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 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 ELAINE  
 WALLACE IN SUPPORT OF  
 DEFENDANTS' OPPOSITION TO  
 PLAINTIFFS' MOTION NO. 1 TO  
 EXCLUDE EXPERT TESTIMONY OF  
 STEPHEN K. CLARKE [AMENDED]**

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

AMENDED WALLACE DECLARATION ISO DEFS' OPP. TO  
 PLFS.' MOT. TO EXCLUDE EXPERT TEST. OF CLARKE  
 Case No. 07-CV-1658 PJH (EDL)

1 I, ELAINE WALLACE, declare as follows:

2 I am an attorney in the law firm of Jones Day, 555 California St., 26th Floor, San  
3 Francisco, California 94104, and counsel of record for Defendants SAP AG, SAP America, Inc.  
4 (together, "SAP"), and TomorrowNow, Inc. ("TN") (collectively, "Defendants") in the above-  
5 captioned matter. I am a member in good standing of the state bar of California and admitted to  
6 practice before this Court. I make this declaration based on personal knowledge and, if called  
7 upon to do so, could testify competently thereto.

8 1. Attached as **Exhibit 1** is a true and correct copy of excerpts from the supplemental  
9 Expert Report of Stephen K. Clarke dated May 7, 2010 ("Clarke Report"). The original report  
10 was served on Plaintiffs on March 26, 2010. The relevant pages of the Clarke Report are: 22, 90-  
11 95, 157-58, 201-235, 294.

12 2. Attached as **Exhibit 2** is a true and correct copy of excerpts from the Deposition of  
13 Paul K. Meyer dated May 12, 2010. The relevant pages are: 137:15-150:12, 153:10-19.

14 3. Attached as **Exhibit 3** is a true and correct copy of excerpts from the Deposition of  
15 Stephen K. Clarke dated June 9, 2010. The relevant pages are: 361:16-362:10, 375:10-381:21,  
16 385:25-386:13, 396:10-400:19, 452:16-454:8, 459:11-25, 630:10-635:4.

17 4. Attached as **Exhibit 4** is a true and correct copy of Plaintiffs' deposition exhibit  
18 608, including only the cover page SAP-OR00136760, page SAP-OR00136764, and a legible  
19 substitution for SAP-OR00136764. These pages come from a powerpoint presentation titled  
20 "Business Case TomorrowNow 2006" and dated November 16, 2005.

21 5. Attached as **Exhibit 5** is a true and correct copy of Plaintiffs' deposition exhibit  
22 436, including only the cover page SAP-OR0014570 and SAP-OR00141571. These pages come  
23 from a powerpoint presentation titled "Supervisory Board Meeting TomorrowNow Status  
24 Update" and dated February 2007.

25 6. Attached as **Exhibit 6** is a true and correct copy of excerpts from the Deposition of  
26 Werner Brandt dated November 13, 2008. The relevant pages are: 262:15-263:17, 273:19-276:7.

27 7. Attached as **Exhibit 7** is a true and correct copy of excerpts from the Deposition of  
28 Stephen K. Clarke dated June 8, 2010. The relevant pages are: 24:23-28:18, 103:3-104:2, 107:2-

1 108:2, 112:1-116:13, 124:1-136:17, 139:20-141:15, 158:17-163:25.

2 8. Attached as **Exhibit 8** is a true and correct copy of excerpts from the Deposition of  
3 Stephen K. Clarke dated June 10, 2010. The relevant pages are: 659:18-664:5, 807:23-810:1,  
4 929:13-930:12.

5 9. Attached as **Exhibit 9** is a true and correct copy of excerpts from the Deposition of  
6 Brian S. Sommer dated June 25, 2010. The relevant pages are: 206:1-208:4, 330:3-332:14.

7 10. Attached as **Exhibit 10** is a true and correct copy of excerpts from the Deposition  
8 of Paul K. Meyer dated May 13, 2010. The relevant pages are: 572:3-575:5.

9 11. Attached as **Exhibit 11** is a true and correct copy of an email between Holly  
10 House and myself dated December 8, 2009.

11 12. Attached as **Exhibit 12** is a true and correct copy of a declaration signed on April  
12 5, 2010 by Richard L. Ball of Standard Register Company and marked as Defendants' Deposition  
13 Exhibit 2047.

14 13. Attached as **Exhibit 13** is a true and correct copy of a declaration signed on April  
15 30, 2010 by Bill Short of Amsted Rail Company and marked as Defendants' Deposition Exhibit  
16 2048.

17 14. Attached as **Exhibit 14** is a true and correct copy of a declaration signed on May  
18 4, 2010 by Daniel A. Clark of NewPage Corporation and marked as Defendants' Deposition  
19 Exhibit 2042.

20 15. Attached as **Exhibit 15** is a true and correct copy of a declaration signed on May  
21 10, 2010 by Andre Birrenbach of Rotkäppchen Sektkellerei GmbH and marked as Defendants'  
22 Deposition Exhibit 2041.

23 16. Attached as **Exhibit 16** is a true and correct copy of a declaration signed on July  
24 27, 2010 by Ann Harten of Haworth and produced by Stephen K. Clarke as SAP-SKC-118356-  
25 57.

26 17. Attached as **Exhibit 17** is a true and correct copy of a declaration signed on July  
27 21, 2009 by Gary Gates of Amsted Rail Company and produced by Paul K. Meyer as ORCLX-  
28 NAV-00058.

1           18. Attached as **Exhibit 18** is a true and correct copy of a declaration signed on  
2 November 11, 2009 by Richard L. Ball of Standard Register Company and produced by Paul K.  
3 Meyer as ORCLX-NAV-00063.

4           19. Attached as **Exhibit 19** is a true and correct copy of a declaration signed on March  
5 4, 2010 by Kathy Sauer of Cowlitz County, Washington and marked as Defendants' Deposition  
6 Exhibit 2049.

7           20. Attached as **Exhibit 20** is a true and correct copy of excerpts from the Deposition  
8 of Richard Allison dated November 12, 2009. The relevant pages are: 215:17 – 216:1.

9           21. Attached as **Exhibit 21** is a true and correct copy of Plaintiffs' deposition exhibit  
10 3210, bates labeled ORCL00670717-26. It is a blank Oracle License and Services Agreement  
11 ("OLSA").

12           22. Attached as **Exhibit 22** is a true and correct copy of excerpts from the  
13 Supplemental Expert Report of Paul K. Meyer dated February 23, 2010. The relevant paragraphs  
14 are: **91-95, 157-58**, 166-167, 252.

15           23. Attached as **Exhibit 23** is a true and correct copy of *Bowling v. Hasbro, Inc.*, No.  
16 05-229, 2008 U.S. Dist. LEXIS 30043 (D.R.I. Mar. 17, 2008).

17           24. Attached as **Exhibit 24** is a true and correct copy of *Burnham v. United States*, No.  
18 CV-07-8017, 2009 U.S. Dist. LEXIS 62602 (D. Ariz. Jul. 20, 2009).

19           25. Attached as **Exhibit 25** is a true and correct copy of *Capitol Justice LLC v.*  
20 *Wachovia Bank, N.A.*, No. 07-2095, 2009 U.S. Dist. LEXIS 126573 (D.D.C. Dec. 8, 2009).

21           26. Attached as **Exhibit 26** is a true and correct copy of *Gray v. United States*, No. 05-  
22 CV-1893, 2007 U.S. Dist. LEXIS 17937 (S.D. Cal. Mar. 12, 2007).

23           27. Attached as **Exhibit 27** is a true and correct copy of *Humphreys v. Regents of Univ.*  
24 *of Cal.*, No. C-04-03808, 2006 U.S. Dist. LEXIS 47822 (N.D. Cal. Jul. 6, 2006).

25           28. Attached as **Exhibit 28** is a true and correct copy of *International Business*  
26 *Machines Corp. v. Fasco Indus., Inc.*, No. C-93-20326, 1995 WL 115421 (N.D. Cal. Mar. 15,  
27 1995).

28           29. Attached as **Exhibit 29** is a true and correct copy of *Indus. Automation Supply*,

1 *LLC v. United Rentals Highway Techs.*, No. 3:04-CV-99, 2006 WL 5219390 (D. N.D. Feb. 8,  
2 2006).

3 30. Attached as **Exhibit 30** is a true and correct copy of *Luke v. Family Care and*  
4 *Urgent Med. Clinics*, 323 Fed. Appx. 496 (9th Cir. 2009).

5 31. Attached as **Exhibit 31** is a true and correct copy of *Maionchi v. Union Pacific*  
6 *Corp.*, No. C-03-0647, 2007 U.S. Dist. LEXIS 53169 (N.D. Cal. Jul. 9, 2007).

7 32. Attached as **Exhibit 32** is a true and correct copy of *MMI Realty Servs., Inc. v.*  
8 *Westchester Surplus Lines Ins. Co.*, No. 07-00466, 2009 U.S. Dist. LEXIS 18379 (D. Haw.  
9 Mar. 10, 2009).

10 33. Attached as **Exhibit 33** is a true and correct copy of *Powell v. Carey Int'l, Inc.*,  
11 No. 05-21395, 2007 WL 1068487 (S.D. Fla. Apr. 9, 2007).

12 34. Attached as **Exhibit 34** is a true and correct copy of *SEC v. Badian*, No. 06-Civ-  
13 2621, 2009 U.S. Dist. LEXIS 120951 (S.D.N.Y. Dec. 22, 2009).

14 35. Attached as **Exhibit 35** is a true and correct copy of *Secure Energy, Inc. v. Coal*  
15 *Synthetics, LLC*, No. 4:08CV1719, 2010 U.S. Dist. LEXIS 41120 (E.D. Mo. Apr. 27, 2010).

16 36. Attached as **Exhibit 36** is a true and correct copy of *United States v. 14.3 Acres of*  
17 *Land*, No. 07CV886, 2008 U.S. Dist. LEXIS 66667 (S.D. Cal. Aug. 29, 2008).

18 I declare under penalty of perjury under the laws of the United States and the State of  
19 California that the foregoing is true and correct. Executed on this 10th day of September, 2010 in  
20 San Francisco, California.

21  
22 /s/ Elaine Wallace

23 Elaine Wallace  
24  
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26

27 SFI-649577v1  
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