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

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

24 Plaintiffs,

25 v.

26 SAP AG, *et al.*,

27 Defendants.

No. 07-CV-01658 PJH (EDL)

**DECLARATION OF CHAD RUSSELL IN
 SUPPORT OF PLAINTIFFS' OPPOSITION
 TO DEFENDANTS' MOTIONS *IN LIMINE*
 [EXHIBITS D, N, P, Q, R, T FILED UNDER
 SEAL]**

Date: September 30, 2010
 Time: 2:30 pm
 Place: Courtroom 3, 3rd Floor
 Judge: Hon. Phyllis J. Hamilton

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<i>MOTION IN LIMINE NO. 1</i>	
A	SAP Press Release - “SAP Acts to Focus TomorrowNow Lawsuit,” dated August 5, 2010
B	Expert Report of Paul Meyer
C	Paul Meyer Deposition
D	Larry Ellison Deposition (portions FILED UNDER SEAL)
E	Safra Catz Deposition
F	Oracle 2005 10-K
G	Doug Kehring Deposition
H	Depo Ex. 595 - Oracle Corporation, Notes to Consolidated Financial Statements
I	Hasso Plattner Deposition
J	Expert Report of Stephen Clarke
<i>MOTION IN LIMINE NO. 2</i>	
K	Depo. Ex. 447 - A Roadmap for PSFT Customers to SAP
L	Depo. Ex. 225 - PeopleSoft 1-2-3
M	Depo. Ex. 2043 - SAP AG Phone Conference
N	ORCL00313255 - Project Spice, PeopleSoft Operating Model (FILED UNDER SEAL)
O	Initial Disclosures
P	Depo. Ex. 403 - Oracle Corporation, Estimation of the Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004 (FILED UNDER SEAL)

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Q	Depo. Ex. 401 - PeopleSoft, Inc., 2004 Forecast / 2005 Planning Model (FILED UNDER SEAL)
R	Depo. Ex. 591 - PeopleSoft, Inc., 2004 Forecast / 2005 Planning Model (FILED UNDER SEAL)
S	Charles Phillips Deposition
T	Paul Meyer Schedule 12.2.SU - Oracle Projected PeopleSoft/J.D. Edwards New License Revenue Losses, Projected 3,000 Lost Support Customers / 2,000 Switch to SAP - Lost New License Revenue (Cross-Sell) (FILED UNDER SEAL)
MOTION IN LIMINE NO. 4	
U	Paul Meyer's Handwritten Notes (portions redacted at Defendants' request)
MOTION IN LIMINE NO. 5	
V	John Baugh Deposition
W	Catherine Hyde Deposition (4/1/2008)
X	Catherine Hyde Deposition (5/12/2009)
Y	Discovery Conference Hearing Transcript
Z	Keith Shankle Deposition
AA	Depo. Ex. 1446 - Support Services Agreement (portions redacted at Defendants' request)
BB	Matthew Bowden Deposition
CC	Paul Pinto Deposition
MOTION IN LIMINE NO. 6	
DD	Chris Faye Deposition
EE	Andrew Nelson Deposition
MOTION IN LIMINE NO. 7	
FF	SAP Press Release - "SAP Responds to Oracle Complaint," dated July 3, 2007
GG	Mark White Deposition (3/5/2010)
HH	Mark White Deposition (3/6/2010)
MOTION IN LIMINE NO. 8	
II	Defendant's Motion to Compel No. 1
JJ	Defendants' Response to Oracle's Motion to Compel Seth Ravin and Rimini Street
MOTION IN LIMINE NO. 9	
KK	Depo. Ex. 473 - TomorrowNow Global Leadership Meeting
LL	Depo. Ex. 495 - Hyperion-Oracle
MM	Depo. Ex. 475 - Business Case: TomorrowNow - Hyperion, and Business Case: TomorrowNow - Oracle eBusiness Suite
NN	Gerd Oswald Deposition

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<i>MOTION IN LIMINE NO. 10</i>	
OO	SAP-OR00077786 - Questions about the Safe Passage Program
PP	Depo. Ex. 253 - How Close is "Too Close"?
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RR	Request for Admission No. 70
SS	Depo. Ex. 720 - URGENT
TT	Depo. Ex. 316 - TNow

1 I, Chad Russell, declare as follows:

2 1. I am an attorney at law licensed to practice in the State of California and
3 before this Court, and am an associate with at Bingham McCutchen LLP, counsel of record for
4 plaintiffs Oracle USA, Inc. (predecessor to Oracle America, Inc.), Oracle International
5 Corporation, Oracle EMEA Limited and Siebel Systems, Inc. (collectively “Oracle” or
6 “Plaintiffs”) in this action. I have personal knowledge of the facts stated below by virtue of my
7 representation of Oracle in this action and if called as a witness could competently testify as to
8 them.

9 2. The evidence described below and attached to this Declaration is grouped
10 according to the Motion in Limine Opposition to which the evidence relates, except that each
11 source is listed only once, and not repeated if cited in subsequent Opposition.

12 3. To the extent possible without losing context, Oracle has attached only the
13 relevant pages and information for all exhibits to this Declaration, including deposition
14 transcripts. Unless otherwise noted below for a particular document, all highlighting and red
15 circles/boxes in these exhibits has been provided by Oracle to further assist in identifying the
16 information relevant to Oracle’s Opposition to Defendants’ Motions *in Limine*.

17 **I. MIL NO. 1 RE GOODWILL**

18 4. Attached as Exhibit A is a true and correct copy of a document entitled “SAP
19 Acts to Focus TomorrowNow Lawsuit,” dated August 5, 2010, and printed from
20 <http://www.sap.com/usa/about/newsroom/press.epx?pressid=13722>. Oracle also filed this
21 document as Exhibit A to Oracle’s Trial Brief on August 5, 2010 (Dkt. 748-1).

22 5. Attached as Exhibit B is a true and correct copy of portions of the
23 Supplemental Expert Report of Paul K. Meyer, dated February 23, 2010.

24 6. Attached as Exhibit C is a true and correct copy of portions of the transcript of
25 the deposition of Paul Meyer, on May 12-14, 2010.

26 7. Attached as Exhibit D is a true and correct copy of portions of the transcript of
27 the deposition of Larry Ellison on May 5, 2009.

28 8. Attached as Exhibit E is a true and correct copy of portions of the transcript of

1 the deposition of Safra Catz on March 27, 2009.

2 9. Attached as Exhibit F is a true and correct copy of portions of a United States
3 Securities and Exchange Commission Form 10-K for Oracle Corporation, dated June 30, 2005,
4 and printed from http://www.oracle.com/corporate/investor_relations/10k_2005.pdf.

5 10. Attached as Exhibit G is a true and correct copy of portions of the transcript of
6 the deposition of Doug Kehring on August 28, 2009.

7 11. Attached as Exhibit H is a true and correct copy of portions of Defendants'
8 Deposition Exhibit 595, a document entitled "Oracle Corporation, Notes to Consolidated
9 Financial Statements."

10 12. Based on a review of the transcripts of the deposition of Paul Meyer on May
11 12-13, 2010, I estimate that Defendants spent approximately 2 hours of record time questioning
12 Mr. Meyer on the subject of goodwill.

13 13. Attached as Exhibit I is a true and correct copy of portions of the transcript of
14 the deposition of Hasso Plattner on June 2, 2009.

15 14. Attached as Exhibit J is a true and correct copy of portions of the Expert
16 Report of Stephen Clarke, dated May 7, 2010.

17 **II. MIL NO. 2 RE PRECLUDED LOST PROFITS**

18 15. Attached as Exhibit K is a true and correct copy of portions of an email and
19 attached PowerPoint produced on or about September 5, 2008 by Defendants and entitled "A
20 Roadmap for PSFT Customers to SAP." The email and PowerPoint were marked by Oracle as
21 Plaintiffs' Deposition Exhibit 447 in their originally-produced scanned "TIFF" form.

22 Defendants have since produced the native PowerPoint, excerpts of which are included in place
23 of the black-and-white images. In the chart at page SAP-OR00253288, the "Revenue" for
24 "Upswitch" and "CrossSell" for 2005, 2006, and 2007 sums to approximately \$557.7 million.

25 16. Attached as Exhibit L is a true and correct copy of portions of an email and
26 attached document produced on or about April 14, 2008 by Defendants and entitled "PeopleSoft
27 1-2-3," originally marked in their entirety as Plaintiffs' Deposition Exhibit 225.

28 17. Attached as Exhibit M is a true and correct copy of portions of a document

1 produced by Defendants on or about October 1, 2008 and entitled “SAP AG Phone Conference,”
2 originally marked in its entirety as Defendants’ Deposition Exhibit 2043.

3 18. Attached as Exhibit N is a true and correct copy of a portion of a document
4 entitled “Project Spice, PeopleSoft Operating Model,” and produced by Oracle in this action as
5 ORCL00313255.

6 19. Attached as Exhibit O is a true and correct copy of portions of Oracle’s
7 Supplemental and Amended Initial Disclosures, served on May 22, 2009.

8 20. Plaintiffs’ Deposition Exhibit 447 (attached as Ex. K and described at ¶ 15)
9 was the subject of testimony by the following SAP witnesses:

Witness	Date
Thomas Ziemen	September 30, 2008
Werner Brandt	November 12, 2008
Gerd Oswald	December 10, 2008
Shai Agassi	January 5, 2009

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14 21. Plaintiffs’ Deposition Exhibit 225 (attached as Ex. L and described at ¶ 16)
15 was the subject of testimony by the following SAP witnesses:

Witness	Date
Arlen Shenkman	June 4, 2008
John Zepecki	September 9, 2008
Jeffrey Word	December 11, 2008
Shai Agassi	January 5, 2009

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20 22. Attached as Exhibit P is a true and correct copy of portions of a document
21 produced by Oracle on or about February 6, 2009 entitled “Oracle Corporation, Estimation of the
22 Fair Value of Certain Assets and Liabilities of PeopleSoft, Inc. as of December 28, 2004,”
23 originally marked in its entirety as Defendants’ Deposition Exhibit 403.

24 23. Attached as Exhibit Q is a true and correct copy of portions of a document
25 produced by Oracle and entitled “PeopleSoft, Inc., 2004 Forecast / 2005 Planning Model,”
26 originally marked in its entirety as Defendants’ Deposition Exhibit 401.

27 24. Attached as Exhibit R is a true and correct copy of portions of a document
28

1 produced by Oracle and entitled “PeopleSoft, Inc., 2004 Forecast / 2005 Planning Model,”
2 originally marked in its entirety as Defendants’ Deposition Exhibit 591.

3 25. Attached as Exhibit S is a true and correct copy of portions of the transcript of
4 the deposition of Charles Phillips on April 17, 2009.

5 26. Attached as Exhibit T is a true and correct copy of a document entitled
6 “Oracle Projected PeopleSoft/J.D. Edwards New License Revenue Losses, Projected 3,000 Lost
7 Support Customers / 2,000 Switch to SAP - Lost New License Revenue (Cross-Sell),” produced
8 by Oracle on February 23, 2010 as part of Paul Meyer’s Supplement Expert Report (at Schedule
9 12.SU, 12.1.SU, 12.2.SU, 12.3.SU.xlsx); and an appended third page with the text of the “notes”
10 in the document enlarged. Documents cited in these notes are referenced in Oracle’s Opposition
11 and attached to this Declaration as follows:

Note	Bates	Defs’ Depo. Exhibit	Attached Exhibit	Paragraph
2	ORCL00313160- 253 at 189	403	P	22
4	ORCL00312843- 868 at 849	401	Q	23
4	ORCL00312843- 868 at 849	591	R	24
7	ORCL00313255	n/a	N	18

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19 **III. MIL NO. 3 RE NON-PARTY LOST PROFITS**

20 27. There is no evidence cited in this portion of Oracle’s opposition.

21 **IV. MIL NO. 4 RE SOMMER REPORT**

22 28. The Expert Report of Stephen Clarke, provided by Defendants on March 26,
23 2010 (when expert rebuttal reports were due per the Parties’ agreed upon and ordered Case
24 Management schedule), is single-spaced, and 294 pages long, not counting hundreds of
25 accompanying electronic files of various types (databases, excel spreadsheets, pdfs, etc.). The
26 Clarke Report cites to multiple other reports provided by Defendants’ experts. The Expert
27 Report of Brian Sommer, also provided by Defendants, is single-spaced and 61 pages long, not
28

1 counting Appendices.

2 29. Oracle's damages expert, Paul Meyer, made detailed notes on multiple pages
3 of Mr. Clarke's May 7, 2010 Supplemental Report and provided them to Defendants' counsel the
4 first morning of his May 10, 2010 deposition. Attached as Exhibit U is a true and correct copy of
5 a subset of those handwritten notes on the pages of Mr. Clarke's report referencing or related to
6 Mr. Sommer.

7 30. To my knowledge, after Mr. Meyer's deposition, Defendants never sought
8 further testimony from him related to the Expert Report of Brian Sommer, either through meet
9 and confer or motion practice.

10 **V. MIL "NO. 5"**

11 31. Attached as Exhibit V is a true and correct copy of portions of the transcript of
12 the deposition of John Baugh on February 7, 2008.

13 32. Attached as Exhibit W is a true and correct copy of portions of the transcript
14 of the deposition of Catherine Hyde on April 1, 2008. This deposition was pursuant to a Federal
15 Rule of Civil Procedure 30(b)(6) notice by Oracle.

16 33. Attached as Exhibit X is a true and correct copy of portions of the transcript of
17 the deposition of Catherine Hyde on May 12, 2009.

18 34. In its Initial Disclosures, served to Defendants on or about August 16, 2007,
19 Oracle identified employees Paul Brook, Uwe Koehler, Buffy Ransom, Edward Screven and
20 Marlene Veum as knowledgeable about "technical analysis." In its Supplemental and Amended
21 Initial Disclosures, served to Defendants on or about May 22, 2009, Oracle further identified
22 employees Sid Chilakapati, Jason Rice and Greg Story as knowledgeable about "technical
23 analysis." In its Second Supplemental and Amended Initial Disclosures, served to Defendants on
24 or about October 9, 2009, Oracle further identified employees Edward Abbo, Norm Ackermann,
25 Jesper Andersen, Dawn Baker, John Burke, Treasure Diehl, Larry Ellison, Alan Fletcher, Linda
26 Fowler, Marina Furey, Kim Green, Gary Greishaber, Charles Homs, George Jacob, Jason Kees,
27 Charles Rozwat, Keith Ryland, David Storn and Daniel Vardell as knowledgeable about
28 "technical analysis" and/or "software development," in addition to further identifying several of

1 the previously disclosed employees as knowledgeable about “software development.” In its
2 Third Supplemental and Amended Disclosures, served to Defendants on or about November 2,
3 2009, Oracle further identified Tanya Ishiguro as knowledgeable about “technical analysis.”
4 Defendants’ first deposition of any of any of the individuals identified above after their date of
5 disclosure was Elizabeth Shippy on September 25, 2008.

6 35. The fact discovery deadline in this case was set by the Court as December 4,
7 2009. On or about October 19, 2009, Defendants served four Federal Rule of Civil Procedure
8 30(b)(6) deposition notices to Oracle. Defendants stated by email On October 23, 2009 that they
9 “may seek to depose” twenty individuals identified in Oracle’s Initial Disclosures. On
10 November 5, 2009, Defendants added one more individual to the list “contained in [their]
11 October 23 email.”

12 36. Attached as Exhibit Y is a true and correct copy of portions of the transcript of
13 the November 17, 2009 Discovery Conference Hearing before Judge Laporte.

14 37. Up until October 23, 2009, Defendants had deposed approximately 39 Oracle
15 witnesses.

16 38. Pursuant the Court's November 18, 2009 Order (Dkt. 553), Oracle confirmed
17 which of Oracle's experts were relying on the witnesses Defendants identified. Defendants
18 deposed Daniel Vardell, Edward Screven, Greg Story, Linda Fowler, Jason Rice and Norm
19 Ackermann between November 25, 2009 and December 4, 2009.

20 39. Attached as Exhibit Z is a true and correct copy of portions of the transcript of
21 the deposition of Keith Shankle on June 16, 2009.

22 40. Attached as Exhibit AA is a true and correct copy of portions of a document
23 produced by Defendants entitled “Support Services Agreement,” marked by Oracle as Plaintiffs’
24 Deposition Exhibit 1446.

25 41. Attached as Exhibit BB is a true and correct copy of portions of the transcript
26 of the deposition of Matthew Bowden on December 5, 2008.

27 42. Attached as Exhibit CC is a true and correct copy of portions of the transcript
28 of the deposition of Paul Pinto on May 19, 2010.

1 43. To my knowledge, and excluding Defendant employees and former
2 employees, Defendants have never offered to provide reports or depositions for any individuals
3 who provided information to or otherwise assisted Defendants' experts.

4 **VI. MIL NO. 6 RE ATTORNEY-CLIENT PRIVILEGE**

5 44. Attached as Exhibit DD is a true and correct copy of portions of the transcript
6 of the deposition of Christopher Faye on October 22, 2008. Oracle designated this testimony in
7 its Deposition Designations for Trial, filed on August 5, 2010 (Dkt. 744).

8 45. Attached as Exhibit EE is a true and correct copy of portions of the transcript
9 of the deposition of Andrew Nelson on April 29, 2009. Oracle designated this testimony in its
10 Deposition Designations for Trial, filed on August 5, 2010 (Dkt. 744).

11 **VII. MIL NO. 7 RE INVESTIGATIONS BY THE DOJ AND FBI**

12 46. Attached as Exhibit FF is a true and correct copy of a document entitled "SAP
13 Responds to Oracle Complaint," dated July 3, 2007, and printed from
14 <http://www12.sap.com/global/templates/press.epx?pressid=7971&query=tomorrownow>.

15 47. Attached as Exhibit GG is a true and correct copy of portions of the transcript
16 of the deposition of Mark White on March 5, 2009.

17 48. Attached as Exhibit HH is a true and correct copy of portions of the transcript
18 of the deposition of Mark White on March 6, 2009.

19 **VIII. MIL NO. 8 RE RIMINI STREET**

20 49. Attached as Exhibit II is a true and correct copy of portions of Defendants'
21 Motion to Compel No. 1, filed on January 28, 2008 before Judge Legge.

22 50. Attached as Exhibit JJ is a true and correct copy of portions of Defendants'
23 Response to Oracle's Motion to Compel Seth Ravin and Rimini Street, filed in the District Court
24 of Nevada on September 14, 2009 (Dkt. 25).

25 **IX. MIL NO. 9 RE HYPERION, RETEK, AND E-BUSINESS SUITE**

26 51. Attached as Exhibit KK is a true and correct copy of portions of a document
27 produced by Defendants and entitled "TomorrowNow Global Leadership Meeting," dated
28 January 11, 2007. The document was marked by Oracle as Plaintiffs' Deposition Exhibit 473 in

1 its originally-produced scanned “TIFF” form. Defendants have since produced the native
2 PowerPoint, excerpts of which are included in place of the black-and-white images.

3 52. The “TomorrowNow Global Leadership Meeting” document (attached Exhibit
4 KK, *see* ¶ 51 above) describes the “Safe Passage Offering” as including “Recognition of your
5 previous investments (up to 75% license credit) in Oracle, PSFT, JDE, Siebel, or Retek” at page
6 SAP-OR00007485. The same page also describes the offering as including “Support for PSFT,
7 JDE or Siebel via SAP subsidiary, TomorrowNow.” Defendants’ production contains many
8 documents that similarly reference TomorrowNow, Safe Passage, and Hyperion, Retek or E-
9 Business. For instance, running a search for “TomorrowNow and Passage and Retek” in
10 documents produced by SAP (excluding documents attributed by Defendants to SAP TN) yields
11 approximately 3,828 results. Running the same search, but substituting Hyperion for Retek,
12 yields approximately 1,370 results.

13 53. Attached as Exhibit LL is a true and correct copy of an email chain produced
14 by Defendants re “Hyperion-Oracle,” marked by Oracle as Plaintiffs’ Deposition Exhibit 495.

15 54. Attached as Exhibit MM is a true and correct copy of portions of an email and
16 attached PowerPoints produced by Defendants and entitled “Business Case: TomorrowNow -
17 Hyperion” and “Business Case: TomorrowNow - Oracle eBusiness Suite.” The email, its
18 certified translation, and the PowerPoints in their originally-produced scanned “TIFF” form were
19 all originally marked as Plaintiffs’ Deposition Exhibit 475. Defendants have since produced the
20 native PowerPoints, excerpts of which are included in place of the black-and-white images.

21 55. Attached as Exhibit NN is a true and correct copy of portions of the transcript
22 of the deposition of Gerd Oswald on December 11, 2008.

23 **X. MIL NO. 10 RE SAP/TN**

24 56. Attached as Exhibit OO is a true and correct copy of a document produced by
25 Defendants and entitled “Questions about the Safe Passage Program,” produced by Defendants
26 as SAP-OR00077786 to SAP-OR00077788.

27 57. Attached as Exhibit PP is a true and correct copy of an email chain produced
28 by Defendants re “How Close is ‘Too Close’?” marked by Oracle as Plaintiffs’ Deposition

