BINGHAM MCCUTCHEN LLP
DONN P. PICKETT (SBN 72257)
GEOFFREY M. HOWARD (SBN 157468)
HOLLY A. HOUSE (SBN 136045)
ZACHARY J. ALINDER (SBN 209009)
BREE HANN (SBN 215695)
Three Embarcadero Center
San Francisco, CA 94111-4067
Telephone: 415.393.2000
Facsimile: 415.393.2286
zachary.alinder@bingham.com
geoff.howard@bingham.com
holly.house@bingham.com
bree.hann@bingham.com

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

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

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

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

OAKLAND DIVISION

ORACLE USA, INC., *et al.*,	Case No. 07-CV-01658 PJH (EDL)
Plaintiffs,	PLAINTIFFS' TRIAL BRIEF
v.	
SAP AG, *et al.*,	Date: September 30, 2010 Time: 9:00 a.m.
Defendants.	Place: 3rd Floor, Courtroom 3 Judge: Hon. Phyllis J. Hamilton

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

PLAINTIFFS' TRIAL BRIEF

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I.   SUMMARY OF CASE

This case is about SAP AG and SAP America's ("SAP") deliberate scheme to "inflict pain" on Oracle through knowingly illegal conduct.

Two days ago, defendants sent a proposal to Oracle they deemed "subject to FRE 408 and, separately, request[ed] that plaintiffs agree to treat it as confidential" under the Protective Order. Oracle agreed to confidential status. In their trial brief, filed at 2:00 p.m. today, defendants revealed the "confidential" proposal. The brief violates the Protective Order and improperly engages the trial court in settlement discussions. Under the circumstances, Oracle is compelled to advise the Court that it responded this morning to defendants' proposal with a more reasonable offer to streamline the case. In that proposal Oracle invited SAP to do what it should have done years ago, and admit full liability on the underlying claims against TomorrowNow ("TN" or "SAP TN").

A few hours after Oracle made its proposal, SAP filed its trial brief with the Court. It simultaneously issued a press release in time for the east coast news cycle. The press release, a sample of the resulting immediate news coverage, and a screenshot of SAP's website showing links to its trial brief and press release side by side, are all attached as Exhibit A to this brief. In the press release, contrary to what the trial brief and SAP's proposal to Oracle say, SAP *accepts* Oracle's proposal and admits *all* liability against SAP TN, preserving no defenses. Under SAP's publicized version of its offer, what remains are Oracle's claims against SAP AG and SAP America and, of course, damages. SAP concedes at least "tens of millions" of dollars of harm to Oracle. SAP then suggests, publicly and in its brief, that it has no responsibility for the admitted conduct. That suggestion contradicts the facts explained below that conclusively demonstrate the knowledge, decision, and complicity of SAP's board. It is a ploy to avoid liability for the gamble SAP's board knowingly took when it acquired TN to take billions of dollars away from Oracle's core business.

Oracle intends to proceed responsibly, confidentially, and bilaterally to resolve the remaining serious claims against SAP. In the absence of a pretrial agreement to streamline the issues or stipulate to uncontested facts and details, one thing is clear: the time for trial will be

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1 very (and unnecessarily) long. In their pretrial submissions today, Defendants alone have

2 identified 123 witnesses, over 4,680 deposition designations, and 9,262 trial exhibits. Their

3 special verdict form, when populated with the tables Defendants would have jurors fill out,

4 would run 171 pages. Under these circumstances, Oracle's estimate of a 12-week trial is

5 conservative. Rather than negotiate through the court or the press, Oracle remains committed to

6 negotiating in good faith to significantly reduce this through factual stipulations and narrowing

7 of claims.

8   * * * * * *

9   Early in 2005, Oracle strengthened its competitive position against SAP by acquiring

10 PeopleSoft for $11.1 billion. SAP retaliated by acquiring TN, the only viable independent

11 provider of support for Oracle's newly acquired customers. SAP believed that by lending its

12 name and resources to TN's business, SAP would damage Oracle's reputation, disrupt its

13 business, and deny Oracle the very benefits that it hoped to realize from its enormous investment

14 in PeopleSoft.[1] But there was a fundamental problem with SAP's strategy: as SAP knew, TN's

15 support business relied on infringement of Oracle's copyrights. Thus, acquiring TN presented a

16 calculated risk for SAP.

17   SAP was fully aware of that risk; SAP carefully considered the risk; and after full

18 consideration by its most senior executives, SAP knowingly and deliberately took the risk. It did

19 so for the express purpose of harming Oracle and enriching itself through the potential

20 acquisition of thousands of Oracle customers. SAP took control of TN, expanded its business,

21 and exploited that unlawful business model in pursuit of its own financial gain.

22   Had SAP bargained openly for what it took in secret, it would have had to pay the fair

23 market value of Oracle's copyrighted works. The evidence of that value includes SAP's

24 contemporaneous, careful projections of expected gain to SAP and harm to Oracle. The resulting

25 fair market value exceeds $2 billion. That is the measure of Oracle's damages.

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27 [1] SAP-OR00299495-518 (Exhibit 595).

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PLAINTIFFS' TRIAL BRIEF

1   ***Oracle*.** Founded in the 1970s, Oracle has grown to be one of the world's largest

2   enterprise software companies. Businesses use enterprise software to run essential functions,

3   such as tax, human resources, insurance, and payroll. Oracle designs and offers customers

4   database software, as well as products from the PeopleSoft (human resources management and

5   customer relationship management), J.D. Edwards (finance), and Siebel Systems (customer

6   relationship management) families of enterprise applications.[2] To keep its products operational

7   and current, Oracle offers support services and materials, including software updates and fixes.[3]

8   As is typical in the enterprise software industry, Oracle's customers do not actually own the

9   software or support materials Oracle provides. Instead, they license limited rights to use

10   Oracle's software and support materials. Oracle retains all copyrights and other intellectual

11   property rights in those works. Oracle earns revenue by licensing software to its business

12   customers and by providing support and maintenance services to those licensees, including

13   copyrighted software and related documentation, on an annual fee basis. The 111 registered

14   copyrights at issue in this case are owned or exclusively licensed by Oracle (specifically, Oracle

15   International Corporation) and cover Oracle's database and enterprise application software, and

16   manuals, guides, notes, and other documentation related to the software.

17   ***SAP's Competitive Position*.** SAP long held a dominant position in the enterprise

18   application software industry. On January 18, 2005, Oracle completed its acquisition of

19   PeopleSoft (and with it, J.D. Edwards) to emerge as the second-largest provider of business

20   software applications in the world, albeit still far smaller than SAP. Oracle then launched the

21   newly united company, unveiling plans to provide unparalleled innovation and support to its

22   combined 23,000 customers around the world. The opportunity to challenge SAP did not come

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24   [2] Oracle proposes to have one of its executives present a tutorial to the Court, prior to trial,
25   concerning the functions of, and differences between, these product families.

         [3] A "fix" is any software application patch, fix, code change, bug fix. Fixes typically address
26   issues with the functionality or performance of the software in the form of new or modified code,
         for example to address new regulatory requirements that affect payroll software. They can be
27   delivered individually, or grouped with other fixes in packages often called "updates."

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1 cheap – in addition to the more than $11 billion that Oracle paid for PeopleSoft, Oracle had spent

2 billions of dollars to develop products and related copyrighted materials on its own.

3   ***SAP Responds By Acquiring TN***. The day after Oracle launched the newly combined

4 company, SAP announced its own purchase of TN and its intent to use TN as the "cornerstone"

5 of its "Safe Passage" program to recruit newly-acquired PeopleSoft customers to SAP. Before

6 buying TN, SAP had a former PeopleSoft executive, John Zepecki, examine TN's use of

7 Oracle's software. Mr. Zepecki's assessment was clear: "It's very likely that TomorrowNow is

8 using the software outside the contractual use rights."[4] Days later, SAP bought TN anyway.

9   Because it did not pay for what it stole, TN could provide support to Oracle customers for

10 considerably less than what Oracle charged. As a result, with an acquisition price of only $10

11 million, TN looked like a bargain. But SAP concluded that by acquiring TN, it would take

12 billions of dollars in revenues away from Oracle, first by offering competing cut-rate support for

13 Oracle products, and then migrating those customers to SAP's competing offerings. However,

14 SAP knowingly took on a comparable risk of liability. SAP's own documents – Executive Board

15 presentations and other documents that SAP created at the time – admitted the dangers created

16 by TN's unlawful conduct. Indeed, SAP's written presentation seeking Executive Board

17 authorization for the deal stated that "access rights to the PeopleSoft software is very likely to be

18 challenged by Oracle and past operating issues may be a serious liability if Oracle challenges."[5]

19 Instead of walking away from TN, SAP took steps – what SAP called a "liability shield"[6] – to try

20 (unsuccessfully) to eliminate SAP's responsibility, and thereby have its cake and eat it too.

21   ***SAP's Plan to "Inflict Some Pain on Oracle."*** SAP proceeded with its plan to use SAP

22 TN's ill-gotten advantage to take away Oracle's customers and deprive Oracle of the benefit of

23 its $11 billion investment in PeopleSoft. As SAP Chairman Leo Apotheker put it at the time, the

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[4] SAP-OR-00091723-24, at -24 (Exhibit 210).

26 [5] SAP-OR-00136126-35 at -32 (Exhibit 449).

27 [6] SAP-OR-00136126-35 at -33 (Exhibit 449).

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1   acquisition would enable SAP to "inflict some pain on Oracle."[7] SAP thought of SAP TN as a

2   "strategic weapon" to hurt Oracle by "taking away maintenance revenue" and serve as a "bridge

3   to future SAP license business."[8] SAP and SAP TN offered Oracle's customers heavily

4   discounted support to lure them away from Oracle and to SAP TN and ultimately SAP. SAP

5   now tries to minimize the significance of SAP TN by arguing that it was not profitable, but

6   SAP's primary goal with SAP TN was not to generate support revenues. SAP offered SAP TN

7   support as a loss leader (sometimes even for free) to give customers "Safe Passage" to SAP.[9]

8   SAP's senior executives were thrilled with their plan, as evidenced in their own

9   documents. SAP forecast $897 million in financial benefits from owning SAP TN from 2005

10   through 2007 alone. It projected that 3,000 to 5,000 Oracle customers – perhaps half of the

11   10,000 newly acquired PeopleSoft and J.D. Edwards customers – would leave Oracle in response

12   to Safe Passage.[10] And SAP Board Member Shai Agassi was confident SAP could do even

13   better.[11] If realized, defendants' use of SAP TN would yield SAP billions of dollars, undermine

14   Oracle's $11.1 billion investment in PeopleSoft, and confer countless other strategic benefits.[12]

15   ***SAP TN's Corrupt Business.*** Discovery has exposed what SAP hoped to hide behind the

16   "liability shield." SAP TN built a master library of *thousands* of copies of Oracle's copyrighted

17   software and *millions* of copies of Oracle's support materials, many of which it deleted while

18   anticipating that Oracle would sue and many of which it produced well after the end of fact

19   discovery in this case. SAP TN created its library by making copies of software without a

20   license, in violation of Oracle's copyrights, and by illegally accessing and using Oracle's

21   password-protected computer systems, in violation of state and federal laws. Rather than writing

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23   [7] SAP-OR00206525 (Exhibit 487).

24   [8] SAP-OR00141570-81 at -71 (Exhibit 436).

25   [9] SAP-OR 00156241-242 (Exhibit 454).

     [10] SAP-OR00253278-301, at -288 (Exhibit 447), SAP-OR00299495-518 (Exhibit 595).

26   [11] Agassi Tr. 311:12-312:12 .

27   [12] SAP-OR00299495-518 (Exhibit 595); SAP-OR00141570-81 at -71 (Exhibit 436).

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1 application software code of its own, SAP TN designed computer programs called "scrapers,"

2 including one called Titan, to take a customer credential and indiscriminately download literally

3 everything on Oracle's support websites. Titan repeatedly caused Oracle's websites to crash.

4   SAP TN employees frankly admitted what they were doing – and that it was wrong – in

5 instant message ("IM") chats that they obviously thought would never be revealed. Indeed, SAP

6 itself tried to conceal those IMs, and disclosed them only by accident well after the close of fact

7 discovery and as the case neared trial. For example, in one IM, two SAP TN employees

8 discussed Oracle's complaint in this case, just after it was filed in March 2007:

9   *[Kim Martinez]:*   *what are they saying in a nutshell*

10   *[Kristin Paige]:*   *that we illegally downloaded their stuff*

11   *[Kristin Paige]:*   *used false information and customer id/pw to get it*

12   *[Kim Martinez]:*   *well, that's true [¶] wonder who on the inside told*

13   *[Kristin Paige]:*   *i think they caught us.....*[13]

14   On the same day, other SAP TN employees also discussed the new lawsuit. One

15 admitted "we all knew it was coming"; another advised him to "put nothing in writing (i'm sure

16 you know better)."[14] Similar admissions and efforts to conceal are spread through SAP TN files.

17   Expert analysis of Oracle's own data and the data that defendants produced (except the

18 voluminous late-produced materials) confirms what SAP and SAP TN already knew: SAP TN's

19 business relied on unauthorized access to and mass downloading from Oracle systems. Oracle's

20 computer forensics expert, Kevin Mandia, will testify that SAP TN pervasively used improper

21 credentials and false pretexts to access Oracle support websites. For example, Mr. Mandia's

22 analysis of data for just five SAP TN customers revealed over 20,000 downloaded files without

23 license. SAP TN used virtually any working password to download files indiscriminately for

24 other customers. Mr. Mandia found that SAP TN downloaded at least 992,420 files from Oracle

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26 [13] (Doc ID 00012935).

27 [14] (Doc ID 00018098).

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PLAINTIFFS' TRIAL BRIEF

1   servers between September 1, 2006 and May 8, 2008. His review of SAP TN systems revealed

2   downloads totaling over 9 million files related to Oracle software and related support materials.

3   On several occasions, SAP TN connected to Oracle support websites over 600,000 times in a

4   single day. And as large as these numbers are, they underestimate what SAP TN actually did

5   because, as SAP TN has admitted, it downloaded and then deleted millions of files containing

6   updates and support materials. For the files that they did preserve, SAP and SAP TN admit that

7   they cannot tell which customer's credentials were used to download the materials.

8   SAP TN copied, distributed, modified, and used Oracle's software and related support

9   materials in numerous improper ways. The creation of full working copies of Oracle's

10 copyrighted applications was central to SAP TN's business. To create these copies, SAP TN

11 first obtained installation CDs from its customers and copied them onto its computers. These

12 CDs would not have all the more recent software that SAP TN's customers needed, so SAP TN

13 would download that software and apply it to the older versions, creating a copy of the software

14 application that was as current as possible. SAP TN then used these copies, or "environments,"

15 to develop and test fixes and updates to Oracle software that it distributed to its customers. SAP

16 TN created and stored thousands of copies of Oracle's core software programs as local

17 environments on its servers. As Mr. Mandia will show, and as defendants have admitted, SAP

18 TN created approximately 90% of the fixes it delivered to its customers by using software from

19 at least one other customer. Comparisons of SAP TN's fixes to Oracle's original copyrighted

20 code show that SAP TN's fixes included a significant amount of Oracle's code. Delivery of

21 these contaminated fixes infringed Oracle's copyrights and breached the terms SAP TN agreed

22 to when it accessed Oracle's websites. SAP TN copied and used Oracle's database software to

23 support at least 40% of its customers and likely all of its PeopleSoft and JDE customers.

24   Some of SAP TN's customers had licenses from Oracle that allowed those customers to

25 have access to and keep some of Oracle's software and support materials in their own facilities

26 for some of the time that they were also customers of SAP TN. But no customer had any license

27 of any kind that would have allowed SAP TN to engage in the copying, modification, use, and

28 cross-use that SAP TN's own employees and senior SAP executives have admitted to, and that

1   Mr. Mandia has extensively documented. Nor did SAP TN have a license of its own.

2   Defendants have retained two computer experts of their own – Stephen Gray and Gary

3   Funck. Mr. Gray and Mr. Funck had access to the same data – server log files, computer code

4   for the Titan scraper, local environments maintained by SAP TN, updates and fixes delivered by

5   SAP TN to customers, modified Oracle code produced by SAP TN, copies of files downloaded

6   by SAP TN employees, and so on – that Mr. Mandia collected and analyzed. Neither Mr. Gray

7   nor Mr. Funck, however, conducted any extensive analyses of that data. Whatever marginal

8   criticisms they may offer in response to Mr. Mandia's work, neither Mr. Gray nor Mr. Funck can

9   or will testify that any of Mr. Mandia's core conclusions, summarized above, are incorrect.

10   ***SAP Knew About and Supported SAP TN's Unlawful Conduct.*** Once it acquired TN,

11 SAP did nothing to stop the infringing practices. To the contrary, SAP evaluated SAP TN using

12 "Key Performance Indicators," based on infliction of financial "pain" on Oracle, and not at all on

13 stopping illegal copying and downloading.[15] SAP created "Rules of Engagement" that approved

14 SAP TN's unlicensed software copying and unauthorized downloading but tried to distance SAP

15 by limiting the location of the illegal copies to SAP TN. SAP knew from experience that SAP

16 TN could not develop the software and support materials it needed to meet SAP's growth

17 projections without a larger budget and more people. But SAP denied SAP TN those resources,

18 ensuring that SAP TN would continue to infringe Oracle's copyrights. SAP also demanded and

19 financed SAP TN's geographic and product expansion. For example, after Oracle acquired

20 Siebel for $6.1 billion in March 2006, SAP decided to expand SAP TN's service offerings to

21 Siebel products. SAP knew SAP TN would support Siebel with illegal local copies, but

22 encouraged SAP TN to grow its Siebel support business rapidly.

23   SAP defends itself now by claiming that by March 2005 – it cannot say precisely when –

24 the SAP board supposedly issued what SAP now calls a "Directive" to SAP TN to remove all

25 infringing copies of Oracle copyrighted works from SAP TN's servers. No actual record of that

26 _____

27 [15] SAP-OR00136760-768, at -762 (Exhibit 608).

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PLAINTIFFS' TRIAL BRIEF

1   Directive exists. No board minutes or resolutions contain any such Directive. No memos

2   summarize its terms. No emails confirm its existence. Board members who supposedly issued

3   the Directive – including board members directly involved in overseeing SAP TN – have no

4   recollection of it. In any event, SAP never enforced any such "Directive."

5   Meanwhile, SAP TN concealed its unlawful scheme from Oracle by modulating

6   downloads to increase overnight, entering false or misleading information when accessing and

7   downloading from Oracle's websites, and posing as a new customer location to receive software

8   from Oracle. Oracle first learned facts that warranted investigation in November 2006, when an

9   employee, Buffy Ransom, attempted to analyze customer data logged from Oracle's customer

10   support website and uncovered a large volume of suspicious downloads. Ms. Ransom reported

11   this to Oracle's lawyers, who began an investigation. In a few months, Oracle employees were

12   able to identify over 10,000 unauthorized downloads – a tiny fraction of SAP TN's actual

13   campaign of wholesale copying – and Oracle sued.

14   ***Ultimately SAP Conceded That SAP TN Could Not Be Operated Ethically.*** Once

15   Oracle sued, SAP could no longer pretend to be ignorant of SAP TN's unlawful conduct.

16   Nonetheless, SAP did not stop that misconduct for over one year after Oracle filed its complaint

17   and over three years after it acquired TN. Instead, under the self-serving pretense that SAP TN

18   customers would be hurt if they lost their source of stolen support materials, SAP allowed SAP

19   TN to continue. SAP admits that by 2008, it concluded that SAP TN could not be operated

20   ethically.[16] That admission should not be mistaken for high-mindedness. SAP was shopping

21   SAP TN and willing to allow SAP TN to stay its course if only someone else could be convinced

22   to foot the bill and assume the liabilities. Only when it became clear that SAP could not evade

23   its problems by selling off SAP TN to someone with different "ethical standards"[17] did SAP do

24   what it always had the ability to do. In October 2008, SAP closed SAP TN.

25   _____

26   [16] Apotheker Tr. at 32:19-22.

27   [17] Apotheker Tr. at 35:7-21 (testifying that SAP was willing to sell SAP TN, and that "everyone has their own ethical standards").

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1 ***Oracle's Damages.*** Copyright law provides that Oracle be compensated with the fair

2 market value (FMV) of the license that SAP would have had to bargain for if it had asked to use

3 Oracle's copyrighted materials in the way it did.[18] *Polar Bear Prods., Inc. v. Timex Corp.*, 384

4 F.3d 700, 709 (9th Cir. 2004); *Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505,

5 513 (9th Cir. 1985); *see also On Davis v. The Gap Inc.*, 246 F.3d 152, 171-72 (2d Cir. 2001);

6 *Getaped.com, Inc. v. Cangemi,* 188 F. Supp.2d 398, 404-06 (S.D.N.Y. 2002). The use of the

7 copyrights is valued as of the date SAP acquired TN, based on a hypothetical negotiation for a

8 license to Oracle's PeopleSoft, J.D. Edwards, and database-related copyrights, and as of the date

9 SAP TN first supported Siebel software for a hypothetical Siebel license.

10 Oracle's damages expert, Paul Meyer, analyzed the information that was available to

11 Oracle and SAP at the time those negotiations would have occurred. For example, in December

12 2004, SAP projected that in the first three years of owning TN, it would obtain as many as 3,000

13 PeopleSoft customers and earn additional revenues valued at $897 million;[19] within days of the

14 acquisition, SAP had set a goal to acquire 50% of the existing PeopleSoft and JD Edwards

15 customers;[20] internal projections by TN estimated that every dollar that TN earned represented

16 $18 in lost revenues for Oracle;[21] SAP timed its acquisition and press announcements for January

17 19 to undermine Oracle's PeopleSoft acquisition; and Oracle had paid $11.1 billion for

18 PeopleSoft and JD Edwards assets and then $6.1 billion for Siebel Systems the following year.

19 Based on these and other facts, Mr. Meyer will testify that the negotiations would have

20 established the FMV of using the infringed copyrighted works as $2.156 billion.

21 In contrast, defendants' damages expert, Stephen Clarke, substitutes his own claimed but

22 inapplicable expertise – and the improper benefit of hindsight – to restrict the purported FMV to

23 SAP TN's actual support sales. This method ignores the considered, documented financial and

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25 [18] Jan. 28, 2010 Order Denying Defs.' Mot. for Partial Summary Judgment, Dkt. No. 628 at 3-5.
[19] SAP-OR00253278-301, at 288 (Exhibit 447).

26 [20] SAP-OR00299495-518, at 500 (Exhibit 595); Agassi Tr. 315:19-318:12.

27 [21] TN-OR00609470-471, at 470 (Exhibit 1018).

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1   strategic expectations of the SAP business executives who would have conducted the

2   negotiation.

3   In support of this argument, defendants claim that a hypothetical negotiation analysis

4   "permits and often requires a court to look to events and facts that occurred thereafter and that

5   could not have been known to or predicated by the hypothesized negotiators." Defendants'

6   Proposed Jury Instruction No. 38-b (citing *Lucent Tech. Inc. v. Gateway Inc.*, 580 F.3d 1301

7   (Fed. Cir. 2009). But *Lucent* does not say what defendants suggest. Rather, it merely observes

8   that events after the hypothetical negotiation sometimes help identify what the parties would

9   have considered during that negotiation. *Id.* at 1334. Nothing in *Lucent* suggests that a party or

10   its expert can use hindsight to assume away the specific, detailed estimates that the party actually

11   made at the relevant point in time. Indeed, ample case law holds just the opposite. For example,

12   in *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, the defendant argued that plaintiffs' proof

13   of damages was speculative because it was based on an "outdated business plan and its

14   optimistic assumptions of future revenue growth." 274 F.3d 1371, 1384 (Fed. Cir. 2001). The

15   Federal Circuit rejected that argument. The projections, created two months before the

16   hypothetical negotiation, would have been available to the defendant at the critical time.

17   Whether those projections were actually met was "irrelevant." *Id*. at 1385.

18   Although copyright law *allows* Oracle to introduce evidence of actual lost profits to

19   prove its damages, it is not *required* to do so. Lost profits cannot limit Oracle's damages to the

20   extent that they fail to reflect the full value of the use of the infringed copyrighted work. *Taylor*

21   *v. Meirick*, 712 F.2d 1112, 1120-1121 (7th Cir. 1983); *Lucky Break Wishbone Corp. v. Sears*

22   *Roebuck & Co.*, Nos. 08-35933, 08-35985, 2010 WL 1391358, at *3 (9th Cir. Apr. 7, 2010)

23   (unpublished) ("jury is not restricted . . . to awarding lost profits" where evidence of both was

24   presented at trial). On other claims, described further below, Oracle is entitled to recover the

25   profits that it lost as a result of defendants' wrongful conduct or the costs it incurred.

26   II.   PLAINTIFFS' LEGAL CLAIMS

27   Between them, four Oracle plaintiffs assert ten claims against the three defendants: (1)

28   copyright infringement; (2) violations of the Federal Computer Fraud and Abuse Act ("CFAA");

1   (3) violations of the California Computer Data Access and Fraud Act ("CDAFA"); (4) breach of

2   contract; (5) intentional interference with prospective economic advantage; (6) negligent

3   interference with prospective economic advantage; (7) violation of Cal. Business & Professions

4   Code § 17200; (8) trespass to chattels; (9) unjust enrichment; and (10) an accounting.[22]

5   Oracle asserts all claims directly against SAP TN and indirectly against SAP AG and

6   SAP America. Oracle also asserts direct claims against SAP AG and SAP America for certain

7   computer fraud violations, intentional and negligent interference, violation of Section 17200,

8   unjust enrichment, and an accounting.

9   **A.**   **Copyright Infringement**

10   **1.**   **Direct Infringement**. Oracle will establish that SAP TN is liable for

11 copyright infringement because (i) Oracle International Corporation ("OIC") is the owner or

12 exclusive licensee of the copyrights, (ii) SAP TN copied from those copyrighted works, and (iii)

13 what SAP TN copied included substantial protected material. *E.g.*, *Data East USA, Inc. v. Epyx,*

14 *Inc.*, 862 F.2d 204, 206 (9th. Cir. 1988). SAP TN's wholesale, literal copying of entire works

15 makes it unnecessary for Oracle to show that any particular part of the code is protectable. *Triad*

16 *Sys. Corp. v. Southeastern Ex. Co.*, 64 F.3d 1330, 1335 (9th. Cir. 1995), *cert. denied,* 516 U.S.

17 1145 (1996) (protectable expression plainly copied where accused infringer's "service activities

18 involved copying entire programs"); *Stenograph L.L.C. v. Bossard Assocs., Inc.*, 144 F.3d 96,

19 100, 102 (D.C. Cir. 1998) (in case of "wholesale copying" of source code, plaintiff need not

20 show which software elements were protectable). Copying of protected expression is established

21 by both direct evidence and the legal presumption from the registrations themselves.

22   *Section 410(c) presumption.* Of Oracle's 111 copyright registrations in suit, 105 were

23 registered within five years of the first publication of the underlying work. Under the Copyright

24 Act, "if a copyright holder secures a registration certificate within five years after first

25 ───────────────

26 [22] As discussed in the Joint Pretrial Statement (pp.4-6), the parties continue to negotiate over
streamlining the trial and currently dispute the trial time needed absent an agreement. Oracle
27 (and Defendants) will report further to the Court on this issue once the negotiations are resolved.

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1 publication, such certificate will constitute prima facie evidence of both the validity of the

2 copyright and the facts stated in the certificate." *Cosmetic Ideas, Inc. v. IAC/InteractiveCorp.*,

3 606 F.3d 612, 619 (9th Cir. 2010) (citing 17 U.S.C. § 410(c)). These 105 certificates of

4 registration are prima facie evidence of the validity of the registrations, the originality of the

5 registered works, and the copyrightability of the subject matter. *Religious Tech. Ctr. v. Netcom*

6 *On-Line Comm'n Svcs., Inc.*, 923 F. Supp. 1231, 1241 (N.D. Cal. 1995). The statements in the

7 105 certificates concerning authorship, ownership, work-for-hire, and prior written assignment

8 are also presumed valid. *E.g., Micro Star v. Formgen, Inc.*, 154 F.3d 1107, 1109-10 (9th Cir.

9 1998) (copyright registration creates presumption of ownership).

10 The six remaining registrations are for different versions of the same software for which

11 Oracle has presumptively valid registrations; the difference is solely one of timing. This Court

12 has discretion to find that the six remaining registrations are entitled to the same presumption

13 under 17 U.S.C. § 410(c). Courts in this circuit have granted the full weight of the presumption

14 to late-registered works when provided sufficient evidence of creation or ownership of those

15 works. *See, e.g.*, *Lanard Toys Ltd. v. Novelty Inc.*, 511 F. Supp. 2d 1020, 1031 & n.12 (C.D. Cal.

16 2007). Prior to trial, Oracle will proffer evidence and request that the Court exercise its

17 discretion to find that the presumption should also apply to the six registrations.

18 *Creative expression*. Defendants have the burden to rebut the presumption that Oracle's

19 source code is protected expression. *See*, *e.g., Ets-Hokin v. Skyy Spirits, Inc.*, 225 F.3d 1068,

20 1082 (9th Cir. 2000) (merger of ideas and expression is defense to infringement claim, not

21 element of copyrightability). *See also Worth v. Selchow & Righter & Co.*, 827 F.2d 569, 570 n.1

22 (9th Cir. 1987); *Baxter v. MCA, Inc.*, 812 F.2d 421, 425 (9th Cir. 1987).[23] As Oracle witnesses

23 will explain if necessary, Oracle engineers exercise creative choice about how to articulate or

24 present the concepts reflected by the relevant code. The resulting software constitutes protected

25 expression. *See Computer Assocs. v. Quest Software, Inc.*, 333 F. Supp. 2d 688, 699 (N.D. Ill.

26

27 [23] Defendants have disclaimed any fair use defense. *See* Defendants' Opposition to Oracle's
    Mot. for Summary Judgment, Dkt. No. 670 at 9 n.4.

28

1   2004) (protecting expression of functions and code comments); *see also Feist Publ'ns, Inc. v.*

2   *Rural Tel. Svc. Co.*, 499 U.S. 340, 345 (1990) ("original element" of work need not be new or

3   novel; "even a slight amount [of creativity] will suffice").

4   *Derivative works*. Oracle publishes successive releases of its software. Each new release

5   is registered as a derivative work and contains, in addition to the new code, code from prior

6   versions owned by Oracle. In this circumstance, the registration covers not only the material that

7   is newly added, but also the derivative material, taken from the prior work. *See* 2 Melville

8   Nimmer & David Nimmer, Nimmer on Copyright, § 7.16[B][2][c] at 7-175 (2009) ("[W]hen the

9   same party owns the derivative . . . work plus the underlying elements incorporated therein, its

10   registration of the [derivative work] is 'sufficient to permit an infringement action on the

11   underlying parts, whether they be new or preexisting.'" (quoting *Xoom, Inc. v. Imageline, Inc.*,

12   323 F.3d 279, 283-84 (4th Cir. 2003), *cert. denied*, 540 U.S. 879 (2003))); *accord Streetwise*

13   *Maps, Inc. v. Vandam, Inc.*, 159 F.3d 739, 746-47 (2d Cir. 1998); *Religious Tech. Ctr.,* 923 F.

14   Supp. at 1241. This rule applies to software. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 775 F.

15   Supp. 544, 556 (E.D.N.Y. 1991) (derivative work registration for version 2.1 of software enabled

16   copyright owner to pursue claims for infringement of preexisting material from previous

17   version), *aff'd in part and vacated on other grounds*, 982 F.2d 693 (2d Cir. 1992); *see also Apple*

18   *Computer, Inc. v. Microsoft Corp.*, 35 F.3d. 1435, 1447-48 (9th Cir. 1994) (error to hold 17

19   U.S.C. § 103(b) prevented plaintiff from asserting infringement of derivative work where

20   infringed elements were in underlying work plaintiff also owned).

21   2.   **Vicarious Infringement.** Oracle will prove that SAP AG and SAP

22   America are vicariously liable for SAP TN's infringement because they each (i) received a direct

23   financial benefit from SAP TN's infringing activity, and (ii) had the right and ability to supervise

24   or control the infringing activity. *See, e.g., Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146,

25   1173-74 (9th Cir. 2007); *see also Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) ("A

26   defendant is vicariously liable for copyright infringement if he enjoys a direct financial benefit

27   from another's infringing activity and 'has the right and ability to supervise' the infringing

28   activity.") (citation omitted). SAP AG and SAP America have conceded vicarious liability from

1 March 1, 2005 forward for SAP TN's infringement of six registrations.[24]

2   **3.**   **Contributory Infringement.** Oracle will prove that SAP AG and SAP

3 America are liable for contributory infringement because they each (i) knew of or had reason to

4 know of SAP TN's infringing activity, and (ii) intentionally induced or materially contributed to

5 the infringing activity. *Perfect 10*, 508 F.3d at 1170-73; *Gershwin Publ'g Corp. v. Columbia*

6 *Artists Mgmt., Inc.*, 443 F.2d 1159, 1162 (2d Cir. 1971). Inaction, combined with specific

7 knowledge, constitutes strong evidence of culpable intent. *Perfect 10*, 508 F.3d at 1172 ("intent

8 may be imputed" from "knowing failure to prevent infringing actions"). SAP AG and SAP

9 America are liable for contributory infringement if, for example, they knew specific infringing

10 material was available on SAP TN systems and, despite that information, failed to remove it.

11   **4.**   **Oracle's Proof of Infringement.** As noted above, all defendants have

12 already conceded liability with respect to certain copyrights. With respect to the remainder,

13 without attempting to set forth the full extent of Oracle's proof at trial,[25] Oracle will prove:

14   *First*, OIC is the owner or exclusive licensee of the 111 software programs and support

15 materials at issue. Those copyrighted materials include specific versions of Oracle's database

16 software and specific software from the PeopleSoft, J.D. Edwards, and Siebel Systems product

17 families. They also include written support materials, such as instruction manuals, guides, notes,

18 and other documentation related to the software and databases. OIC is the owner or exclusive

19 licensee of all these copyrights, as demonstrated by the copyright registrations themselves,

20 resulting presumptions, and evidence of Oracle's acquisition of the copyrights.

21   *Second*, SAP TN created thousands of literal copies of Oracle's software and millions of

22 literal copies of Oracle support materials owned or exclusively licensed by OIC. As described

23 above, and as will be shown through defendants' admissions and Mr. Mandia's testimony, SAP

24 TN created those copies by installing and repeatedly copying Oracle software onto its computers,

25 ────────────────

26 [24] *See* Defendants' Opp. to Oracle's Mot. for Summary Judgment, Dkt. No. 670 at 4:28-5:5.

[25] A more detailed, but still necessarily incomplete, summary of key facts is included in Oracle's
27 portion of the parties' joint pre-trial statement.

28

PLAINTIFFS' TRIAL BRIEF

1   through unlicensed, unauthorized downloading of materials from Oracle's websites to its

2   computers, and by burning those Oracle materials to disc, among other things.

3   *Third,* SAP TN regularly modified the Oracle software, fixes and updates it copied to

4   generate SAP TN-branded fixes distributed to its customers. These fixes consisted of original or

5   modified Oracle code. SAP TN also modified Oracle code, including source code and

6   application database schemas and contents, to change features and functionality of Oracle

7   software by copying portions of one SAP TN customer's code into a second customer's code and

8   combining code from multiple customers into one environment. These modifications were

9   derivative works based on software covered by one or more of Oracle's copyright registrations.

10   *Fourth*, the copies made by SAP TN contained substantial amounts of protected

11   expression, consisting of direct, literal copying of Oracle's copyrighted works. SAP TN did not

12   study Oracle code and recreate it with some differences. It copied the exact code wholesale,

13   millions of times over, by downloading and installing software and creating backups or restores.

14   SAP TN then provided much of the copied material to its customers.

15   *Fifth*, both SAP AG and SAP America received a direct financial benefit from the

16   infringing activity of SAP TN. Both had the right and ability to supervise and control the

17   infringing activity and did so. Both knew of or had reason to know of the infringing activity.

18   Both intentionally induced or materially contributed to the infringing activity, including by

19   providing the facilities SAP TN used to accomplish its infringement, encouraging SAP TN to

20   continually infringe, and failing to stop SAP TN's infringement when they had the opportunity.

21   Indeed, SAP has conceded that it had control over SAP TN, and that it received direct financial

22   benefit from SAP TN's operations. These facts establish each of SAP AG's and SAP America's

23   liability for vicarious and contributory infringement. *See Perfect 10*, 508 F.3d at 1170-74.

24   **B.**   **CFAA/CDAFA/Trespass to Chattels/Contract**

25   SAP TN is directly liable for violating the CFAA, CDAFA, and common law trespass to

26   chattels. SAP TN entered into and breached the contractual terms of use that governed its access

27   to and use of the Oracle websites that are the subject of the statutory and trespass claims. SAP

28   AG and SAP America are liable for all four claims under indirect liability theories. See Section

1   II.G. SAP AG and SAP America also are directly liable for violating the CDAFA.

2   **1.   CFAA.** Oracle contends defendants are liable for violating the following sections

3   of 18 U.S.C. § 1030 as it existed at the time of the conduct: 18 U.S.C. §§ 1030(a)(2)(C),

4   1030(a)(4), 1030(a)(5)(A)(i), 1030(a)(5)(A)(ii), 1030(a)(5)(A)(iii). Those sections prohibit

5   intentional, unauthorized access of Oracle's computers that results in obtaining or transmitting

6   information and causing harm to Oracle. Each of those sections gives rise to a separate claim.[26]

7   **2.   CDAFA.** Oracle contends that defendants are liable for violating California Penal

8   Code §§ 502(c)(2), 502(c)(3), 502(c)(6), and 502(c)(7). Each section establishes a separate

9   claim. Like the CFAA, the CDAFA prohibits intentional, unauthorized access to computer

10   systems or data. Oracle seeks to hold SAP AG and SAP America indirectly liable on these

11   claims. Section 502(c)(6) also provides direct liability for one who "assists" in a violation of that

12   subsection, and Oracle brings direct claims against SAP AG and SAP America on that basis as

13   well. SAP TN also has conceded liability on aspects of this claim.

14   **3.   Trespass to Chattels.** Oracle must prove that (i) Oracle owned the customer

15   support websites and access-restricted internet-based support systems accessed by SAP TN; (ii)

16   SAP TN intentionally and without authorization interfered with Oracle's use of its systems; and

17   (iii) SAP TN's unauthorized trespass and interference was a substantial factor in causing Oracle

18   damage. *See eBay, Inc. v. Bidder's Edge Inc.*, 100 F. Supp. 2d 1058, 1069-70 (N.D. Cal. 2000).

19   **4.   Breach of Contract.** SAP TN agreed to and breached plaintiff Oracle USA's

20   contractual Terms of Use. The Terms of Use imposed restrictions on how SAP TN could access

21   Oracle's websites, the purposes for which SAP TN could do so, and the extent to which and

22   circumstances in which SAP TN could use, disclose, download, copy, modify, or distribute the

23   materials on those websites. *See, e.g.*, *Craigslist, Inc. v. Naturemarket, Inc.*, 694 F. Supp. 2d

24   1039, 1059 (N.D. Cal. 2010) (holding that plaintiff adequately stated breach of contract based on

25   defendant clicking "accept" to terms of use for website).

26   _____

27   [26] SAP TN has conceded liability under § 1030(a)(2)(C). *See* Defendants' Opposition to
     Oracle's Mot. for Summary Judgment, Dkt. No. 670 at 14 n.5.

28

1   **5.   Oracle's Proof.** The evidence for these claims is substantially the same, and

2   defendants have already admitted some of the unlawful conduct.

3   Oracle provided unique usernames and passwords only to its paying maintenance

4   customers, and in this way limited access to its websites. When SAP TN employees obtained

5   access to Oracle's websites, they agreed to the Terms of Use. The Terms of Use are a valid

6   contract entered into by SAP TN. *See Craigslist*, 694 F. Supp. 2d at 1059; *see also* Order

7   Granting Motion to Dismiss, Dkt. No. 224 at 11 (holding that Oracle adequately pled contract

8   claim). The Terms of Use varied slightly over time, but always prohibited defendants from using

9   Oracle websites and data, including the updates and support materials on them, for their own

10   commercial purposes.

11   Contrary to the Terms of Use, and thus without authorization, SAP TN knowingly and

12   intentionally engaged in massive downloading from Oracle's websites, partly through use of

13   Titan. Access and use beyond what is "set forth in a user agreement constitute unauthorized use

14   under the CFAA." *eBay Inc. v. Digital Point Solutions, Inc.*, 608 F. Supp. 2d 1156, 1164 (N.D.

15   Cal. 2009). Titan's author, John Ritchie, admitted that Titan used expired log-in credentials,

16   transmitted commands to Oracle's systems seeking to download *all* of the support materials

17   available on them, slowed the performance of Oracle's computers, and caused them to crash.

18   Indeed, Mr. Ritchie compared Titan's effect on Oracle's servers to "denial-of-service attack, you

19   know, where you basically pound on a server so hard that nobody can get through to it."[27] Titan

20   also corrupted data that Oracle used from website access to support its customers. Oracle spent

21   over $300,000 in a single year to investigate and assess the damage to the systems and to restore

22   and protect its systems and data from further harm.

23   Defendants conceded in their Answer that many of these downloads were inappropriate,

24   and later admitted in response to Oracle's summary judgment motion that over one million of the

25   downloads violated the CFAA and CDAFA. Defendants' concessions are not surprising given

26   _____

27   [27] Ritchie Tr. 34:3-12; 145:7-147:15.

28

1 the testimony of SAP TN employees, who questioned the legality of this mass downloading at

2 the time. The unprecedented, coordinated attack on Oracle was a clear violation of the CFAA,

3 CDAFA, and the common law prohibition on trespass to chattels. Subject to the Court's ruling

4 on the pending summary judgment motions, the only remaining issue for trial is the extent of that

5 unlawful conduct and the measure of damages.

6   SAP TN also breached by cross-using Oracle support materials among customers, using

7 expired logins and fraudulently gaining access to Oracle's website.

8   **C.   Intentional/Negligent Interference With Prospective Economic Advantage**

9   Oracle asserts that all three defendants are directly liable for intentional and negligent

10 interference with prospective economic advantage. To establish these claims, Oracle must prove

11 all of the following: (i) Oracle had economic relationships with current and prospective

12 customers that would have resulted in a future benefit to Oracle; (ii) defendant knew or should

13 have known of those relationships, and that those relationships would be disrupted by its

14 intentional acts (or negligence); (iii) defendant engaged in wrongful conduct, either intentionally

15 or negligently; and (iv) defendant's conduct disrupted Oracle's relationships and caused harm to

16 Oracle. *See, e.g.*, *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1164-66 (2003)

17 (standard for intentional interference); *Avago Technologies U.S., Inc. v. Venture Corp. Ltd.*, No.

18 C 08-03248 JW, 2008 WL 5383367, at *7-8 (N.D. Cal. Dec. 22, 2008) (standard for negligent

19 interference). SAP AG and SAP America are liable for SAP TN's interference under the

20 secondary liability theories described in Section II.G.

21   "Wrongful conduct" means conduct that violated a statute, regulation or common law

22 duty, such as a violation of the CFAA, the CDAFA, or California Business and Professions Code

23 § 17200, or a breach of contract or trespass to chattels. *See, e.g.*, *Korea Supply Co.*, 29 Cal. 4th

24 at 1158-59. Given defendants' concessions to violations of the CFAA and CDAFA, wrongful

25 conduct has already been established.

26   As direct competitors of Oracle, each defendant was well aware of Oracle's relationships

27 with customers. Defendants knew that their actions would disrupt Oracle's business

28 relationships. That was the admitted goal of the TN acquisition, as made clear by candidly titled

1 documents like the "Q1 Oracle Disruption Plan."[28] SAP called TN a "strategic weapon" to be

2 used against Oracle. SAP executives pushed the acquisition of TN intending to disrupt Oracle's

3 business and to prevent Oracle from obtaining the value of the $11 billion PeopleSoft

4 acquisition, and then bankrolled the expansion of SAP TN across the globe.

5   Defendants interfered with the 358 customers who contracted with SAP TN by using

6 SAP TN to target those customers with illegal, but "urgent" downloading from Oracle and

7 improper use of Oracle's licensed software beyond mere copying. Defendants caused Oracle

8 substantial losses by diverting these customers from Oracle to SAP TN. SAP AG and SAP

9 America then used SAP TN to help entice these customers to switch to SAP enterprise software.

10   **D.   Unjust Enrichment**

11   Unjust enrichment is a claim to be decided by the jury. *See Lectrodryer v. SeoulBank*, 77

12 Cal.App.4th 723, 728 (Ct. App. 2000). There are two elements to the claim: (i) defendants

13 received a benefit; and (ii) defendants unjustly retained the benefit at Oracle's expense. *See, e.g.*,

14 *AccuImage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 958 (N.D. Cal. 2003)

15 (citing *Lectrodryer*, 77 Cal. App. 4th at 726). "[A] benefit is conferred not only when one adds

16 to the property of another, but also when one saves the other from expense or loss." *Ghirardo v.*

17 *Antonioli*, 14 Cal. 4th 39, 51 (1996). Thus, the term "benefit" includes the costs of development

18 of products that a defendant avoided as a result of its unjust conduct. *See, e.g.*, *Ajaxo Inc. v.*

19 *E*Trade Grp., Inc.*, 135 Cal. App. 4th 21, 56-57 (Ct. App. 2005) (affirming award based on

20 avoided development costs). Development of enterprise applications software is expensive and

21 risky. Defendants avoided those costs and risks. Oracle's expert, Paul Pinto, has estimated those

22 costs at $1.1 to $3.5 billion. Oracle may recover that unjust benefit.

23   **E.   Unfair Competition**

24   Each of the defendants violated Section 17200, which prohibits business practices that

25 are unlawful, fraudulent, or unfair. *See Cel-Tech Comm's, Inc. v. Los Angeles Cellular Tel. Co.*,

26 _____

27 [28] SAP-OR 00156241-242 (Exhibit 454); SAP-OR00004991-5007, at 998-5003 (Exhibit 225).

28

1   20 Cal. 4th 163, 180 (1992). This claim must be decided by the Court. The relief that Oracle

2   seeks is described in its Proposed Findings of Fact and Conclusions of Law for such claims, filed

3   simultaneously with this trial brief. The "'unlawful' practices prohibited by Section 17200 are

4   "any practices forbidden by law, be it civil or criminal, federal, state, or municipal, statutory,

5   regulatory, or court-made." *Saunders v. Superior Court*, 27 Cal. App. 4th 832, 838-39 (Ct. App.

6   1994). As a result of defendants' concessions to CFAA and CDAFA liability on summary

7   judgment, this element is already established. *See, e.g.*, *CRST Van Expedited, Inc. v. Werner*

8   *Enters., Inc.*, 479 F.3d 1099, 1107 (9th Cir. 2007).

9   **F.   Accounting**

10   Oracle seeks an accounting of the income and gross profits defendants obtained through

11   their wrongful conduct. This claim must be decided by the Court. The relief that Oracle seeks is

12   described in its Proposed Findings of Fact and Conclusions of Law. Oracle must prove that (i)

13   misappropriated of property to create a financial benefit; and (ii) money due to Oracle cannot be

14   ascertained without an accounting. *See, e.g.*, *Teselle v. McLoughlin*, 173 Cal. App. 4th 156, 179-

15   80 (Ct. App. 2009).

16   **G.   Indirect Liability for Non-Copyright Claims**

17   Indirect liability for copyright infringement is addressed above. Oracle will also establish

18   that SAP AG and SAP America are indirectly liable on non-copyright claims under four theories:

19   **1.   Agency.** SAP AG and SAP America are each indirectly liable for SAP TN's

20   unlawful conduct because all of the following are true: (i) SAP AG or SAP America manifested

21   an intent that SAP TN should act on their behalf; (ii) SAP TN accepted the undertaking to act on

22   SAP AG's and SAP America's behalf; and (iii) there was an understanding between the parties

23   that SAP AG and SAP America had control of SAP TN's undertaking. *See, e.g.*, *Sun*

24   *Microsystems, Inc. v. Hynix Semiconductor Inc.*, 622 F. Supp. 2d 890, 899 (N.D. Cal. 2009);

25   *Bowoto v. Chevron Texaco Corp.*, 312 F. Supp. 2d 1229, 1238-39 (N.D. Cal. 2004).

26   **2.   Conspiracy.** SAP AG and SAP America are each indirectly liable for SAP TN's

27   unlawful conduct because both of the following are true: (i) SAP AG or SAP America were

28   aware that SAP TN planned to commit one or more of the wrongful acts and (ii) SAP AG or

1 SAP America agreed with SAP TN and intended that one or more of the wrongful acts be

2 committed. *See, e.g.*, *Wyatt v. Union Mortgage Co.*, 24 Cal. 3d 773, 784 (1979) ("a plaintiff is

3 entitled to damages from those defendants who concurred in the tortious scheme with knowledge

4 of its unlawful purpose"). The existence of an agreement "may be inferred from the acts done,

5 the relation of the parties, the interests of the alleged conspirators, and other circumstances." *Id.*

6 at 785 (citation omitted).

7   **3.**   **Aiding and abetting.** SAP AG and SAP America are each indirectly liable for

8 SAP TN's unlawful conduct because all of the following are true: (i) SAP AG or SAP America

9 knew that the wrongful conduct was being committed by SAP TN against Oracle; (ii) SAP AG

10 or SAP America gave substantial assistance or encouragement to SAP TN; and (iii) the conduct

11 of SAP AG or SAP America was a substantial factor in causing harm to Oracle. *See, e.g.*,

12 *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1118 (C.D. Cal. 2003); *Saunders*, 27

13 Cal. App. 4th at 846.

14   **4.**   **Ratification.** SAP AG and SAP America are each indirectly liable for SAP TN's

15 unlawful conduct because all of the following are true: (i) SAP TN intended to act on behalf of

16 SAP AG or SAP America; (ii) SAP AG or SAP America learned of SAP TN's conduct after it

17 occurred; and (iii) SAP AG or SAP America approved SAP TN's conduct. *See, e.g.*, Cal. Civ.

18 Code § 2339; *Rakestraw v. Rodrigues*, 8 Cal. 3d 67, 73 (1972).

19 **III.**   **DEFENDANTS' AFFIRMATIVE DEFENSES**

20   Defendants have asked the jury to be instructed on four affirmative defenses, each

21 addressed below.

22   **1.**   **Statute of Limitations**: Defendants contend that Oracle's claims for copyright

23 infringement, violation of the CFAA and CDAFA, breach of contract, intentional and negligent

24 interference with prospective economic advantage, and trespass to chattels are barred in part by

25 statutes of limitation.[29]

26 ───────────────

27 [29] The specific statutes of limitation and their application are: copyright (three years, *see* 17
U.S.C § 507(b)); CFAA (two years, *see* 18 U.S.C. § 1030(g)); CDAFA (three years, *see* Cal.

28   (Footnote Continued on Next Page.)

PLAINTIFFS' TRIAL BRIEF

1   For the statute of limitations to apply, defendants must prove that Oracle actually knew or

2   should have known, through reasonable inquiry, of the specific conduct that was ultimately

3   challenged in this lawsuit, prior to the applicable limitations period. *See, e.g.*, *Polar Bear*

4   *Prods.,* 384 F.3d at 706 (statute does not bar damages if plaintiff unaware of infringement). As

5   described above, Oracle did not know, or have any reason to know, about the illegal conduct

6   alleged in this case until some time after November 2006. To be sure, Oracle did wonder how

7   SAP TN could offer such low prices without access to the software (and it did try to find out).

8   But Oracle never had any proof until it discovered that SAP TN was downloading massive

9   amounts of unlicensed materials from its servers in November 2006. In fact, because SAP TN

10   actively concealed its unlawful conduct, as described above, to prevent Oracle from discovering

11   its conduct or its role in causing Oracle's injury, the statute of limitations is tolled. *See Wood v.*

12   *Santa Barbara Chamber of Commerce, Inc.*, 705 F.2d 1515, 1521 (9th Cir. 1983) (fraudulent

13   concealment tolls statute as to copyright claims). All of defendants' statute of limitations

14   arguments thus fail.

15   Moreover, the statute does not bar a continuing course of conduct (as in this case) that

16   falls within the applicable statutory period. *See, e.g.*, *Roley v. New World Pictures, Ltd.*, 19 F.3d

17   479, 481 (9th Cir. 1994) (copyright claim may be brought for all acts that accrued within the

18   three years preceding the filing of the suit."). Consequently, as matter of law, defendants cannot

19   defeat *any* cause of action entirely based on a statute of limitations defense.

20   **2.   Waiver (asserted as to copyright**): Defendant have not asserted waiver as a

21   defense to any claim other than copyright. "Waiver is the intentional relinquishment of a known

22   right with knowledge of its existence and an intent to relinquish it." *A&M Records, Inc. v.*

23   *Napster, Inc.*, 239 F.3d 1004, 1026 (9th Cir. 2001) (citation omitted). Waiver of the right to sue

24   for copyright infringement "occurs only if there is an intent by the copyright proprietor to

25   (Footnote Continued from Previous Page.)

26   Penal Code § 502(e)(5); breach of contract (four years, *see* Cal. Code Civ. Proc. § 337);
     intentional / negligent interference with prospective economic advantage (two years, *see* Cal.
27   Code Civ. Proc. § 339); trespass to chattels (three years, *see* Cal. Code Civ. Proc. § 338).

28

1   surrender rights in his work." *Id.* (citation omitted). *See also Hampton v. Paramount Pictures*

2   *Corp.*, 279 F.2d 100, 104 (9th Cir. 1960) ("Abandonment of [copyrights], must be manifested by

3   some overt act indicative of a purpose to surrender the rights and allow the public to copy.")

4   Defendants cannot meet this standard. There is no evidence that Oracle intended to

5   "surrender" rights to its copyrighted works to SAP TN, or that Oracle ever intended to waive its

6   right to assert these claims. To the contrary, Oracle expressly limited access to and use of its

7   copyrighted materials in its website terms of use and customer licenses. *See, e.g.*, *Metro-*

8   *Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 518 F. Supp. 2d 1197, 1224-25 (C.D. Cal. 2007)

9   (rejecting waiver defense).

10   **3.   Laches (asserted as to copyright)**: Defendants propose that the jury be

11   instructed that it may find for defendants on Oracle's copyright infringement claim on the basis

12   of laches. Defendants do not assert laches as a defense to any other claim.

13   To establish a laches defense, defendants must prove "both an unreasonable delay by

14   plaintiff and a prejudice to itself." *McIntosh v. Northern Cal. Universal Enters. Co.*, 670 F.

15   Supp. 2d 1069, 1100 (E.D. Cal. 2009). Laches only applies where a plaintiff, "with full

16   knowledge of the facts, acquiesces in a transaction and sleeps upon his rights." *Danjaq LLC v.*

17   *Sony Corp.*, 263 F.3d 942, 950-951 (9th Cir. 2001) (internal quotations and citations omitted).

18   Further, laches is unavailable where the infringing conduct "occurs 'with knowledge that the

19   defendant's conduct constitutes copyright infringement.'" *Id.* at 952-957; see also *Stewart v.*

20   *Wachowski*, No. CV 03-2873 MMM, 2004 WL 5618385, at *6 (C.D. Cal. Sept. 28, 2004) (laches

21   unavailable to willful infringer).

22   Defendants cannot meet this standard. First, there was no unreasonable delay by Oracle.

23   Oracle promptly investigated and brought suit upon learning of SAP TN's infringement.

24   Second, that infringement continued for eighteen months after Oracle sued. No defense of laches

25   applies as to any of that ongoing conduct. Third, the infringement was willful, as all of the

26   defendants were well aware that SAP TN's copying infringed Oracle's copyrights. This is

27   demonstrated by, among other things, the instant message chats among SAP TN employees

28   admitting that "we all knew it was coming," and SAP's knowledge that it was "very likely" that

1   SAP TN was "using the software outside the contractual use rights" and "very likely" that Oracle

2   would sue. Laches cannot apply.

3   **4.   License (asserted as to copyright)**: Defendants claim that SAP TN had a license

4   to "use" Oracle's software. However, they have failed to identify any license that would apply to

5   any of the specific copies that Oracle has identified as infringing. On the basis of defendants'

6   failure to make such disclosures in discovery, Oracle has moved in limine to preclude any

7   evidence or argument in support of this claimed defense.

8   Moreover, defendants cannot establish the elements of their purported defense. To

9   establish a license defense, SAP TN must first prove it holds some license. *See Bourne v. Walt*

10   *Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995); *Michaels v. Internet Entm't Group, Inc.*, 5 F. Supp.

11   2d 823, 831, 834 (C.D. Cal. 1998). SAP TN had no license of its own, so instead it tries to rely

12   on (unidentified) licenses of its customers. SAP TN cannot determine which customer's CD was

13   used to make particular copies, so it cannot identify any license that would permit such copying.

14   Even if SAP TN succeeded in identifying the licensed customer for a given CD, it would avail

15   SAP TN nothing, for copyright licenses are not transferable unless they expressly say so, *see*

16   *Michaels*, 5 F. Supp. 2d at 834.

17   In any event, SAP TN engaged in conduct that was not permitted by any license.

18   Oracle's licenses imposed restrictions on who could make copies, where copies could be kept,

19   the purposes for which copies could be used. SAP TN's regular practice of developing

20   environments using one client's software to support other customers was not permitted by any

21   license, and SAP TN cannot show otherwise. *See, e.g.*, *S.O.S., Inc. v. Payday, Inc.*, 886 F.2d

22   1081, 1088 (9th Cir. 1989) (license is "assumed to prohibit any use not authorized").

23   **IV.   CONCLUSION**

24   Based on the evidence and argument that Oracle will present at trial, Oracle will seek

25   judgment against SAP TN, SAP AG, and SAP America, including compensatory damages in

26   excess of $2.1 billion, punitive damages, attorneys fees, and injunctive and equitable relief.

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                                              By: /s/ Geoffrey M. Howard
4   Geoffrey M. Howard
                                                         Attorneys for Plaintiffs
5   Oracle USA, Inc., Oracle International
                                              Corporation, Oracle EMEA Limited, and Siebel
6   Systems, Inc.

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