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 SAP AG, SAP AMERICA, INC., and
 18 TOMORROWNOW, INC.

19 UNITED STATES DISTRICT COURT
 20 NORTHERN DISTRICT OF CALIFORNIA
 21 OAKLAND DIVISION

22 ORACLE USA, INC., et al.,

23 Plaintiffs,

24 v.

25 SAP AG, et al.,

26 Defendants.

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

**DECLARATION OF SCOTT W.
 COWAN IN SUPPORT OF
 DEFENDANTS' OBJECTIONS TO
 THE DECLARATIONS OF DANIEL
 LEVY**

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

1 I, Scott W. Cowan, declare as follows:

2 (1) I am a partner in the law firm of Jones Day, 717 Texas, Suite 3300, Houston,
3 Texas 77002, and counsel of record for Defendants SAP AG, SAP America, Inc. (together,
4 “SAP”), and TomorrowNow, Inc. (“TN”) (collectively, “Defendants”) in the above-captioned
5 action. I am a member in good standing of the State Bar of Texas, all federal district courts in
6 Texas, and the United States Courts of Appeal for the Third, Fourth, Fifth, Ninth and Eleventh
7 Circuits. I am also admitted *pro hac vice* in this matter. I make this declaration based on
8 personal knowledge and, if called upon to do so, could testify competently thereto.

9 **A. Time Calculations**

10 (2) On August 19, 2010, Plaintiffs filed declarations from Daniel Levy in support of
11 Plaintiffs’ motions to exclude the expert testimony of Clarke and Spencer. *See* Declaration of
12 Daniel S. Levy, Ph.D. In Support of Motion No. 1: To Exclude Testimony of Defendants’ Expert
13 Stephen Clarke (declaration filed under seal in support of D.I. 781) (“Levy Declaration In
14 Support of Motion No. 1 to Exclude Clarke”) and Declaration of Daniel S. Levy In Support of
15 Oracle’s Motion No. 6: To Exclude Testimony of Defendants’ Expert Bruce Spencer (declaration
16 filed as D.I. 779 in support of D.I. 773) (“Levy Declaration In Support of Motion No. 6 to
17 Exclude Spencer”).

18 (3) The deadline to serve expert reports was on November 16, 2009. *See* D.I. 325
19 (Stip. Rev. Case Mgt. & Pretrial Order) at 1. By counting the days between November 16, 2009
20 and August 19, 2010, I determined that the Levy declarations were filed 276 days after this date.

21 (4) The deadline to serve rebuttal expert reports was on March 26, 2010. *See* D.I. 586
22 (Stip. & Order to Ext. Time for Exp. Disc.) at 1. By counting the days between March 26, 2010
23 and August 19, 2010, I determined that the Levy declarations were filed 146 days after rebuttal
24 expert reports were due.

25 (5) Levy was deposed on April 30, 2010. *See* Ex. A (Levy Tr.) (indicating the
26 deposition was conducted on April 30, 2010). By counting the days between April 30, 2010 and
27 August 19, 2010, I determined that the Levy declarations were filed 111 days after Levy’s
28 deposition.

1 (6) Spencer was deposed on June 4, 2010. *See* Ex. B (Spencer Tr.) (indicating the
2 deposition was conducted on June 4, 2010). By counting the days between June 4, 2010 and
3 August 19, 2010, I determined that the Levy declarations were filed 76 days after Spencer’s
4 deposition.

5 (7) Clarke was deposed on June 8-10, 2010. *See* Ex. C (Clarke Tr.) (indicating the
6 deposition was conducted on June 8-10, 2010) and Levy Declaration In Support of Motion No. 1
7 to Exclude Clarke ¶ 3 (indicating Levy considered the June 10 deposition). By counting the days
8 between June 10, 2010 and August 19, 2010, I determined that the Levy declarations were filed
9 70 days after Clarke’s deposition.

10 (8) The deadline for expert discovery was June 18, 2010. *See* D.I. 586 (Stip. & Order
11 to Ext. Time for Exp. Disc.) at 1. By counting the days between June 18, 2010 and August 19,
12 2010, I determined that the Levy declarations were filed 62 days after this deadline.

13 (9) The Pretrial Conference is scheduled for September 30, 2010. *See* D.I. 325 (Stip.
14 Rev. Case Mgt. & Pretrial Order) at 2. By counting the days between August 19, 2010 and
15 September 30, 2010, I determined that the Levy declarations were filed only 42 days before the
16 Pretrial Conference.

17 (10) The trial is scheduled to commence on November 1, 2010. *See* D.I. 325 (Stip.
18 Rev. Case Mgt. & Pretrial Order) at 2. By counting the weeks between August 19, 2010 and
19 November 1, 2010, I determined that the Levy declarations were filed approximately 10 weeks
20 before the trial is scheduled to commence.

21 **B. Timeline**

22 (11) The suit was filed on March 22, 2007. *See* D.I. 1 (Complaint for Damages).

23 (12) The deadline to designate expert witnesses was October 2, 2009. *See* D.I. 325
24 (Stip. Rev. Case Mgt. & Pretrial Order) at 1. Plaintiffs’ expert disclosures stated that: “Dr. Levy
25 will testify about statistical analyses used to extrapolate occurrences and rates of infringement or
26 misuse of Oracle’s intellectual property, from a sample to a larger population.” *See* Ex. D
27 (Oracle’s Initial Exp. Discl.) at 1; Ex. E (Oracle’s Supp. Initial Exp. Discl. served on October 16,
28 2009) at 1.

1 (13) The deadline to serve expert reports was November 16, 2009. *See* D.I. 325 (Stip.
2 Rev. Case Mgt. & Pretrial Order) at 1. In the report, Levy expressly states:

3 I have been retained by counsel for the Plaintiffs . . . to design a
4 statistically valid sample of [] TN's PeopleSoft HRMS payroll tax
5 and regulatory Updates that can be used to scientifically estimate the
6 number of Fixes delivered to customers by [] TN that infringe Oracle
7 copyrights or otherwise resulted from impermissible cross-use of
8 Oracle's software.

9 *See* Ex. F (Levy Report) at 7.

10 (14) The deadline to designate rebuttal expert witnesses was January 22, 2010.
11 *See* D.I. 325 (Stip. Rev. Case Mgt. & Pretrial Order) at 1. Levy was not disclosed as a
12 rebuttal expert witness.

13 (15) Oracle submitted two supplemental expert reports and data modifying
14 Levy's original report on February 5, 2010 and February 12, 2010. *See* Exs. G-H (Levy
15 Reports & Cover Letters). These supplemental reports contained the same statement as
16 the November 16, 2009 report cited above. *See id.*

17 (16) On March 26, 2010, Defendants served the expert reports of Clarke and
18 Spencer.

19 (17) On April 28, 2010, Levy produced sur-rebuttal materials in response to
20 Spencer's rebuttal opinions. *See* Ex. I (Sherrod Letter).

21 (18) On April 30, 2010, Levy was deposed. *See* Ex. A (Levy Tr.). Levy stated
22 that he was "attempting to design a statistically valid sample of TomorrowNow's
23 PeopleSoft HRMS payroll tax and regulatory updates or fixes." *See* Ex. A (Levy Tr.) at
24 40:24-41:7. Further, he stated that his "opinions only relate to PeopleSoft HRMS payroll
25 product line and module." *See* Ex. A (Levy Tr.) at 42:25-43:6. He also expressly stated:
26 **"Q: And you're not offering any opinions about economic damages here. Correct?**
27 **A: That's correct. I'm not."** *See* Ex. A (Levy Tr.) at 25:18-20 (emphasis added).

28 (19) On May 7, 2010, Clarke served a supplemental expert report, which Levy

1 states that he reviewed for his declaration. *See* Levy Declaration In Support of Motion
2 No. 1 to Exclude Clarke ¶ 3.

3 (20) On June 4, 2010 Spencer was deposed. *See* Ex. B (Spencer Tr.)
4 (indicating the deposition date).

5 (21) In a June 7, 2010 e-mail, Plaintiffs' counsel Geoff Howard accepted
6 Defendants' "proposed filing date of August 19 [2010] for Daubert motions. . . ."

7 (22) On June 8-10, 2010, Clarke was deposed. *See* Ex. I (Clarke Tr.)
8 (indicating the deposition date). Levy states that he reviewed the June 10 transcript for
9 his declaration. Levy Declaration In Support of Motion No. 1 to Exclude Clarke ¶ 3.

10 (23) On June 18, 2010, expert discovery closed after more than 8 months from
11 the time the first expert designations were made on October 2, 2009. *See* D.I. 586 (Stip.
12 & Order to Ext. Time for Exp. Disc.) at 1.

13 (24) On August 19, 2010, the date the parties agreed to file *Daubert* motions,
14 Plaintiffs filed the two declarations at issue here. *See* Levy Declaration In Support of
15 Motion No. 1 to Exclude Clarke and Levy Declaration In Support of Motion No. 6 to
16 Exclude Spencer. In Plaintiffs' Motion to Exclude Spencer (D.I. 773) on page 8,
17 Plaintiffs expressly state: "Levy's analysis, as noted above, *was about liability, not*
18 *damages.*" (emphasis added).

19 **C. Attached Exhibits**

20 (25) Attached as Exhibit A are true and correct copies of the following excerpts from
21 the April 30, 2010 Daniel Levy Deposition: 25:18-20, 40:24-43:6.

22 (26) Attached as Exhibit B are true and correct copies of the cover and signature pages
23 of the June 4, 2010 Bruce Spencer Deposition.

24 (27) Attached as Exhibit C are true and correct copies of the cover and signature pages
25 of the June 8-10, 2010 Stephen Clarke Deposition.

26 (28) Attached as Exhibit D is a true and correct copy of Oracle's Initial Expert
27 Disclosures produced to Defendants on October 2, 2009.

28 (29) Attached as Exhibit E is a true and correct copy of Oracle's Supplemental Initial

1 Expert Disclosures produced to Defendants on October 16, 2009.

2 (30) Attached as Exhibit F is a true and correct copy of the November 16, 2009 Expert
3 Report of Daniel Levy, which was served by Plaintiffs in this case.

4 (31) Attached as Exhibit G is a true and correct copy of the February 5, 2010 Expert
5 Report of Daniel Levy and corresponding cover letter, which was served by Plaintiffs in this case.

6 (32) Attached as Exhibit H is a true and correct copy of the February 12, 2010 Expert
7 Report of Daniel Levy and corresponding cover letter, which was served by Plaintiffs in this case.

8 (33) Attached as Exhibit I is a true and correct copy of a letter sent from Plaintiff's
9 counsel, Joy Sherrod, on April 28, 2010.

10 (34) Attached as Exhibit J is a true and correct copy of *Luke v. Family Care and Urgent*
11 *Med. Clinics*, 323 Fed. Appx. 496 (9th Cir. 2009).

12 I declare under penalty of perjury under the laws of the United States and the State of
13 California that the foregoing is true and correct. Executed this 9th day of September, 2010 in
14 Houston, Texas.

15 /s/ Scott W. Cowan
16 Scott W. Cowan

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