) TN regularly cross-used and shared Oracle support materials that it had
2 downloaded on behalf of one customer between and among multiple customers.
- 3 b) TN used its access to data and files received from the Oracle Websites for
4 purposes other than in support of the customer on whose behalf TN ostensibly took
5 the data and files.
- 6 c) TN secured access to the data and files on the Oracle Websites using fraudulent
7 means and in violation of the Terms of Use, such as by improper use of customer
8 login credentials and use of expired login credentials.
- 9 d) TN entered false, fake and misleading data into the Oracle Websites to expand
10 access to the Oracle Websites.
- 11 e) Defendants' breaches of contract were a substantial factor in TN's ability to
12 provide its support services to customers.

13 190. Oracle lost revenue for each customer that entered into a support contract with
14 Defendants in lieu of a support contract with Oracle as a result.

15 191. Defendants have engaged in unlawful, fraudulent and unfair business practices by
16 committing the acts described in detail above.

17 192. These acts include computer fraud, trespass to chattels, breach of contract and
18 interference with business relationships.

19 193. Defendants committed these acts to gain an unfair competitive advantage in the
20 form of, for example, better publicity, better revenue stream, disruption of Oracle's ability to
21 compete, harm to Oracle's share price and devaluation of Oracle's recently acquired software
22 brands.

23 194. Defendants recruited Oracle customers and acquired support fees from those
24 customers based on their unlawful, unfair and/or fraudulent business practices.

25 195. As a result of the conduct described above, Defendants unjustly received benefits
26 at the expense of Oracle through Defendants' wrongful conduct.

27 196. As described further above, that wrongful conduct included Defendants' breach of
28 the agreements governing access to and use of the Oracle Websites, interference with Oracle's

1 business relationships and other unfair business practices.

2 197. It also included Defendants' trespass on, and computer fraud concerning, the
3 Oracle Websites, including the access and further use of Oracle data, updates and support
4 materials, which took substantial time and money for Oracle to develop.

5 198. As a result of the conduct described further above, Defendants have received
6 money properly due and owing to Oracle, and Defendants misappropriated Oracle's property and
7 used that property to create a financial benefit in which Oracle is entitled to share.

8 199. The amount of money due from Defendants to Oracle is unknown to Oracle and
9 cannot be ascertained without an accounting of the income and gross profits Defendants have
10 obtained through their wrongful and unlawful conduct.

11 200. Oracle is entitled, therefore, to a full accounting.

12 201. Defendants' illegal conduct discussed above caused harm to Oracle for which it
13 seeks compensation in the form of the value of the use of Oracle's intellectual property by
14 Defendants.

15 DAMAGES

16 202. The date of the hypothetical negotiation to arrive at the fair market value of use
17 license for PeopleSoft and J.D. Edwards software is the day SAP acquired TN, January 19, 2005.

18 203. With regard to the hypothetical license, the parties dispute whether Plaintiffs and
19 SAP would ever have agreed to a license and whether that matters. Defendants contend the
20 parties would not have agreed to a license.

21 204. The parties dispute the form a hypothetical license would have taken. Plaintiffs
22 contend that the license would have been a fully paid-up, lump sum license. Defendants contend
23 that the license would have taken the form of a running royalty.

24 205. Defendants' damages expert and Plaintiffs agree that the 2005 hypothetical
25 negotiation would have been between OIC and SAP. Specifically, Defendants' damages expert
26 stated that "SAP would have been negotiating to acquire the License"

27 206. The parties dispute how the hypothetical license would have been calculated.

28 207. For example, as one input in their valuation, Plaintiffs make various adjustments

1 to the price Plaintiffs paid to acquire PeopleSoft and Siebel. Defendants contend that the price to
2 acquire these companies is not an appropriate reference in measuring the value of use.

3 208. Plaintiffs contend that the fair market value of the infringed copyrights is not
4 determined with a focus on the actual number of customers obtained by TN, but instead should
5 focus on SAP's and Oracle's expectations and projections at the time the parties would have
6 negotiated the license (January 2005). Defendants contend that the actual number of customers
7 and their associated TN revenue should be the only relevant metric on which the hypothetical
8 license must be measured, and that Oracle and SAP expectations, and the projections SAP had in
9 hand and had created as of the negotiation date are not relevant.

10 209. Defendants contend that since Plaintiffs have alleged that infringement
11 commenced in 2002, there would have been two hypothetical negotiations – one in 2002
12 between PeopleSoft and TN, and one in 2005 between OIC and TN – and thus two hypothetical
13 licenses. Plaintiffs concede that there would have been two hypothetical negotiations, did not
14 quantify the 2002 license, and contend the second one would have been between OIC and SAP,
15 not OIC and TN.

16 210. Plaintiffs contend that saved acquisition costs are an appropriate measure of fair
17 market value and/or a factor to consider in determining the fair market value for Plaintiffs'
18 copyright claim and of their unjust enrichment damages. Defendants contend that saved
19 acquisition costs is not an appropriate measure of damages for any of Plaintiffs' claims.

20 211. As of January 19, 2005, Oracle and SAP were direct competitors in the market for
21 development and sale of enterprise application software and related services and support, with
22 SAP the historically dominant seller.

23 212. SAP wanted to stop Oracle's traction and decrease Oracle's market share.

24 213. SAP knew it needed an immediate and uniquely attractive alternative to staying
25 with Oracle to take advantage of that vulnerability.

26 214. In order to take advantage of the perceived vulnerability, SAP searched for
27 existing alternatives and identified TN.

28 215. TN was the only viable and immediately available company providing

1 comparable alternative support on PeopleSoft products.

2 216. It did so to take maximum advantage of its perceived opportunity to decrease
3 Oracle's market share.

4 217. Acquiring TN on January 19, 2005 and immediately offering TN's support to the
5 vulnerable PeopleSoft customer base was highly desirable to SAP.

6 218. For example, in SAP's January 19, 2005 announcement to analysts regarding the
7 TN acquisition, SAP also announced TN's role in the simultaneously created SAP "Safe
8 Passage" program.

9 219. Plaintiffs have marketing programs designed to win SAP customers, including a
10 program called OFF-SAP that was introduced in approximately June 2005.

11 220. By acquiring TN and continuing its support delivery model, SAP avoided
12 spending billions of dollars to independently develop products similar to the Oracle-owned
13 materials TN infringed as part of attracting and supporting customers.

14 221. SAP also avoided the significant delays and inevitable missteps associated with
15 such a development effort.

16 222. In assessing whether to acquire TN and how to best use TN, SAP understood that
17 the majority of PeopleSoft customers were users of PeopleSoft's HRMS and Financial product
18 suites.

19 223. These PeopleSoft HRMS and Financial product suites customers were the most
20 attractive customers to SAP.

21 224. In addition, as described above, SAP sought to expand TN's practice of offering
22 software support service for all PeopleSoft and J.D. Edwards products.

23 225. In late December 2004, while SAP was negotiating to acquire TN, SAP forecasted
24 and expected \$897 million in financial benefits in the years 2005-2007 from owning TN.

25 226. These included forecasted support revenues and forecast up-sales and cross-sales
26 to TN customers.

27 227. The forecast acknowledged SAP's initial goal of targeting joint SAP and
28 PeopleSoft HRMS customers and joint J.D. Edwards and SAP customers.

1 228. The creator of the forecast, SAP Vice President of Service Solution Management
2 - Global Services and Support, Thomas Ziemer, attempted to be reasonable in his estimation.

3 229. He sent the forecast to several SAP Executive Board members, none of whom
4 thought it unreasonable.

5 230. SAP set a goal to convert at least 50% of PeopleSoft and J.D. Edwards customers
6 to SAP.

7 231. SAP Executive Board member and Chief of SAP's Products and Technology
8 Group, Shai Agassi, thought SAP could have done even better.

9 232. In addition, in a January 19, 2005 analyst call, SAP spoke of its plans to initially
10 target the estimated 4,000 joint SAP and PeopleSoft/J.D. Edwards customers, of its anticipated
11 expansion of its TN service offering globally, of its expectation that its Safe Passage offerings
12 would significantly accelerate the migration to SAP by lowering the PeopleSoft customer's total
13 cost of ownership, and of its pledge to scale TN's offering by providing additional resources to
14 meet expected significant demand.

15 233. Also in the January 19, 2005 analyst call, SAP explained that from a financial
16 perspective, "the rationale is more around the value . . . that these customers represent as a
17 potential future set of customers for SAP applications. And it's -- the value was estimated by
18 Oracle . . . as \$10 billion."

19 234. SAP contemporaneously forecasted other benefits from being able to offer TN's
20 claimed comparable or better than Oracle support at half price or less on January 19, 2005.

21 These benefits included:

- 22 a) adversely impacting Oracle's share price,
- 23 b) adversely impacting Oracle's expected return on investment for its PeopleSoft
24 acquisition,
- 25 c) adversely impacting Oracle's ability to pay for the PeopleSoft acquisition out of
26 cash flow,
- 27 d) diminishing Oracle's ability to deliver as promised on the PeopleSoft acquisition,
- 28 e) taking support revenue away from Oracle and thus siphoning off Oracle's ongoing

1 product development research and development (“R&D”) funding, discrediting
2 Oracle’s efforts to create a next-generation applications platform,
3 f) and distracting Oracle from its core business by forcing Oracle to protect its
4 maintenance stream rather than sell software, all of which would potentially
5 impact Oracle’s pricing and market position.

6 235. Defendants intended and marketed that TN could provide support for all current
7 and retired PeopleSoft Enterprise releases, as well for all versions and products of J.D. Edwards
8 World and Enterprise One, and that it could do so globally.

9 236. As of January 19, 2005, Oracle had just paid an up-front lump-sum amount of
10 \$11.1 billion to acquire PeopleSoft.

11 237. Further, “Oracle had just fought for almost two years for the right to purchase
12 [PeopleSoft which] was critical to Oracle’s expansion in the applications business dominated by
13 SAP.”

14 238. Oracle acquired PeopleSoft in order to gain PeopleSoft’s customer base.

15 239. It expected to continue getting lucrative support revenue from that base, which
16 was essential to funding Oracle’s ongoing R&D.

17 240. The R&D would fund PeopleSoft-related support and products.

18 241. Oracle also expected other important benefits from the PeopleSoft customer base.

19 242. Oracle expected to up-sell and cross-sell additional products.

20 243. Oracle expected to benefit from PeopleSoft’s existing and in process application
21 software technology and intellectual property.

22 244. Oracle expected through these benefits and others to become more competitive
23 against SAP.

24 245. Oracle alone had the rights to leverage the PeopleSoft and J.D. Edwards
25 copyrighted materials it acquired to support the PeopleSoft customer base.

26 246. Based on Oracle’s contemporaneous pre-acquisition model for PeopleSoft, Oracle
27 expected an annual PeopleSoft support customer attrition rate of 3.5%, average annual support
28 fees of \$125,000 to \$130,000, an incremental license purchase rate of 14% of the support

1 customer base, average selling price of an incremental license of \$130,000, average selling price
2 of a new license of \$300,000, and annual support fees at a rate of 22% of license revenue.

3 247. At the time of the PeopleSoft acquisition, Oracle recognized intangible assets
4 acquired of \$6.5 billion in goodwill, and \$3.4 billion in other intangible assets, which included a
5 value of \$2.1 billion for existing maintenance agreements and customer relationships, and \$250
6 million for new customer relationships acquired.

7 248. A license to SAP for TN's use of Oracle's just-acquired PeopleSoft software and
8 support materials, would have endangered Oracle's achievements of all of its PeopleSoft
9 acquisition goals.

10 249. "Oracle ha[d] never given any entity a license to 'copy Oracle's application
11 software and support materials in order to create their own fixes, patches or updates for
12 customers.'" "

13 250. The hypothetical license has "nothing in common with any agreement Oracle has
14 with any business Partner," and "the parties have no history of negotiating similar licenses for
15 the use of comparable enterprise software applications."

16 251. Oracle would have understood and expected the license would "cover any
17 'attempt [by Defendants] to convert the customer to a competing software platform and . . . daily
18 wholesale copying and cross-use of Oracle's application software and support materials.'" "

19 252. Oracle would have understood and expected that the "license would have given
20 Defendants free rein 'to use Oracle applications and service support intellectual property to
21 aggressively compete against Oracle for applications customers and market share.'" "

22 253. Oracle would have expected that the hypothetically negotiated license would
23 undermine one of the purposes of its PeopleSoft acquisition, which was to expand its application
24 business such that it could equal or surpass SAP.

25 254. Oracle would have viewed the license as creating a "zero-sum" situation: any
26 customer lost by Oracle would be a customer gained by SAP.

27 255. With a license to its arch rival and powerful competitor SAP at this critical time,
28 Oracle would have expected the potential loss of thousands of PeopleSoft customers and not to

1 have enjoyed most of the above-described benefits Oracle anticipated from the PeopleSoft
2 acquisition.

3 256. Oracle also would have expected to have to spend significant sums and time in
4 efforts to prevent its PeopleSoft customers from leaving to TN and/or SAP.

5 257. If 30% of the approximately 10,000 acquired PeopleSoft support customers would
6 be lost to SAP, Oracle executives would consider the fair market value of that loss to be
7 approximately \$3.33 billion, or 30% of PeopleSoft's acquisition price.

8 258. The fair market value to Oracle and SAP of TN's use of Oracle's PeopleSoft and
9 J.D. Edwards copyrighted software and support materials is \$2 billion.

10 259. The date of the hypothetical negotiation to arrive at the license for the fair market
11 value of use of Siebel IP is the day TN first supported a Siebel customer, September 29, 2006.

12 260. Through its acquisition of Siebel, Oracle had become the leader in Customer
13 Relationship Management ("CRM") software applications and also SAP's undisputed main
14 enterprise application software competitor.

15 261. SAP estimated that SAP's "competitive edge diminished by 40% post SEBL
16 acquisition."

17 262. SAP wanted to stop Oracle's ever-increasing competitive traction from its
18 enterprise application software acquisitions.

19 263. Oracle's pending acquisition of Siebel prompted SAP's Executive Board to
20 expand its Safe Passage program to include offerings for Siebel customers.

21 264. SAP believed that the acquired Siebel customer base was vulnerable to defection
22 from Oracle.

23 265. By including Siebel in its Safe Passage program, SAP was able to quickly offer
24 them a uniquely attractive alternative to staying with Oracle to take advantage of that perceived
25 vulnerability.

26 266. SAP believed that being able to offer Oracle's just acquired Siebel customers the
27 claimed comparable or better support at half price or less through TN would provide SAP many
28 benefits.

1 267. These benefits included the ability to grow maintenance revenue for TN, to create
2 future SAP license revenue, to take away lucrative and needed maintenance revenue from Oracle
3 and to otherwise distract Oracle.

4 268. A contemporaneous SAP Business Case for providing TN support for Oracle-
5 acquired Siebel customers asserted that the Siebel customer base consisted of 4,000 customers,
6 including a large number of joint SAP/Siebel customers, and presented a “huge market
7 opportunity” for SAP.

8 269. SAP forecasted and expected to win 40, 100 and 200 customers of TN for Siebel
9 support between 2006 and 2008 and projected TN revenues would grow from €1.5 million in
10 2006 to €5.8 million in 2007 to €11.9 million in 2008 on which TN would earn a 32% margin.

11 270. In another contemporaneous SAP forecast (dated October 2005) titled “Siebel
12 Safe Passage Program Playbook,” SAP stated it believed it had the opportunity to migrate at least
13 300 Siebel customers to mySAP CRM.

14 271. By expanding TN’s support delivery method to Siebel, SAP could avoid spending
15 billions of dollars to independently develop products similar to the Siebel-owned materials that
16 TN infringed as part of attracting and supporting customers. SAP could also avoid the
17 significant delays and inevitable missteps associated with such a development effort.

18 272. Oracle had just paid an up-front lump sum of \$6.1 billion to acquire Siebel.
19 Among the key assets acquired was Siebel’s lucrative support revenue.

20 273. This revenue was essential to funding Oracle’s ongoing R&D, including for
21 Siebel-related product and support development.

22 274. At the time of the Siebel acquisition, Oracle recognized intangible assets acquired
23 of \$2.5 billion in goodwill, and \$1.6 billion in other intangible assets.

24 275. These assets included a value of \$808 million for existing maintenance
25 agreements and customer relationships.

26 276. The Siebel products Oracle acquired were considered “best in breed” in the
27 industry.

28 277. Siebel had spent at least hundreds of millions of dollars developing them.

1 278. Oracle alone had the rights to leverage the Siebel copyrighted materials it
2 acquired to support the Siebel customer base.

3 279. Oracle's goals for the Siebel acquisition included obtaining Siebel's customer
4 base, being able to sell that base other Oracle products, using the valuable maintenance support
5 stream to fund future R&D, gaining additional traction against SAP and establishing a leadership
6 position in the CRM market.

7 280. SAP's backing of TN's support for Siebel applications, combined with TN's 50%
8 off or more Oracle support pricing, made TN a uniquely attractive third party alternative support
9 provider to Oracle's just-acquired Siebel customers.

10 281. That the hypothetically negotiated license would allow TN to leverage Oracle's
11 proprietary Siebel software and support materials would make that offering all the more
12 attractive.

13 282. Oracle was aware of Siebel's level of source code protection and of SAP's and
14 TN's inability to convert as many acquired PeopleSoft customers as expected by SAP, Oracle
15 and the analysts in 2005.

16 283. A license to SAP for TN's use of Oracle's just-acquired Siebel software and
17 support materials would endanger Oracle's achievement of its acquisition goals for Siebel.

18 284. With a license to its arch rival and powerful competitor SAP, Oracle would have
19 expected to lose many Siebel customers and not to have enjoyed many of the above-described
20 anticipated benefits of the Siebel acquisition.

21 285. Oracle also would have expected to have to spend significant efforts and costs to
22 prevent its acquired Siebel customers from leaving to TN and/or SAP.

23 286. The fair market value to Oracle and SAP of TN's use of Oracle's Siebel
24 copyrighted software and support materials is at least \$100 million.

25 287. Oracle's Database software was "critical" to TN's provision of maintenance
26 services.

27 288. SAP and TN knew they did not have, and needed, a license from Oracle in order
28 for TN to access, copy and/or use Oracle's Database software and related materials in the manner

1 it did.

2 289. TN could not have offered the advertised “comparable” or “superior” support it
3 did, at the price it did, in the manner it did, and in the time period it did, to Oracle’s PeopleSoft,
4 J.D Edwards, and Siebel applications customers without the copies of the Oracle Database
5 programs it used.

6 290. In addition to the 71 unique customers related to TN local environments running
7 Oracle Database software, at least 43 additional PeopleSoft customers received fixes that were
8 developed and/or tested on an Oracle Database software instance associated with a different
9 customer’s local environment on TN’s servers.

10 291. It is more likely than not that every one of TN’s 172 PeopleSoft HRMS customers
11 received support delivered, at least in part, through TN’s use of Oracle Database software for
12 which TN had no commercial license.

13 292. TN repeatedly asked SAP for help regarding obtaining such a license for Oracle
14 Database Software.

15 293. SAP never did secure an appropriate Database software license from Oracle.

16 294. No standard Database software license Oracle has ever issued would permit a
17 licensee to use – or to have its third party support vendor use – Oracle’s Database software in the
18 manner in which TN did.

19 295. SAP and Oracle have an agreement that allows SAP to develop SAP database
20 applications and resell Oracle’s Database software to SAP customers.

21 296. That contract does not permit TN’s use of Oracle’s Database software.

22 297. TN used Oracle Database software for at least 130 local environments accessed
23 on TN’s internal systems.

24 298. Some customers had more than one environment associated with them.

25 299. Based on the servers used by TN, Oracle would price a license for TN at six
26 processors.

27 300. The fair market value to Oracle and SAP of TN’s use of Oracle’s Database
28 software is \$55.6 million.

1 301. The sale of any Oracle Database software licenses to TN would have little, if any,
2 impact on Oracle's costs.

3 302. TN's use of Oracle Database software was not consistent with the rights granted
4 under a standard database license.

5 303. However, as a benchmark for pricing a hypothetical license to TN for its use,
6 Oracle's list price per processor per customer for the basic Enterprise Edition license and support
7 between 2004 and 2008 was \$40,000/processor for the license and \$8,800/processor per year for
8 support.

9 304. Between 2002 and October 31, 2008, TN had over 358 PeopleSoft, J.D. Edwards
10 and/or Siebel support customers, approximately 300 of which it acquired after SAP acquired TN.

11 305. From 2005 (when SAP acquired TN) through 2008, SAP received \$899.6 million
12 in revenue from sales of SAP software licenses, support, training and other services to the 86
13 SAP customers after the customer started receiving support services from TN.

14 306. The parties dispute the extent to which the alleged actions caused Plaintiffs to lose
15 support revenue. Plaintiffs contend that, but for TN, most or all of the customers at issue would
16 have renewed their support services agreements with Plaintiffs consistent with Plaintiffs' average
17 renewal rate for its entire customer base. Defendants contend that customers cancelled the
18 agreements for reasons unrelated to TN and would have done so even absent TN.

19 307. The parties dispute the extent to which alternatives to TN existed to customers
20 who wished to cancel their support agreements with Plaintiffs.

21 308. For a support option other than TN to be a viable alternative to PeopleSoft or
22 Oracle support, the option had to be known to the customer, available on their application(s) in
23 their geography, and not unacceptably risky by virtue of size, reputation, insufficient operating
24 history or lack of financial stability or adequate backing.

25 309. Self support was rarely an option considered or used by customers leaving Oracle
26 support.

27 310. The parties dispute the extent to which the alleged actions caused the 86
28 customers to purchase products or services from SAP. Defendants contend that most or all of the

1 purchases were made for reasons unrelated to TN and/or the alleged actions, and would have
2 been made even in the absence of TN and/or the alleged actions.

3 311. The parties dispute the extent to which the alleged actions were reasonably related
4 to the 86 customers who purchased products or services from SAP while they were with TN.
5 Defendants contend that most or all of the purchases were made for reasons unrelated to TN
6 and/or the alleged actions, and would have been made even in the absence of TN and/or the
7 alleged actions.

8 312. Defendants' recruitment of customers away from Oracle caused Oracle to lose
9 support revenue for those customers.

10 313. Customers switch from either Oracle or SAP for various reasons. Some reasons
11 include the total cost of ownership, reputation, because of a merger or acquisition, or the desire
12 to standardize on one ERP vendor's software.

13 314. Customers rarely cancel their support services with either Oracle or SAP.
14 Reasons for cancellation include cost or a lack of perceived value from the service.

15 315. Once a customer was dislodged from PeopleSoft or Oracle by TN, it usually
16 resulted in a permanent or long term support revenue loss to Oracle because of financial and
17 political obstacles for that customer to return to Oracle for support.

18 316. Any TN customer who also transitioned to SAP applications was even harder for
19 Oracle to get back because of costs and time expended on the product switch.

20 317. If TN did not exist (or if TN were not providing illegal support), those customers
21 lost to TN more likely than not would have stayed with PeopleSoft and/or Oracle.

22 318. One or more of the following facts support this conclusion:

- 23 a) Absent its misuse of Oracle's software and support materials, TN would not have
24 been able to market the ability to provide comparable or better service at a
25 significantly lower price than first PeopleSoft and then Oracle.
26 b) Former TN customers have confirmed that TN customers would not have left
27 PeopleSoft or Oracle support if TN did not offer support comparable to or better
28 than the vendor.

- 1 c) Most TN customers would not have gone to TN if TN did not offer 50% or more
2 off vendor support.
- 3 d) Former TN customers have confirmed that no TN customers would have chosen
4 TN if that customer had known that TN provided support through misuse of
5 PeopleSoft and/or Oracle software and support materials.
- 6 e) The acquisition of TN by SAP made TN a more legitimate, more financially
7 viable, and less risky option for customers.
- 8 f) Throughout the entire time period that TN provided third party vendor support for
9 PeopleSoft, J.D. Edwards and Siebel products, the market for support of these
10 products was primarily a two supplier market consisting of TN and Oracle.
- 11 g) Most of the other third party service providers for the relevant products who
12 operated at any time TN did are no longer in business or only offer consulting
13 services that differ from the level of support that Oracle or TN provided.
- 14 h) Rimini Street, a third party support vendor for the applications at issue beginning
15 in 2006, was founded by the former President of TN. It was described as having
16 the exact same business model as TN.
- 17 i) While TN was in business, Oracle, TN and SAP all viewed TN as Oracle's only
18 significant competition for support on PeopleSoft, J.D. Edwards and Siebel
19 applications.
- 20 j) TN customers did not know of and/or did not seriously consider leaving
21 PeopleSoft or Oracle support for any other third party support provider other than
22 TN when they left for TN.
- 23 k) The acquired PeopleSoft customers who stayed with Oracle, post-acquisition,
24 reported increased satisfaction with the support services provided.

25 319. For PeopleSoft and Oracle, prior to 2007 or 2008, the only third party vendor
26 whom Oracle's applications customers considered a comparable support provider was TN.
27 Subsequently, Rimini Street, whose founder came from TN, has received some interest, as it
28 appears to employ an approach that is similar to TN's model, and acquired a large number of TN

1 customers when TN was shut down.

2 320. Defendants' illegal acts, except where otherwise excluded based on evidence
3 Oracle's damages expert will explain at trial, caused Oracle to lose the customers who went to
4 TN. Otherwise, Oracle would have retained them at its annual retention rates

5 321. Oracle has suffered lost support profits damages beginning on the date that each
6 TN customer cancelled its contract, or contracts, with Oracle and switched that support to TN.

7 322. Those damages include standard annual contractual increases or inflationary
8 increases.

9 323. The damages are subject to adjustments for historic incremental profit margins
10 and certain Oracle inter-company payments.

11 324. Except in certain customer-specific circumstances, a customer's damages end 10
12 years after Oracle's acquisition of PeopleSoft, based on Oracle and SAP evidence on the
13 expected life of a support customer.

14 325. Oracle's lost support profits are \$156.4 million for Plaintiff Oracle USA, \$120.7
15 million for Plaintiff OIC and \$41.0 million for Plaintiff OEMEA.

16 326. Because SAP operated TN as a loss leader, and because of costs associated with
17 this lawsuit and its closure by SAP, TN had minimal revenue and no profits.

18 327. TN's "comparable" or "better" support at low, or often no, cost to these eventual
19 SAP applications customers, was a factor in their decisions to purchase SAP products and
20 services.

21 328. SAP, the largest and most experienced enterprise application software vendor,
22 premised its use of TN as the "cornerstone" of its Safe Passage marketing program based on its
23 expectation that TN would drive just such SAP cross-sales and up-sales.

24 329. After appropriate adjustments based on, *e.g.*, evidence that TN was not a factor in
25 a customer's SAP purchasing decision, and after deducting SAP's costs and applying a 50%
26 profit margin, the infringers' profits damages from SAP are \$288.6 million.

27 330. Defendants avoided significant research and development costs, as well as risks
28 and delays associated with creating the PeopleSoft, J.D. Edwards, and Siebel software

1 applications and support materials used by TN.

2 331. Conservatively, Defendants avoided billions of dollars in development costs and
3 avoided years of delays to market.

4 332. Defendants also avoided incurring the licensing costs and support fees to use
5 Oracle's Database software as TN did in the servicing of its customers.

6 333. Conservatively, those avoided database licensing and support costs are \$55.6
7 million.

8 334. In conducting both investigations related to TN's downloading, in the first year
9 after discovery, Oracle incurred costs of approximately \$306,000 related to personnel time and
10 labor, hardware and software, travel and telecommunications.

11 335. Oracle has incurred significant ongoing legal expenses related to this matter
12 including attorney's fees, costs and other recoverable legal expenses.

13 336. These fees and costs are not yet quantified because they continue to mount.

14 337. Oracle is entitled to, as yet to be quantified, pre-judgment interest on any damages
15 awarded.

16 338. As a result of Defendants' illegal conduct, Oracle has also suffered irreparable
17 injury and, unless Defendants are enjoined, will continue to suffer irreparable injury, whereby
18 Oracle has no adequate remedy at law.

19 339. Defendants' conduct, described above, was malicious, oppressive or in reckless
20 disregard of Oracle's rights. For example:

21 a) TN created a sophisticated software automation program, called Titan, that
22 intentionally downloaded approximately a million files using the login credential
23 of a former Oracle employee and TN continued to test and use the Titan program
24 even after it learned it crashed Oracle's systems.

25 b) Defendants continued to provide support services to customers and grow TN's
26 support business, even encouraging customers to serve as references for one
27 another, with knowledge that TN's support model relied on violation of those
28 customers' license agreements with Oracle.

1 c) Defendants continued to make and use illegal copies of Oracle software even after
2 the start of this litigation.

3 d) Defendants knowingly destroyed or altered evidence important to Oracle’s proof
4 of Defendants’ illegal conduct.

5 340. Defendants’ conduct, described above, was accompanied by ill will, or spite, or
6 undertaken for the purpose of injuring Oracle.

7 341. For example, TN served as a “strategic weapon” against Oracle, designed to “hurt
8 Oracle” and fuel SAP’s “Oracle disruption campaign.”

9 342. As another example, SAP boasted they left a “ticking time bomb” for Oracle
10 through SAP’s acquisition of TN.

11 343. Defendants acted in the face of known risks that their actions would violate
12 Oracle’s rights under federal law.

13 344. For example, SAG AG approved the acquisition of TN despite its knowledge that
14 TN was servicing its customers with intellectual property that resided on TN’s own computers
15 and that TN’s operating issues presented the risk of “serious liability.”

16 345. As another example, TN downloaded software and support material from
17 Oracle’s websites without regard for rules and restrictions – even after TN employees informed
18 management that they believed that their access and downloading were illegal.

19 346. If and when the Court determines punitive damages are appropriate given the
20 facts and findings at trial, Oracle shall present appropriate punitive damages calculations and
21 demands.

22 **DEFENSES**

23 347. The parties dispute whether, and to what extent, each of Plaintiffs’ relevant
24 agreements with TN’s customers permit the complained-of activities.

25 348. The parties dispute whether, when, and to what extent, Plaintiffs knew or should
26 have known about the complained-of activities prior to filing this lawsuit.

27 349. The parties dispute whether, and to what extent, Plaintiffs expressly or impliedly
28 consented to the complained-of activities.

1 350. The parties dispute whether TN, or any Defendant, is a party to any agreement
2 relating to access or use of any of Plaintiffs' website at issue in the litigation.

3 351. A letter dated July 10, 2002, from David Chavez, Assistant General Counsel of
4 PeopleSoft, Inc. to Seth Ravin, then Co-President of TomorrowNow, Inc. ("TN") stated that
5 TN's activities "violate PeopleSoft's rights," including through "access to confidential
6 PeopleSoft information in your possession" and "misleading" representations regarding its
7 ability to offer support services to PeopleSoft customers.

8 352. James Spencer, general counsel for TN, sent a response letter on behalf of TN
9 dated July 27, 2002. In that response to the 2002 letter from PeopleSoft, TN denied any
10 violation of PeopleSoft's rights.

11 353. PeopleSoft did not respond to Mr. Spencer's letter.

12 354. On April 21, 2004, Terry Wagner, Manager Subcontracts at Lockheed Martin, e-
13 mailed Gregory Stevenson at PeopleSoft, stating, "In order for Lockheed Martin to engage
14 TomorrowNow for continued support of V7.5 tax updates we need to have PeopleSoft's
15 authorization to provide the CD's that they are requesting." The same day, Stevenson forwarded
16 Wagner's e-mail to Seth Ravin, then Co-President of TN, asking "Why would we need to
17 provide authorization?" The April 21, 2004 e-mail received by Mr. Stevenson includes an e-mail
18 from Shelley Nelson of TN stating that "TomorrowNow's standard procedure is to get a demo
19 copy of your PeopleSoft Demo software CD's in order to install a 'demo support environment' at
20 TomorrowNow on your behalf." The April 21, 2004 email also indicates that Mr. Stevenson
21 "recommended" TN to Lockheed Martin for "continued tax update support of version 7.5."

22 355. In or around December, 2004, PeopleSoft suggested that customer UBS look at
23 third party support providers for maintenance of its PeopleSoft products.

24 356. Seth Ravin testified that, in late 2002, Andy Allbritten of PeopleSoft proposed
25 that "TomorrowNow focus on smaller customers and that PeopleSoft would take the large
26 customers."

27 357. On August 2, 2004, Sharon Piper, then an employee of TN, e-mailed PeopleSoft
28 employee Surasi Pavani, stating: "I compared the SQR you had attached in your e-mail to ours

1 and it is identical. I am not seeing the paygroup or account code in the header. Could you send
2 me a copy of how the output looks from your system? I am attaching a copy of how it looks
3 when I run it in our demo database.”

4 358. On September 1, 2004, Kevin Maddock, Vice-President of Support Service Sales,
5 stated that PeopleSoft should begin tracking information “about all customers who state that a
6 3rd Party is offering to sell them support.”

7 359. An email dated October 13, 2004 from a PeopleSoft customer to Andy Allbritten,
8 the Managing Director and Group Vice President PeopleSoft Support Services, Worldwide Sales
9 & Operations, stated that “TomorrowNow encourages customers, while they are under existing
10 PSoft support to grab the latest release, prior to PSoft maintenance expiring.”

11 360. The customer’s October 13, 2004 email to PeopleSoft’s Andy Allbritten did not
12 inform him that TN, rather than the customer, was downloading materials from PeopleSoft or
13 that TN was taking more support materials for applications that the customer was not licensed
14 for.

15 361. On October 14, 2004, after PeopleSoft became aware that TomorrowNow
16 encouraged PeopleSoft customers to “grab” the latest version of their software before they
17 cancelled PeopleSoft support, a PeopleSoft employee informed PeopleSoft’s Managing Director
18 and Group Vice President PeopleSoft Support Services, Worldwide Sales & Operations that
19 “some safeguards are needed (per our discussion this am...) to protect our Update/Fix IP.”

20 362. This follow on email on October 14, 2004 about the information provided to Mr.
21 Allbritten from the customer about TN conveyed no knowledge by PeopleSoft of any
22 improprieties by TN. Rather, PeopleSoft thought TN was using a loophole from PeopleSoft’s
23 “product drop support process technical gaps.”

24 363. On October 27, 2004, the head of PeopleSoft’s competitive intelligence for
25 support services instructed a colleague to review TomorrowNow’s website on a weekly basis
26 after Andy Allbritten stated that TomorrowNow had “updated their website and how (sic) state
27 they will also be offering support for the E1 and World product lines.”

28

1 364. In November 2004, the TomorrowNow website indicated that TomorrowNow was
2 providing software support services for PeopleSoft software, including fixes and updates.

3 365. In November 2004, PeopleSoft circulated internally a document titled “Third
4 Party Support Vendor Questions” that purported to be a series of “questions customers should
5 ask potential third-party support vendors prior to dropping enterprise software support” and
6 included the following questions under the section titled “Intellectual Property and
7 Confidentiality Issues”:

- 8 a. “Have you taken and used software updates downloaded from an enterprise
9 software vendor by a customer and applied them to other customers? Have you
10 applied updates to those that are no longer receiving support from the creating
11 vendor?”
12 b. “Have you taken and used software upgrade scripts downloaded from an
13 enterprise software vendor by a customer and applied them to multiple
14 customers?”
15 c. “Have you used an end customer ID to access an enterprise software vendor’s
16 website to download software?”
17 d. “Are you offering me indemnification that the fixes you provide do not infringe
18 upon the intellectual capital of the vendor?”
19 e. “What mechanisms do you have in place to ensure that intellectual capital abuses
20 don’t take place?”

21 366. The November 2004 PeopleSoft document titled “Third Party Support Vendor
22 Questions” was marked confidential and for internal use, was never provided to any customers,
23 and no feedback was ever received or collected related to any of the listed questions. After the
24 acquisition of PeopleSoft, Oracle never used the document.

25 367. On December 7, 2004, Nancy Lyskawa indicated that “My team is actually
26 leading the competitive/marketing strategy on the emerging third party support providers.
27 [Redacted sentence] We are very aware of TomorrowNow and have quite a bit of information on
28 them.”

29 368. In the fall of 2004, when PeopleSoft first began tracking TN, the only information
30 PeopleSoft employee, Ms. Lyskawa, and her small team of PeopleSoft support marketers had on
31 TN was what they learned from TN’s website, which provided no indication that TN was
32 supporting customers in a manner that violated PeopleSoft’s intellectual property or contract
33 rights.

1 369. Prior to acquiring PeopleSoft, Oracle asked PeopleSoft to provide them with the
2 number of customers lost to the third party emerging market, including the names of the third
3 party competitors and lost revenue dollars.

4 370. A document created on January 19, 2005 by Julie O’Shea, a Senior Product
5 Manager at Oracle, states: “Worried at first about companies like TomorrowNow infiltrating the
6 Update Center.”

7 371. An Oracle document created in 2005, entitled “Oracle Support Exclusive
8 Advantages Versus Third Party Vendor Support” states, “While Oracle recognizes that vendors
9 can legitimately offer competitive support services for PeopleSoft products; we are concerned
10 about the potential violation of our intellectual property rights and the terms of our contracts.
11 We are investigating this matter vigorously and will pursue any and all means at our disposal to
12 protect the company’s assets.”

13 372. Plaintiffs’ privilege logs in this case demonstrate that they anticipated litigation
14 against TN at least as early as September 2004.

15 373. On January 12, 2005, in response to Richard Blotner’s January 11, 2005 email
16 referencing TN, Oracle’s Michael Lohead stated in an email: “As far as I know, there are no
17 obvious ‘violations’ at this point, but I believe we want to reinforce the fact that they cannot be
18 using any orcl/psft intellectual property for the services they provide.”

19 374. Oracle employee Buffy Ransom discovered Defendants’ illegal downloading in
20 November 2006. Oracle learned of Defendants’ other infringing activities after filing this
21 lawsuit.

22 375. Prior to Ms. Ransom’s discovery of TN’s downloading activity, Oracle had no
23 knowledge that TN was illegally downloading or otherwise infringing Oracle’s copyrights.

24 376. Prior to Ms. Ransom’s discovery of TN’s downloading activity, the only
25 information first PeopleSoft and then Oracle had on TN came from TN’s website and from what
26 limited hearsay information customers would relate. TN’s website provided no indication that
27 TN was providing support illegally; to the contrary TN and SAP repeatedly conveyed publically
28 and to customers that TN’s support model was legitimate.

1 program called Safe Harbor intended to take advantage of that competitive opportunity.

2 386. Oracle finalized its acquisition of PeopleSoft on January 7, 2005 and had a much-
3 publicized public unveiling by its highest executives of its going-forward plans for PeopleSoft on
4 January 18, 2005.

5 387. The timing of SAP's acquisition of TN and announcement of Safe Passage was
6 designed by SAP to undermine Oracle's prior day's presentation on its going-forward plans for
7 PeopleSoft.

8 388. Throughout SAP TN's operating years, SAP advertised, and touted internally and
9 externally, that TN was the "cornerstone" of the Safe Passage program.

10 389. Customers switch ERP vendors for a variety of reasons, including a desire to
11 standardize on one ERP vendor's software or to obtain specific functionality that is only
12 available from another vendor.

13 390. Customers also cancel an ERP vendor's support services for a variety of reasons,
14 including cost, dislike of the vendor's support service, or a lack of perceived value from the
15 service.

16 391. Customers who cancel an ERP vendor's support service may obtain support
17 services from another provider, some combination of other providers, or may go without support
18 from an outside party (i.e. self-support).

19 392. Plaintiffs identified several characteristics of "at risk" customers. These include
20 customers on old and/or stable releases of products, customers who do not intend to upgrade to a
21 new release of a product, and customers who require little or no support.

22 393. Plaintiffs identified the characteristics of "at risk" customers after SAP and TN
23 began offering their services. The most prevalent "at risk" factor was cost of support, and the
24 greatest risk to Oracle was that these customers would leave for SAP TN. This risk is why
25 Oracle began tracking such customers.

26 394. Over the relevant time period, on average, Oracle applications customers using
27 alternative support options account for less than 3% of all Oracle applications customers.
28

1 395. PeopleSoft also competed in certain aspects of the ERP software and support
2 business, offering its own products and those of J.D. Edwards, Inc. (“JDE”), which PeopleSoft
3 had acquired shortly before Plaintiffs’ hostile acquisition.

4 396. Like Safe Harbor, SAP’s Safe Passage program was intended to win PeopleSoft
5 and JDE customers.

6 397. Of the 358 TN customers, at least 86 were customers that purchased TN support
7 services and SAP products or services simultaneously, or that were existing TN customers at the
8 time that they purchased new SAP software.

9 398. There may also have been an untold amount of additional customers who
10 purchased TN support services and migrated to SAP via their parent companies’ SAP volume
11 contracts.

12 399. SAP products and services sold to these customers included both the sale of SAP
13 software to replace the customers’ PeopleSoft, J.D. Edwards or Siebel applications, as well as
14 sales of other non-replacement SAP products and services.

15 400. After merging with and into OSC, the PeopleSoft and JDE entities ceased to exist
16 as independent entities.

17 401. OEMEA is a part of and acts for the benefit of Oracle’s consolidated corporate
18 operations, the headquarters of which are located in California.

19 402. OEMEA’s sales territory is Europe, the Middle East, and Africa.

20 403. OEMEA’s sales territory includes various countries in Europe, the Middle East,
21 and Africa.

22 404. OEMEA’s customers contract with Oracle distributors, Oracle commissionaires
23 and undisclosed agents acting on OEMEA’s behalf pursuant to various agreements. The
24 commissionaires’, undisclosed agents’ and distributors’ territories are in Europe, the Middle
25 East, and Africa.

26 405. OEMEA’s customers contract with directly with OEMEA, through Oracle
27 distributors, or through Oracle commissionaires and undisclosed agents acting on OEMEA’s
28 behalf pursuant to various agreements. The commissionaires’, undisclosed agents’ and

1 distributors' territories include one or more countries in Europe, the Middle East, and Africa.

2 406. OEMEA's customers are located outside the U.S.

3 407. Many of OEMEA's global customers have locations in California.

4 408. TN is a Texas corporation with its principal place of business in Bryan, Texas.

5 409. TN's support of customers, both domestic and abroad, occurred in Texas.

6 410. TN's support of customers, both domestic and abroad, occurred from its offices in
7 Texas and around the world, including the United Kingdom, Singapore, Australia and other
8 European locations.

9 411. TN's marketing to European customers occurred in Europe.

10 412. TN's marketing to European customers originated in California and Texas, in
11 collaboration with SAP employees in California. Germany and elsewhere, and occurred in
12 Europe, among other places.

13 413. Even though they are direct competitors, Oracle and SAP have a reseller
14 agreement for SAP to sell Oracle's database software, which has resulted in billions of dollars in
15 sales.

16 414. TN ceased actively supporting customers on October 31, 2008, and as to date has
17 not resumed those support activities.

18
19
20
21
22
23
24
25
26
27
28

1 **IV. STIPULATIONS**

2 **A. Existing Stipulations**

3 The Parties have agreed to the following stipulations:

4 1. Discovery responses served by the Parties are deemed
5 verified by the responding party or Parties pursuant to the Federal
6 Rules of Civil Procedure.

7 2. All documents and data produced by the Parties during the
8 course of the litigation are authentic and genuine pursuant to the
9 Federal Rules of Evidence.

10 3. The individual testimony of John Baugh and William
11 Thomas on December 3 and 4, 2010, respectively, may be
12 considered as corporate Rule 30(b)(6) testimony with respect to
13 Defendants copying and use of Oracle's Database products. The
14 individual testimony of Michael Garafola on September 17, 2009,
15 may be considered as corporate Rule 30(b)(6) testimony on the
16 same topics. The Oracle Database software to which Mr.
17 Garafola referred to during his deposition originated from the
18 same Oracle Database software downloads testified to by Mr.
19 Baugh.

20 4. The Parties agree that deposition designations for the July
21 depositions of Scott Trainor and Seth Ravin shall be due two
22 weeks after the final transcript is received by the Parties and that
23 any counter-designations shall be due three weeks after the final
24 transcript is received. To that end, the Parties have agreed to
25 share costs to expedite these transcripts.

26 5. The Parties have agreed that certain native productions of
27 databases used by Defendants shall be admissible pursuant to the
28 Federal Rules of Evidence for certain purposes, as agreed by
email on November 3, 2009 and as described in the Stipulation re
Admissibility of TN Databases.

6. The Parties agree that for readability and ease of use of
trial exhibits, they will cooperate in substituting native documents
with appropriate markings for any previously marked non-native
version of trial exhibits.

7. The Parties have agreed to the availability for trial of
certain media stored at TN, including the collection of media
known as the "CD Binders", and the admissibility of a neutral-
party index of information recorded on the labels of certain of
that media, all as reflected in the CD Storage and Access
Agreement of October 23, 2009. The Parties have also stipulated
to the admissibility of the final version of the related Merrill
Corporation Coding Manual of October 27, 2009.

1 **B. Oracle’s Proposed Stipulations**

2 Oracle has submitted two extensive stipulations to Defendants in an effort to streamline
3 the liability case, attached as Exhibits A and B.

4 **C. Defendants’ Proposed Stipulations**

5 Defendants have proposed that Plaintiffs dismiss those claims for which Plaintiffs have
6 pursued entirely duplicative damages/monetary relief. Defendants have also proposed that the
7 parties stipulate to bifurcation of the trial as described in Section VII(B). Defendants have also
8 proposed that the parties agree to narrow liability issues and focus this case on damages, as more
9 fully described in their Trial Brief.

10 **V. DISPUTED POINTS OF LAW**

11 The Parties agree that there will be a number of discrete points of law in dispute at or
12 before trial, including legal disputes as to the admissibility of evidence, some of which are
13 addressed in the Parties’ separately filed motions in limine and will be addressed in *Daubert*
14 motions to come. Similarly, issues pending on summary judgment are not all addressed below.
15 The Parties have endeavored to identify below the key disputed points of law that this Court will
16 have to decide at or before trial. The issues in ¶¶ 2-4 and 6 were previously presented in
17 Oracle’s Motion for Partial Summary Judgment, Dkt. No. 649. This is not intended to be an
18 exhaustive list of all disputed points of law that may arise at or before trial.

19 1. The evidentiary weight to be given to six certificates of copyright registrations
20 (and the factual statements in those registrations), which must be determined by the court under
21 17 U.S.C. § 410(c) because the copyrights were not registered within five years of first
22 publication. This evidentiary determination in ¶ 1 “shall be within the discretion of the court.”.
23 17 U.S.C. § 410(c).

24

Registration Number	Registration Date	Title of the work.	Date of Publication
TX 6-541-029	4/26/2007	Initial release of JD Edwards World A7.3	6/3/1996
TX 6-541-047	4/26/2007	Initial release of JD Edwards World A8.1	10/1/1997

Registration Number	Registration Date	Title of the work.	Date of Publication
TX 6-541-033	4/26/2007	Initial release of JD Edwards EnterpriseOne XE	9/18/2000
TX 6-941-989	6/29/2009	Siebel 6.3 Initial Release and Documentation	12/15/2000
TX 6-941-988	6/29/2009	Siebel 7.0.5 Initial Release and Documentation	11/15/2001
TX 6-941-990	6/29/2009	Siebel 7.5.2 Initial Release and Documentation	9/4/2002

2. Whether, for each asserted copyright registration that is a derivative work, OIC must plead and prove infringement of prior registered versions of the same work in addition to proving infringement of the asserted, registered derivative work, where all or almost all of the code contained in prior registered works is also contained in the asserted, registered derivative work.

3. Whether, for literal copying of unregistered derivative works, OIC may use a prior registered work to prove infringement of the later, unregistered derivative versions of the same work where all or almost all of the code contained in the asserted, prior registered work is also contained in the unregistered derivative works.

4. Whether, for literal copying of unregistered works, OIC may use a later, registered derivative work to prove infringement of the prior, unregistered versions of the same work where all or almost all of the code contained in asserted, prior registered works is also contained in the unregistered derivative work.

5. Whether, for certain asserted copyright registrations that are derivative works, OIC may prove infringement of each derivative work by proving infringement of the unregistered, incremental changes between the earlier version and the derivative version.

6. Whether (and under what circumstances) Plaintiffs or Defendants bear the burden of proof on any asserted license defense.

7. The extent to which Plaintiffs' state law claims are preempted by the Copyright Act.

8. Whether Plaintiffs must present and prove their various claims on behalf of the

1 specifically named Plaintiffs for each claim.

2 9. Whether each Plaintiff pursuing a particular claim must prove its individual
3 damages and standing.

4 10. Whether Plaintiffs must prove their claims specifically and individually against
5 each named Defendant.

6 11. Whether awareness of a general pattern of ongoing infringement meets the
7 knowledge element of contributory infringement.

8 12. Whether the contributory infringement standard is met by showing a parent
9 corporation knew about the infringement, could have stopped it, but did not.

10 13. Whether Plaintiffs must prove that Defendants owed them a special duty of care
11 to prevail on their claim for negligent interference.

12 14. Whether Plaintiffs' claim for unfair competition is barred for lack of standing.

13 15. Whether Plaintiffs must prove some loss or transfer of property to recover for
14 unjust enrichment/restitution.

15 16. The causation standards Oracle must satisfy for any lost profits or infringer's
16 profits claims it pursues.

17 17. Whether Plaintiffs are precluded from pursuing an alleged fair market value
18 license when there is proof of lost profits.

19 18. Whether (and if so to what extent) it is permissible to look forward to actual
20 results when calculating value at the time of a hypothetical negotiation to establish the fair
21 market value of infringed intellectual property.

22 19. Whether Defendants can restrict "actual use" to only the Oracle software and
23 support materials identified in Defendants' support contracts with their customers, rather than the
24 full list of Oracle software and support materials that Defendants actually copied, used in
25 conducting and promoting their business, and stored on their computers, computer systems and
26 computer network.

27 20. Whether Plaintiffs' claim for an accounting is moot in view of discovery in this
28 case.

1 21. Whether Plaintiffs are entitled to any relief for unjust enrichment.

2 22. Whether Plaintiffs are entitled to seek injunctive relief and/or restitution under
3 the UCL.

4 23. Whether Plaintiffs are entitled to an accounting.

5 **VI. STATEMENT REGARDING BIFURCATION OR SEPARATE TRIAL**

6 **A. Plaintiffs' Statement**

7 Bifurcation under Federal Rule of Civil Procedure 42(b) is inappropriate in light of the
8 breadth of overlapping evidence between direct liability, indirect liability and damages in this
9 case. Bifurcation would confuse the jury and extend the length of trial. This matter does involve
10 numerous issues arising out of Defendants' illegal activities. However, the evidence of direct
11 liability, indirect liability, actual damages and punitive damages is inextricably tied together.
12 Bifurcating in the way Defendants suggest would confuse the jury and prolong the trial because
13 the same evidence would be presented two, three or even four times. For example, SAP TN
14 continued to infringe Oracle's copyrights after its acquisition by SAP pursuant to SAP policies
15 that merely restricted that infringement to segregated SAP TN facilities. The infringement, and
16 the contribution to it, overlap almost exactly. Similarly, SAP's expectations for SAP TN and the
17 scope of SAP TN's infringing business model both relate directly to damages.

18 The same witnesses and documents would be offered for direct liability, SAP's
19 knowledge and contribution to those infringing acts, and the value of the intellectual property
20 that SAP and SAP TN knowingly infringed. Some of the same evidence of indirect liability
21 showing SAP's knowledge of TN's illegal business model at the time of the acquisition also goes
22 directly to punitive damages because it shows both knowledge of the illegal business model and
23 a malicious intent to harm Oracle (*e.g.* SAP AG Executive Board member Shai Agassi boasted
24 that SAP's acquisition of TN left a "ticking time bomb" for Oracle).

25 The quickest, most efficient way to decide this case is for the parties to present the
26 evidence once and only once. Each side will present its case and the jury will deliberate on all
27 issues at one time. Further, Defendants have already admitted liability at summary judgment on
28 a portion of direct liability and a portion of indirect liability. Thus even if the jury found TN *not*

1 liable for other infringement presented at trial, the case would still proceed to the damages phase.

2 Defendants also argue that bifurcation is appropriate in light of the nine claims
3 Oracle has against Defendants. That argument fails because those claims are all based on related
4 facts and issues -- SAP TN's infringing business model and SAP's knowing purchase and
5 continued facilitation of it.

6 In addition, Defendants' bifurcation proposal does not address any supposed
7 complication regarding those claims at all. Bifurcating direct and indirect liability and actual and
8 punitive damages would not impact Oracle's nine direct liability claims at all. There is no
9 efficiency gained by separating these issues.

10 In sum, the volume of overlapping evidence between direct liability, indirect
11 liability, actual damages and punitive damages strongly favors trying and resolving this matter in
12 one, non-bifurcated, trial. The party requesting bifurcation has the burden to prove that
13 bifurcation is warranted "[f]or convenience to avoid prejudice, or to expedite and economize in
14 that particular case." See FRCP 42(b); *Spectra-Physics Lasers, Inc. v. Uniphase Corp.*, 144
15 F.R.D. 99, 102 (N.D. Cal. 1992). Defendants have not met that burden. See, e.g., *Intersong-*
16 *USA, Inc. v. CBS, Inc.*, No. 84 Civ. 998 (JFK), 1985 U.S. Dist. LEXIS 21588, at *3-4 (S.D.N.Y.
17 Mar. 20, 1985) (Denying motion to bifurcate liability and damages in a copyright case and
18 noting that a single trial "tends to lessen the delay, expense and inconvenience to all concerned,
19 and the courts have emphasized that separate trials should not be ordered unless such a
20 disposition is clearly necessary.") (internal citations omitted); *GEM Acquisitionco, LLC v.*
21 *Sorenson Group Holdings LLC*, No. C 09-01484 (SI), 2010 U.S. Dist. LEXIS 50622 (N.D. Cal.
22 Apr. 27, 2010) (in the Ninth Circuit, "Bifurcation . . . is the exception rather than the rule of
23 normal trial procedure.") (internal citations omitted).

24 **B. Defendants' Statement**

25 Defendants have proposed that the jury trial of this case be bifurcated (on the current
26 schedule and within the current time limits) into four stages: (1) direct liability of
27 TomorrowNow; (2) secondary liability of SAP AG or SAP America on claims as to which there
28 is a finding of direct liability of TomorrowNow; (3) actual damages; and (4) punitive damages.

1 Under Rule 42(b), the Court has the discretion to order separate trials of any number of
2 claims or issues “[f]or convenience to avoid prejudice, or to expedite and economize.” Dividing
3 a trial into phases is particularly useful where “litigation of the first issue might eliminate the
4 need to litigate the second issue.” *Amato v. City of Saratoga Springs, N.Y.*, 170 F.3d 311, 316
5 (2d Cir. 1999) (affirming bifurcation of trial on police officer’s individual liability from trial
6 against City and Police Department) (citations omitted). It is also appropriate where “each
7 liability phase depends on a distinct theory of liability.” *Jackson v. County of Los Angeles*, 29
8 Fed. Appx. 430, 435-36 (9th Cir. 2001). These factors support bifurcation as proposed by
9 Defendants, as briefly summarized here.

10 The most important reason to bifurcate or phase the trial, however structured, is the sheer
11 number of issues that will be presented to the jury and the Court. Four different plaintiffs assert
12 a total of ten claims against three defendants on various theories of direct and indirect liability.
13 Each claim is subject to a different statute of limitations. Each claim has a different standard for
14 indirect liability. Each state law claim is subject to preemption under the Copyright Act. Some
15 of plaintiffs’ claims will be presented to the jury, and the Court may or may not want the
16 assistance of the jury in resolving Plaintiffs’ claims in equity. It is hard to imagine that a jury
17 would be better off deciding all these issues at once, as opposed to in a logical, structured order.

18 That logical, structured order is presented by the very nature of this case. As the parties’
19 briefing on the pending motions for summary judgment makes clear, this case is focused on the
20 conduct of TomorrowNow. SAP AG and SAP America are liable, if at all, only if
21 TomorrowNow is liable. It would be a waste of the jury’s and Court’s time to deal with damages
22 and other issues on any claims that cannot get over the threshold of TomorrowNow’s liability
23 (including issues of standing, statutes of limitation, other time- or conduct-based defenses, and
24 preemption). That issue should be resolved first, and then the jury can properly focus on SAP
25 AG’s and SAP America’s alleged indirect liability, under different standards for different claims,
26 then damages on any claims that survive.

27 Additionally, Plaintiffs seek punitive damages on two of their nine claims asserted in the
28 Fourth Amended Complaint (Plaintiffs apparently contend that they are entitled to seek punitive

1 damages on three claims, but did not pray for that relief in the Fourth Amended Complaint, the
2 fifth complaint they filed in this case). Courts frequently try the amount of punitive damages in a
3 separate phase at the end of trial. *See, e.g., Estate of Gonzales v. Hickman*, 2007 WL 3237635,
4 at *10 (C.D. Cal. June 28, 2007); *U.S.E.E.O.C. v. The Copley Press, Inc.*, 2006 WL 5201348, at
5 *3 (S.D. Cal. Oct. 12, 2006); *Robinson v. Crown Equip. Corp.*, 2007 WL 2819661, at *2 (E.D.
6 Ark. Sept. 26, 2007). Doing so in this case will promote efficiency because the liability phase
7 may dispense with the need to reach the issue of punitive damages, if neither of the underlying
8 claims (under the CDAFA and for intentional interference with contract) survive the liability
9 phase, time-based defenses or preemption (much less the pending motion for summary
10 judgment), or if no damages are awarded on those claims.

11 Rule 42 and the law of this Circuit certainly permit bifurcation of this case into its four
12 key phases, and the many and complicated issues in this case strongly support doing so. Beyond
13 making it clear that Plaintiffs see the upcoming trial primarily as a publicity forum for Oracle to
14 take shots at its competitor, Plaintiffs' response to Defendants' proposal is to point out the
15 obvious, that many facts may relate to more than one issue. This is the situation most every time
16 bifurcation is at issue. What matters is whether bifurcation would help the Court manage this
17 case and assist the jury in timely reaching a fair verdict on issues that actually require decision.
18 It would.

19 **VII. STATUS OF SETTLEMENT NEGOTIATIONS**

20 The Parties first engaged in mediation before Richard Abramson on May 29, 2008
21 without resolution. Since then, the Parties have appeared for settlement conferences before
22 Magistrate Judge Joseph C. Spero, but have not been able to reach a settlement. The first
23 settlement conference before Magistrate Judge Spero occurred on October 6, 2008, followed by a
24 second settlement conference before Magistrate Judge Spero on February 23, 2009. The Court
25 has set a further settlement conference date before Magistrate Judge Spero on September 7,
26 2010.

27 **VIII. CONFIDENTIAL MATERIAL**

28 Pursuant to the Court's July 21, 2010 Order, the parties will file any requests for

