EXHIBIT II

JONES DAY

555 CALIFORNIA STREET • 26TH FLOOR • SAN FRANCISCO, CALIFORNIA 94104-1500
TELEPHONE: 415-626-3939 • FACSIMILE: 415-875-5700

Direct Number: (415) 875-5820
jmcdonell@JonesDay.com

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VIA EMAIL AND HAND DELIVERY

Hon. Charles A. Legge (Ret.)
JAMS
Two Embarcadero Center, Suite 1500
San Francisco, CA 94111

Re: ***Oracle Corporation, et al. v. SAP AG, et al.***
Defendant's Motion to Compel No. 1

Dear Judge Legge:

Pursuant to the Stipulation Re Special Discovery Master Hearing and Briefing Procedures, TommorowNow, Inc. ("TN") submits this first motion to compel.[1]

INTRODUCTION

This case is about whether TN exceeded its customers' rights in downloading certain allegedly copyrighted "Software and Support Materials" ("SSMs"). That is not a matter of "corporate theft on a grand scale," as Oracle says, but a matter of contract interpretation.

The basic facts are less dramatic than presented by Oracle. Briefly, when customers licensed "enterprise software" applications from PeopleSoft or J.D. Edwards (now part of Oracle), they typically also purchased service contracts for annual fees. Pursuant to those contracts, the customers obtained the right to SSMs that are available on Oracle's "Customer Connection" website. Oracle, however, does not make it easy for its customers to determine what they have rights to use. As noted by one industry analyst, Oracle ships "new versions of the licensed software as well as software that a customer is not authorized to use, with full rights to download such software . . . As Oracle renames and rebundles its software products, it is often difficult to know which products were originally licensed."

"Third-party support" companies like TN compete with Oracle in providing support for PeopleSoft and JDE applications at lower prices than Oracle charges. Oracle is well-aware of the third-party support market and, in fact, has provided training to employees of third-party support companies, including TN, even after this case was filed. And, as Oracle conceded in its First Amended Complaint (the "Complaint"), the companies that provide third-party support may access Customer Connection to download SSMs on behalf of their customers.

[1] This motion addresses four categories of discovery. Defendants have numerous other categories of discovery for which they plan to move to compel in subsequent scheduled hearings.

The third-party support market is also relevant to the issue of damages. Oracle alleges that it lost customers as a result of improper downloads and "cross-use" of its intellectual property. That puts into issue the extent to which Oracle lost business to other third-party service providers and derivatively how those companies were doing business. It would be misleading and artificial for Oracle to pretend that it only lost customers to TN and only because of the allegedly excessive downloading by TN. Evidence that Oracle lost business to other third-party support providers will be directly relevant to prevent Oracle from taking that misleading position. It is also relevant to determine whether Oracle would have lost some or all of those customers to some other support vendor regardless of whether TN was in business

Under the Copyright Act, actual damages represent the injury to the market value of the copyrighted work at the time of infringement. 4 *Nimmer on Copyright* § 14.02(a) at 14-13 to 14-14. In appropriate circumstances, this amount is computed by determining what profits would have accrued to plaintiff *but for* the infringement. *Nimmer* §14.02(a)(1) at 14-14. Therefore, a plaintiff bears the burden of proving a *causal connection* between the infringement and actual damages, a requirement which is "akin to tort principles of causation and damages." *Polar Bear Productions, Inc. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir. 2004).[9] Thus, evidence that TN's customers could have or would have left Oracle with or without TN's activities presents a defense and discovery must be permitted into that area.

In searching for responsive documents, Oracle should be required, among other things, to search files related to *United States v. Oracle*, 31 F. Supp. 2d 1098 (N.D. Cal. 2004), which was the action by the Department of Justice seeking to prevent Oracle's acquisition of PeopleSoft on antitrust grounds. It stands to reason that Oracle would have collected and created documents concerning the market for third-party support in connection with that matter.

3. Copyrights (Requests Nos. 61, 63 & 87)

At its core, this is a copyright case premised on Oracle's "registered copyrights on the Software and Support Materials" allegedly infringed by TN. *See, e.g.*, Complaint, ¶ 83. Oracle has failed to produce discovery that will permit defendants to test the *bona fides* of Oracle's copyright claims.

Request No. 61 seeks documents that have any tendency to support or refute any of the facts set forth in the federal copyright registrations for Oracle's alleged Registered Works. Oracle has refused to produce any documents in response to this request. This is a very finite request. If, for example, Oracle has documents that question the validity of its copyrights or contradict any representation it made to the Copyright Office in connection with its copyright applications, they are indisputably relevant and important, and Oracle has no legitimate basis to resist their production.

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[9] In *Polar Bear*, plaintiff granted defendant a license to use their video footage of extreme kayakers. Defendant exceeded the scope of the license, and plaintiff brought a §504(b) action. Plaintiff argued that but for defendant's infringement, it would have earned the necessary funds to produce other outdoor adventure videos which would have yielded profits. The court rejected this theory of liability as "too pie-in-the-sky" and found that plaintiffs failed to establish a legally sufficient causal link between infringement and damages.