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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

23

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

25   Plaintiffs,
   v.

26 SAP AG, *et al.*,

27   Defendants.

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Case No. 07-CV-01658 PJH (EDL)	
AMENDED JOINT PROPOSED JURY INSTRUCTIONS	
Date:	September 30, 2010
Time:	9:30 a.m.
Place:	3rd Floor, Courtroom 3
Judge:	Hon. Phyllis J. Hamilton

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

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

JOINT PROPOSED PRELIMINARY AND FINAL JURY INSTRUCTIONS

1

2   Pursuant to the Court's Pretrial Instructions and this Court's September 13, 2010

3   Order on pretrial issues (Dkt. No. 867), Plaintiffs Oracle USA, Inc., Oracle International

4   Corporation, and Siebel Systems, Inc. (collectively, "Oracle") and Defendants SAP AG, SAP

5   America, Inc., and TomorrowNow, Inc. (collectively, "Defendants," and with Oracle, the

6   "Parties") submitted joint, separate, and competing Proposed Preliminary and Final Jury

7   Instructions to the Court on August 5, 2010. *See* Dkt. No. 747. In light of the Court's recent

8   order on the Parties' motions for partial summary judgment (Dkt. No. 762) and the Parties' Trial

9   Stipulation and Order (Dkt. No. 866), the Parties have met and conferred extensively in an effort

10   to narrow the disputes relating to those previously submitted instructions. As a result of those

11   discussions, the Parties hereby submit the following revised sets of joint, separate, and

12   competing Proposed Preliminary and Final Jury Instructions, which contain approximately 100

13   fewer instructions submitted and many fewer instructions disputed, which disputes the Parties

14   hope to further narrow.

15   As with their August 5, 2010 instructions, the Parties submit "Preliminary

16   Instructions," which the Parties propose the Court read to the jury at the beginning of the case.

17   Second, the Parties submit "Final Instructions," which the Parties propose the Court read before

18   the jury begins its deliberations. The Parties submit both sets of jury instructions in the order in

19   which the Parties request they be read to the jury.

20   Additionally, the Parties again indicate whether each jury instruction is joint,

21   separate, or competing both in the preceding Tables of Contents as well as on the face of each

22   instruction. For example, when an instruction is jointly proposed, the instruction will state

23   "Proposed Instruction No. __ (Joint)" at the top right of the page. Where the Parties have

24   proposed competing instructions, the Parties have labeled the instruction either "Proposed

25   Instruction No. __ (Plaintiffs)" or "Proposed Instruction No. __ (Defendants)" at the top right of

26   the page. The Parties submit competing instructions and unilaterally proposed instructions

27   subject to, and without waiving, the non-sponsoring party's objections. Finally, to facilitate the

28   Court's review of the Parties' competing instructions, in the Final Jury Instructions, the Parties

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

1   grouped together competing sets of topically-related instructions into "modules." The Parties

2   have provided cover pages to identify whether the "module" is Oracle's or Defendants' proposed

3   "module."

4   The Parties will continue to meet and confer to further narrow the disputed issues

5   and to incorporate any guidance provided by the Court at the September 30, 2010 pretrial

6   conference.

7   DATED: September 23, 2010   Bingham McCutchen LLP

8

9

10   By: /s/ Zachary J. Alinder
                                                            Zachary J. Alinder
11   Attorneys for Plaintiffs
                                                    Oracle USA, Inc., Oracle International
12   Corporation, and Siebel Systems, Inc.

13   In accordance with General Order No. 45, Rule X, the above signatory attests that

14   concurrence in the filing of this document has been obtained from the signatory below.

15   DATED: September 23, 2010   JONES DAY

16

17

18   By: /s/ Tharan Gregory Lanier
                                                            Tharan Gregory Lanier
19   Attorneys for Defendants
                                                    SAP AG, SAP America, Inc.,
20   and TomorrowNow, Inc.

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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Proposed Instruction No. 3 (Plaintiffs)

<u>**PARTIES, CLAIMS AND DEFENSES**</u>

3   To help you follow the evidence, I will give you a brief summary of who the

4   parties are and the positions of the parties:

5   There are three plaintiffs: Oracle USA, Inc. (which I will refer to as "Oracle

6   USA"), Oracle International Corporation (which I will refer to as "Oracle International"), and

7   Siebel Systems, Inc. (which I will refer to as "Siebel Systems"). I will refer to these three

8   entities collectively as "Plaintiffs" or "Oracle." Oracle develops, manufactures, markets,

9   distributes and services computer software designed to help its customers manage their business

10   operations. Oracle's software offerings include database, middleware, and applications software

11   programs.

12   There are three defendants: SAP AG, SAP America, Inc. (which I will refer to as

13   "SAP America") and TomorrowNow, Inc. (which I will refer to as "TomorrowNow"). I will

14   refer to these three entities collectively as "Defendants" or "SAP." SAP AG is the world's

15   largest provider of business software. SAP AG develops, manufactures, markets and distributes

16   a portfolio of business software, technology, and related services and support to companies of all

17   sizes and industries. SAP America is also a Defendant in this case and is a wholly-owned

18   subsidiary of SAP AG. Defendant TomorrowNow is a wholly-owned subsidiary of SAP

19   America that provided software support services for certain brands of enterprise application

20   software.

21   Two events happened in January 2005 that are important to your consideration of

22   this case. First, Oracle finalized the acquisition of an enterprise software company known as

23   PeopleSoft. By acquiring PeopleSoft, Oracle also acquired both the PeopleSoft and J.D.

24   Edwards brands of software, because PeopleSoft had previously acquired J.D. Edwards & Co.

25   The second relevant event in January 2005 is that SAP AG acquired defendant

26   TomorrowNow as a wholly-owned subsidiary through SAP America. TomorrowNow was

27   headquartered in Bryan, Texas, and it provided software support services for customers using

28   PeopleSoft and J.D. Edwards software.

1   Oracle brought ten distinct claims against Defendants. As I will describe in a

2   later instruction, the Parties have stipulated that TomorrowNow is liable for all of these claims.

3   First, that the Parties stipulated that TomorrowNow infringed Oracle's copyrights.

4   A copyright is the exclusive right to copy a protected work, which includes the exclusive right to

5   reproduce the copyrighted work, prepare derivative works based on the copyrighted work,

6   publicly display the copyrighted work, and to distribute copies of either the copyrighted work or

7   unauthorized derivative works. The Parties agree that TomorrowNow infringed Oracle's

8   copyrights by downloading, reproducing, creating derivative works, publicly displaying and

9   distributing Oracle's copyrighted software applications and/or software support materials. The

10   Parties also agree that SAP AG and SAP America are liable for this infringement because they

11   received a direct financial benefit from the infringement and had the right and ability to

12   supervise or control the infringing activity. This is known as "vicarious infringement." Oracle

13   also contends that SAP AG and SAP America are liable for this infringement because they had

14   knowledge or reason to know of the infringement and intentionally induced or materially

15   contributed to the infringing activity. This is known as "contributory infringement."

16   Second, the Parties agree that TomorrowNow violated the Federal Computer

17   Fraud and Abuse Act ("CFAA") and caused Oracle harm by knowingly, and with intent to

18   defraud Oracle, accessing a protected computer without authorization or by exceeding authorized

19   access, and by obtaining information and things of value from such a protected computer.

20   Third, the Parties agree that TomorrowNow violated the California Penal Code by

21   knowingly and fraudulently, and without permission accessing, taking, copying and making use

22   of programs, data, and files from Oracle's computers, computer systems and/or computer

23   networks.

24   Fourth, the Parties agree that TomorrowNow agreed to abide by certain Terms of

25   Use as a condition of access to Oracle's customer support websites, that TomorrowNow

26   breached the terms of these agreements, and that those breaches harmed Oracle.

27   Fifth, the Parties agree that TomorrowNow intentionally interfered with Oracle's

28   prospective economic advantage by disrupting Oracle's relationships with current and

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

1   prospective software and support customers.

2   Sixth, the Parties agree that TomorrowNow negligently interfered with Oracle's

3   prospective economic advantage with current and future customers by disrupting Oracle's

4   relationships with current and prospective software and support customers.

5   Seventh, the Parties agree that TomorrowNow engaged in unfair competition by

6   committing unlawful, unfair and fraudulent acts in an effort to gain an unfair competitive

7   business advantage over Oracle.

8   Eighth, the Parties agree that TomorrowNow trespassed on Oracle' computer

9   systems by intentionally interfering with Oracle's use or possession of Oracle's customer support

10   websites and related internal databases and systems, and interfered with Oracle's use, ownership

11   and control of copies of Oracle's software and support materials on those support systems.

12   Ninth, the Parties agree that TomorrowNow unjustly received benefits at the

13   expense of Oracle through its wrongful conduct.

14   Tenth, the Parties agree that Oracle is entitled to a full accounting of the income

15   and gross profits TomorrowNow obtained through its wrongful conduct to the extent that the full

16   measure of money due from TomorrowNow to Oracle cannot be ascertained without a full

17   accounting.

18   Because TomorrowNow agrees to direct liability on all claims and SAP AG and

19   SAP America agree to vicarious liability for copyright infringement, there is only one liability

20   claim remaining for the jury to decide, which is Oracle's claims against SAP AG and SAP

21   America for contributory copyright infringement. Oracle has the burden of proving this claim.

22   In addition, Oracle seeks compensatory damages based on the stipulated claims

23   against TomorrowNow, SAP AG and SAP America, and on the contributory infringement claims

24   against SAP AG and SAP America. Oracle also seeks punitive damages against TomorrowNow

25   based on the stipulated claims.

26   SAP AG and SAP America deny the contributory infringement claim against

27   them, and contest the issue of damages.

28   Oracle denies Defendants' affirmative defenses.

1

2   Authority: Instruction 1.2, Ninth Circuit Manual of Model Jury Instructions (Civil) (modified).

3 **[Per the Court's Pretrial Order (D.I. 84 at 4), Defendants are not submitting an instruction**

4 **based on Model Instruction 1.2.]**

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

PARTY HAVING POWER TO PRODUCE BETTER EVIDENCE

You may consider the ability of each party to provide evidence. If a party provided weaker evidence when it could have provided stronger evidence, you may distrust the weaker evidence.

Authority: CACI No. 203

Proposed Instruction No. 7 (Joint)

<u>**WILLFUL SUPPRESSION OF EVIDENCE**</u>

3   You may consider whether one party intentionally concealed or destroyed

4   evidence. If you decide that a party did so, you may decide that the evidence would have been

5   unfavorable to that party. You may also consider that fact in determining what inferences to

6   draw from the evidence, including as an indication of the party's consciousness that his case is

7   weak or unfounded.

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9   Authority: CACI No. 204 (modified); BAJI 2.03 (modified); *Glover v. BIC Corporation*, 6 F.3d

10   1318, 1329 (9th Cir. 1993); *Thor v. Boska*, 38 Cal. App.3d 558, 565-68 (1974).

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

Proposed Instruction No. 8 (Joint)

2   <u>**TWO OR MORE PARTIES—DIFFERENT LEGAL RIGHTS**</u>

3   You should decide this case as to each plaintiff separately and as to each

4   defendant separately. Unless otherwise stated, the instructions apply to all parties.

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6   Authority: Instruction 1.5, Ninth Circuit Manual of Model Jury Instructions (Civil).

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

WITNESS WILLFULLY FALSE

A witness who is willfully false in one material part of his or her testimony is to be distrusted in others. You may reject the whole testimony of a witness who willfully has testified falsely as to a material point, unless, from all the evidence, you believe the probability of truth favors his or her testimony in other particulars.

Authority: BAJI § 2.22.

1	**Proposed Instruction No. 16 (Joint)**
2	**INFERENCES DEFINED**
3	You are to consider only the evidence in the case. However, you are not limited
4	to the statements of the witnesses. In other words, you are not limited to what you see and hear
5	as the witnesses testify. You may draw from the facts that you find have been proved such
6	reasonable inferences as seem justified in light of your experience.
7	"Inferences" are deductions or conclusions which reason and common sense lead
8	you to draw from facts established by the evidence in the case.
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10	Authority: Instruction 104.20, Federal Jury Practice and Instructions (5th ed. 2000).
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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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2 <u>**JURY TO BE GUIDED BY OFFICIAL ENGLISH TRANSLATION/INTERPRETATION**</u>

3   Languages other than English, in particular German, may be used during this trial

4 in deposition or live testimony and in documents.

5   The evidence to be considered by you is only that provided through the official

6 court translators. Although some of you may know German, it is important that all jurors

7 consider the same evidence. Therefore, you must accept the English translation. You must

8 disregard any different meaning.

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10 Authority: Instruction 1.16, Ninth Circuit Manual of Model Jury Instructions (Civil).

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USE OF INTERPRETERS—OTHER LANGUAGES; COUNTRIES OF ORIGIN

You must not make any assumptions about a witness or a party based solely upon the use of an interpreter to assist that witness or party.

Some of the witnesses who have testified live in this courtroom, or via deposition video clip, do not speak English as a native language. Some of the witnesses speak German as a native language. You must not make any assumptions about a witness or a party based upon the language that is used by any witness in communicating with his/her colleagues or others.

The evidence to be considered by you is only that provided through the official court translators. Although some of you may know German, or any other foreign language used and translated during this case, it is important that all jurors consider the same evidence. Therefore, you must accept the English translation. You must disregard any different meaning.

One of the parties—specifically, defendant SAP AG—is incorporated in another country. You must not make any assumptions about a party based on where it is incorporated or where it is headquartered.

Authority: Instructions 1.16, 1.17 Ninth Circuit Manual of Model Jury Instructions (Civil) (modified).

[Defendants propose to submit Defendants' Proposed Instruction No. 19 in lieu of Plaintiffs' Proposed Instruction Nos. 19 and 20.]

USE OF INTERPRETERS IN COURT

You must not make any assumptions about a witness or a party based solely upon the use of an interpreter to assist that witness or party.

Authority: Instruction 1.17, Ninth Circuit Manual of Model Jury Instructions (Civil).

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

Proposed Instruction No. 24 (Joint)

<u>**STIPULATED TESTIMONY**</u>

3   The parties have agreed what [*witness*]'s testimony would be if called as a

4 witness. You should consider that testimony in the same way as if it had been given here in

5 court.

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7 Authority: Instruction 2.1, Ninth Circuit Manual of Model Jury Instructions (Civil).

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1   **Proposed Instruction No. 25 (Joint)**

2   <u>**STIPULATIONS OF FACT**</u>

3   The parties have agreed to certain facts, and their written stipulations of fact will

4   be placed in evidence as Exhibit 1. You should therefore treat these facts as having been proved.

5   I will read those agreed facts to you now [*Read Stipulations of Fact Into The Record, including*

6   *[Full Title of Stipulations Under Consideration As Eventually Filed]*].

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8   Authority: Instruction 2.2, Ninth Circuit Manual of Model Jury Instructions (Civil).

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Proposed Instruction No. 26 (Joint)

2   **STIPULATIONS OF LIABILITY**

3   The parties have reached stipulations that TomorrowNow is directly liable to

4   Plaintiffs for all of the claims that Plaintiffs have asserted, and that SAP AG and SAP America

5   are vicariously liable for TomorrowNow's direct copyright infringement. Those stipulations of

6   liability will be placed in evidence as Exhibit 2. You should therefore treat these claims as

7   having been proved. I will read these agreements on liability to you now. [*[Full Title of*

8   *Stipulation As Filed]*]

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10   Authority: Instruction 2.2, Ninth Circuit Manual of Model Jury Instructions (Civil) (Modified).

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Proposed Instruction No. 27 (Joint)

<u>**JUDICIAL NOTICE**</u>

3   The court has decided to accept as proved the fact that [*state fact*], even though no

4   evidence has been introduced on the subject. You must accept this fact as true.

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6   Authority: Instruction 2.3, Ninth Circuit Manual of Model Jury Instructions (Civil).

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Proposed Instruction No. 28 (Joint)

2 <u>**DEPOSITION IN LIEU OF LIVE TESTIMONY**</u>

3   A deposition is the sworn testimony of a witness taken before trial. The witness is

4 placed under oath to tell the truth and lawyers for each party may ask questions. The questions

5 and answers are recorded. When a person is unavailable to testify at trial, the deposition of that

6 person may be used at the trial.

7   The deposition of [*witness*] was taken on [*date*]. You should consider deposition

8 testimony, presented to you in court in lieu of live testimony, insofar as possible, in the same

9 way as if the witness had been present to testify.

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11 Authority: Instruction 2.4, Ninth Circuit Manual of Model Jury Instructions (Civil) (modified).

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1	**Proposed Instruction No. 29 (Joint)**
2	**<u>USE OF INTERROGATORIES OF A PARTY</u>**

3   Evidence may be presented to you in the form of answers of one of the parties to

4 written interrogatories submitted by the other side. These answers were given in writing and

5 under oath, before the actual trial, in response to questions that were submitted in writing under

6 established court procedures. You should consider the answers, insofar as possible, in the same

7 way as if they were made from the witness stand.

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9 Authority: Instruction 2.10, Ninth Circuit Manual of Model Jury Instructions (Civil) (modified).

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Proposed Instruction No. 30 (Joint)

<u>**USE OF REQUESTS FOR ADMISSION**</u>

3   Before trial, each party has the right to ask another party to admit in writing that

4   certain matters are true. If the other party admits those matters, you must accept them as true.

5   No further evidence is required to prove them. You must also accept as true any stipulated facts

6   I read to you, and those set forth in the stipulation(s) I will provide to you.

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8   Authority: CACI No. 210.

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

Proposed Instruction No. 31 (Joint)

2 <u>**EXPERT OPINION**</u>

3   Some witnesses, because of education or experience, are permitted to state

4 opinions and the reasons for those opinions. Opinion testimony should be judged just like any

5 other testimony. You may accept it or reject it, and give it as much weight as you think it

6 deserves, considering the witness's education and experience, the reasons given for the opinion,

7 and all the other evidence in the case.

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9 Authority: Instruction 2.11, Ninth Circuit Manual of Model Jury Instructions (Civil) (modified).

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1   **Proposed Instruction No. 32 (Joint)**

2   **CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE**

3   Certain charts and summaries not received in evidence may be shown to you in

4   order to help explain the contents of books, records, documents, or other evidence in the case.

5   They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts

6   or figures shown by the evidence in the case, you should disregard these charts and summaries

7   and determine the facts from the underlying evidence.

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9   Authority: Instruction 2.12, Ninth Circuit Manual of Model Jury Instructions (Civil) (modified).

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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2 ## <u>CHARTS AND SUMMARIES RECEIVED IN EVIDENCE</u>

3 Certain charts and summaries may be received into evidence to illustrate

4 information brought out in the trial. Charts and summaries are only as good as the underlying

5 evidence that supports them. You should, therefore, give them only such weight as you think the

6 underlying evidence deserves.

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8 Authority: Instruction 2.13, Ninth Circuit Manual of Model Jury Instructions (Civil) (modified).

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2   **EVIDENCE IN ELECTRONIC FORMAT**

3   Those exhibits capable of being displayed electronically will be provided to you

4   in that form, and you will be able to view them in the jury room. A computer, projector, printer

5   and accessory equipment will be available to you in the jury room.

6   A court technician will show you how to operate the computer and other

7   equipment; how to locate and view the exhibits on the computer; and how to print the exhibits.

8   You will also be provided with a paper list of all exhibits received in evidence. (Alternatively,

9   you may request a paper copy of an exhibit received in evidence by sending a note through the

10   [clerk] [bailiff].) If you need additional equipment or supplies, you may make a request by

11   sending a note.

12   In the event of any technical problem, or if you have questions about how to

13   operate the computer or other equipment, you may send a note to the clerk, signed by your

14   foreperson or by one or more members of the jury. Be as brief as possible in describing the

15   problem and do not refer to or discuss any exhibit you were attempting to view.

16   If a technical problem or question requires hands-on maintenance or instruction, a

17   court technician may enter the jury room with the clerk present for the sole purpose of assuring

18   that the only matter that is discussed is the technical problem. When the court technician or any

19   non-juror is in the jury room, the jury shall not deliberate. No juror may say anything to the

20   court technician or any non-juror other than to describe the technical problem or to seek

21   information about operation of equipment. Do not discuss any exhibit or any aspect of the case.

22   The sole purpose of providing the computer in the jury room is to enable jurors to

23   view the exhibits received in evidence in this case. You may not use the computer for any other

24   purpose. At my direction, technicians have taken steps to make sure that the computer does not

25   permit access to the Internet or to any "outside" website, database, directory, game, or other

26   material. Do not attempt to alter the computer to obtain access to such materials. If you discover

27   that the computer provides or allows access to such materials, you must inform me immediately

28   and refrain from viewing such materials. Do not remove the computer or any electronic data

1   from the jury room, and do not copy any such data.

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3   Authority: Instruction 2.14, Ninth Circuit Manual of Model Jury Instructions (Civil).

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Proposed Instruction No. 39 (Joint)

<u>**CORPORATIONS—FAIR TREATMENT**</u>

3   All parties are equal before the law and a corporation is entitled to the same fair

4   and conscientious consideration by you as any party.

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6   Authority: Instruction 4.1, Ninth Circuit Manual of Model Jury Instructions (Civil).

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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2 <u>**LIABILITY OF CORPORATIONS—SCOPE OF AUTHORITY NOT IN ISSUE**</u>

3   Under the law, a corporation is considered to be a person. It can only act through

4 its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts

5 of its employees, agents, directors, and officers performed within the scope of authority.

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7 Authority: Instruction 4.2, Ninth Circuit Manual of Model Jury Instructions (Civil).

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

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

Proposed Instruction No. 40 (Defendants)

2   **<u>LIABILITY OF CORPORATIONS</u>**

3   Under the law, a corporation is considered to be a person. It can only act through

4   its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts

5   of its employees, agents, directors, and officers, performed within the scope of authority.

6   An act is within the scope of a person's authority if it is within the range of

7   reasonable and foreseeable activities that an employee, agent, director or officer engages in while

8   carrying out that person's business.

9   For each of the claims asserted by the various plaintiffs in this case, the specific

10   plaintiff or plaintiffs asserting that claim bear the burden of establishing that the accused actions

11   of the employees, agents, directors, and officers of each of the defendants were committed within

12   the scope of those persons' authority.

13   For each of the defenses asserted by the various defendants in this case, the

14   specific defendant or defendants asserting that defense bear the burden of establishing that the

15   accused actions of the employees, agents, directors, and officers of each of the plaintiffs were

16   committed within the scope of those persons' authority.

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18   Authority: Instruction 4.2, Ninth Circuit Manual of Model Jury Instructions (Civil) (modified);

19   *See Delfino v. Agilent Techs., Inc.*, 52 Cal. Rptr. 3d 376, 395 (Cal. Ct. App. 2006) ("The plaintiff

20   bears the burden of establishing that the employee's action for which vicarious liability is sought

21   to be imposed was committed within the scope of the employment."); *Lowery v. Reinhardt*, No.

22   Civ. S-07-0880 RRB DAD, 2008 WL 550083, at *5 (E.D. Cal. Feb. 27, 2008) (same).

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                                    AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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FINAL JURY INSTRUCTIONS

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

No Instructions.

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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INTRODUCTORY INSTRUCTION (SEPARATE)

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OVERVIEW OF CLAIMS

As I described to you at the beginning of the trial, there are three plaintiffs in this case: Oracle USA, Inc. (which I will refer to as "Oracle USA"), Oracle International Corporation (which I will refer to as "Oracle International"), and Siebel Systems, Inc. (which I will refer to as "Siebel Systems"). From time to time I may refer to these three entities collectively as "Plaintiffs" or "Oracle."

As I will describe further in a moment. SAP AG, SAP America, Inc. (which I will refer to as "SAP America") and TomorrowNow, Inc. (which I will refer to as "TomorrowNow") have stipulated that TomorrowNow is liable to Oracle for each of Oracle's ten claims. From time to time I may refer to these three entities collectively as "Defendants" or "SAP."

Therefore, the Parties all agree that TomorrowNow has violated the following ten laws:

    1)   Copyright infringement;

    2)   Violations of the Federal Computer Fraud and Abuse Act;

    3)   Violations of the California Computer Data Access and Fraud Act;

    4)   Breach of contract;

    5)   Intentional interference with prospective economic advantage;

    6)   Negligent interference with prospective economic advantage;

    7)   Violations of California Business & Professions Code § 17200;

    8)   Trespass to chattels;

    9)   Unjust enrichment; and

    10)   An accounting.

SAP AG and SAP America also agree that they are responsible for the copyright infringement that TomorrowNow has agreed to under a theory of vicarious infringement.

As described further below, there is only one liability question remaining. Oracle further claims that SAP AG and SAP America are also responsible for the copyright infringement that TomorrowNow has agreed to under a theory that SAP contributed to

1   TomorrowNow's infringement.

2   I will now describe for you in more details the elements of the claim for

3   contributory infringement, the elements of the defenses asserted by the Defendants, and the

4   damages that you may award as a result of the agreed legal violations and any further proven

5   contributory infringement.

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7   Authority: None. Transitional instruction.

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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INTRODUCTORY COPYRIGHT INSTRUCTIONS (JOINT, SEPARATE AND COMPETING)

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1   **Proposed Instruction No. 2-A (Plaintiffs)**

2   <u>**PRELIMINARY INSTRUCTION—COPYRIGHT**</u>

3   Oracle International owns copyrights and seeks damages against all three of the

4   defendants, TomorrowNow, SAP AG, and SAP America, for copyright infringement.

5   Defendants all agree that TomorrowNow directly infringed all of Oracle's asserted copyrights in

6   this Action, and that SAP AG and SAP America are also vicariously liable for infringement of

7   these same copyrights. In addition, Oracle claims that SAP AG and SAP America are liable for

8   contributory infringement of its copyrights. SAP AG and SAP America deny that claim. You

9   must decide this remaining allegation of infringement. To help you understand the evidence in

10   this case, I will now explain some of the legal terms you will hear during this case, instruct on

11   you the law regarding copyright infringement, and the damages you may award based on both

12   the agreed copyright infringements and the contested allegation of contributory infringement.

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14   Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.0 (Civil) (modified).

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

PRELIMINARY INSTRUCTION—COPYRIGHT

Oracle International claims ownership of various copyrights and seeks damages against TomorrowNow, Inc. ("TomorrowNow") for direct copyright infringement, and SAP America, Inc. ("SAP America") and SAP AG for indirect (*i.e.*, vicarious and contributory) copyright infringement.

TomorrowNow has agreed to liability under the claim of direct infringement for purposes of this case. Thus, with respect to the claim for direct infringement against TomorrowNow, you only need address whether damages should be awarded against TomorrowNow for direct copyright infringement and, if so, how much.

SAP America and SAP AG have agreed to liability under the claim for vicarious copyright infringement, but deny any liability under contributory copyright infringement. Thus, with respect to the claim against SAP America and SAP AG for vicarious copyright infringement, you need only address whether damages should be awarded against SAP America and SAP AG for vicarious copyright infringement and, if so, how much.

Additionally, you must determine whether SAP America and SAP AG are liable for contributory copyright infringement. If you find SAP America or SAP AG liable for contributory copyright infringement, then you must determine whether damages should be awarded against that party for contributory copyright infringement and, if so, how much.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.0 (Civil) (modified).

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2 <u>**COPYRIGHT—DEFINED**</u>

3 A copyright is the exclusive right to copy. This right to copy includes the

4 exclusive rights to:

5   1)   reproduce the copyrighted work;

6   2)   prepare derivative works based upon the copyrighted work by adapting or

7   transforming it; and

8   3)   distribute copies of either the copyrighted work or any unauthorized

9   derivative work; and

10   4)   display publicly a copy of either the copyrighted work or any unauthorized

11   derivative work.

12 It is the owner of a copyright who may exercise these exclusive rights. The

13 "owner" refers to the author of the work, or one who has been assigned the ownership of

14 exclusive rights in the work. In general, copyright law protects against the production,

15 adaptation, distribution, or public display of the owner's copyrighted work without the owner's

16 permission. An owner may enforce these rights to exclude others in an action for copyright

17 infringement. Even though one may acquire a copy of the copyrighted work, the copyright

18 owner retains certain rights and control of that copy, including uses that may result in additional

19 copies or alterations of the work.

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21 Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.1 (Civil) (modified).

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COPYRIGHT—SUBJECT MATTER

Many of the materials involved in this trial are computer software programs, which consist of sets of statements or instructions used by a computer to bring about a certain result. Computer software programs are treated as literary works under copyright law, and they are eligible for copyright protection insofar as they incorporate original expression. This trial also concerns written support materials, such as instruction manuals, guides, notes, and other documentation related to the computer software programs. These written materials are also eligible for copyright protection to the extent they incorporate original expression.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.2 (Civil) (modified).

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

COPYRIGHT—SUBJECT MATTER—IDEAS AND EXPRESSION

Copyright law allows the author of an original work to prevent others from copying the way or form the author used to express the ideas in the author's work.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.3 (Civil) (modified); *Harper & Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539 (1985); *Arica Institute, Inc. v. Palmer et al.*, 970 F.2d 1067 (2d Cir. 1992); *Allen v. Academic Games League of Am.*, 89 F.3d 614 (9th Cir. 1996); *Computer Associates v. Altai, Inc*, 982 F.2d 693 (2d Cir. 1992); Nimmer on Copyrights, 13.03[F][2], [F][3].

2

<u>COPYRIGHT—STIPULATED INFRINGEMENT</u>

3   Oracle International owns copyrighted works that embody and relate to Oracle's

4   applications and database software (including software programs themselves, support materials,

5   and related documentation). Oracle International registered each of these works with the United

6   States Copyright Office, and owns a valid copyright registration for each work in this Action.

7   TomorrowNow has agreed that it downloaded millions of Oracle support materials and made

8   thousands of copies of Oracle's applications and database software, including the software and

9   support materials listed in the copyright registrations that follow. Defendants agree that

10 TomorrowNow infringed all of Oracle's copyrights in the following 120 registered works, in

11 Tables A-1 to A-8 below. SAP AG and SAP America agree they are vicariously liable for

12 TomorrowNow's infringements of all 120 registered works listed in Tables A-1 to A-8 below.

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Title of Work	Date of Registration	Registration Number
PeopleSoft 8 Customer Relationship Management	September 27, 2001	TX-5-456-777
PeopleSoft 8.8 Customer Relationship Management	June 11, 2004	TX 6-015-317
PeopleSoft 8.8 Enterprise Performance Management	June 11, 2004	TX-5-993-616
PeopleSoft Financials, Distribution & Manufacturing 7.5	December 15, 1998	TX 4-792-574
PeopleSoft 8 Financials and Supply Chain Management: Service Pack 2	September 27, 2001	TX-5-456-780
PeopleSoft 8.4 Financials and Supply Chain Management	August 5, 2002	TX-5-586-247
PeopleSoft HRMS 7.0	December 15 1998	TX 4-792-577
PeopleSoft HRMS 7.5	December 15, 1998	TX 4-792-575
PeopleSoft 8 HRMS SP1	March 26, 2001	TX 5-501-312
PeopleSoft 8.3 HRMS	February 1, 2002	TX 5-469-032
PeopleSoft 8.8 HRMS	June 11, 2004	TX 6-093-947
PeopleSoft 8 Student Administration Solutions	November 30, 2001	TX 5-431-289
PeopleTools 7.5	November 20, 1998	TX 4-792-578
PeopleTools 8.10	September 5, 2000	TX 5-266-221
PeopleTools 8.4	August 5, 2002	TX 5-586-248
PeopleSoft 8.1 Customer Relationship Management	March 20, 2002	TX 5-493-450
PeopleSoft 8 EPM SP3	March 30, 2001	TX 5-345-698
PeopleSoft 8.3 Enterprise Performance Management	March 11, 2002	TX 5-485-839
PeopleSoft 7.0 financials, distribution & manufacturing 7.0	December 15, 1998	TX 4-792-576

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

Title of Work	Date of Registration	Registration Number
PeopleSoft Financials and Supply Chain Management (FIN/SCM) 8.0	November 20, 2000	TX 5-291-439
PeopleSoft 8 FIN/SCM SP1	March 26, 2001	TX 5-501-313
PeopleSoft HRMS 8.0	November 20, 2000	TX 5-291-440
PeopleTools 8.0	September 5, 2000	TX 5-266-222
PeopleSoft Pension Administration 7	June 21, 1999	TX 3-772-290
PeopleSoft Payroll 7	June 22, 1999	TX 4-501-140
PeopleSoft Payroll Interface 7	June 22, 1999	TX 4-501-138
PeopleSoft Time and Labor 7.0	June 28, 1999	TX 4-994-866
PeopleSoft Benefits Administration 7.0	June 15, 1999	TX 4-258-824
PeopleSoft Human Resources 7	June 28, 1999	TX 4-994-865
PeopleSoft Payroll Interface 7 Higher Education	June 28, 1999	TX 5-013-124
PeopleSoft Time and Labor 7	June 28, 1999	TX 5-013-128
PeopleSoft Benefits Administration 7.50	June 14, 1999	TX 5-072-090
PeopleSoft Payroll Interface 7.50	June 21, 1999	TX 3-772-292
PeopleSoft Pension Administration 7.50	June 21, 1999	TX 3-772-291
PeopleSoft Human Resources 7.50	June 28, 1999	TX 5-013-123
PeopleSoft Payroll 7.50	June 28, 1999	TX 5-013-125
PeopleSoft Time and Labor 7.50	June 28, 1999	TX 4-994-867

Table A-1: PeopleSoft Application Registrations

Title of Work	Date of Registration	Registration Number
Database of Documentary Customer Support Materials for PeopleSoft Software	July 1, 2009	TXu1-607-454
PeopleTools Third Party Daylight Saving Time Required Modifications	April 26, 2007	TX 6-541-019
PeopleTools Third Party Daylight Saving Time Required Modifications (Revised)	April 26, 2007	TX 6-541-018
PeopleSoft 8.01 & 8.31 Payroll Tax Update 05-F Year-End Processing: Canada	May 2, 2008	TX 6-838-549
PeopleSoft Payroll 1200457000 - User Documentation	May 2, 2008	TX 6-838-537
PeopleSoft Application Update Installation Instructions (UPD595817)	May 2, 2008	TX 6-838-544

Table A-2: Oracle Updates and Support Materials Registrations for Oracle's PeopleSoft-branded Products

Title of Work	Date of Registration	Registration Number
Initial release of JD Edwards EnterpriseOne Xe	April 26, 2007	TX 6-541-033
Initial release of JD Edwards EnterpriseOne 8.0	April 26, 2007	TX 6-541-050
Initial release of JD Edwards EnterpriseOne 8.10	April 26, 2007	TX 6-541-038
Initial release of JD Edwards EnterpriseOne 8.11	April 26, 2007	TX 6-541-028
Initial release of JD Edwards EnterpriseOne 8.12	April 26, 2007	TX 6-541-041
Initial release of JD Edwards World A7.3	April 26, 2007	TX 6-541-029
Initial release of JD Edwards World A8.1	April 26, 2007	TX 6-541-047
Current development environment for JD Edwards EnterpriseOne Xe	April 26, 2007	TXu1-345-109

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

	Title of Work	Date of Registration	Registration Number
1			
2	Current development environment for JD Edwards EnterpriseOne 8.0	April 26, 2007	TXu1-345-111
3	Current development environment for JD Edwards EnterpriseOne 8.9	April 26, 2007	TXu1-345-112
4	Current development environment for JD Edwards EnterpriseOne 8.10	April 26, 2007	TXu1-345-113
5	Current development environment for JD Edwards EnterpriseOne 8.11	April 26, 2007	TXu1-345-114
6	Current development environment for JD Edwards EnterpriseOne 8.11 SP1	April 26, 2007	TXu1-345-115
7	Current development environment for JD Edwards EnterpriseOne 8.12	April 26, 2007	TXu1-346-350
8	Current development environment for JD Edwards World A7.3	April 26, 2007	TXu1-345-110
9	Current development environment for JD Edwards World A8.1	May 1, 2007	TX 6-545-422
10	Initial release of JD Edwards EnterpriseOne 8.9	April 26, 2007	TX 6-541-049
11	Initial release of JD Edwards EnterpriseOne 8.11 SP1	April 26, 2007	TX 6-541-040
12	Initial release of JD Edwards World A9.1	April 26, 2007	TX 6-541-030
13	Accounts Payable program	March 7, 1995	TXu 619-320
14	Accounts Receivable program	March 7, 1995	TXu 619-312
15	Capacity Requirements Planning program	March 7, 1995	TXu 619-307
16	Configuration Management program	March 7, 1995	TXu 619-305
17	EDI Interface (6) program	March 7, 1995	TXu 619-304
18	Enterprise Facility Planning program	March 7, 1995	TXu 619-311
19	Equipment Management (5) program	March 7, 1995	TXu 619-309
20	Financial Modeling, Budgeting & Allocations program	March 7, 1995	TXu 619-321
21	Financial Reporting (FASTR) program	March 7, 1995	TXu 619-318
22	General Ledger & Basic Financial program	March 7, 1995	TXu 619-310
	Inventory Management program	March 7, 1995	TXu 619-314
	Master Production Scheduling program	March 7, 1995	TXu 619-306
	Product Data Management program	March 7, 1995	TXu 619-317
	Purchase Order Processing program	March 7, 1995	TXu 619-316
	Sales Order Processing/Sales Analysis program	March 7, 1995	TXu 619-315
	Shop Floor Control program	March 7, 1995	TXu 619-303
	Warehouse Management program	March 7, 1995	TXu 619-313
	WorldCASE Development Environment program	March 7, 1995	TXu 619-308
	WorldCASE Foundation Environment (3) program	March 7, 1995	TXu 619-319

Table A-3: J.D. Edwards Application Registrations

Title of Work	Date of Registration	Registration Number
Cumulative Update 8 for JD Edwards EnterpriseOne Xe	April 26, 2007	TX 6-541-048
Cumulative Update 1 for JD Edwards EnterpriseOne 8.0	April 26, 2007	TX 6-541-034
Cumulative Update 2 for JD Edwards EnterpriseOne 8.10	April 26, 2007	TX 6-541-032
Cumulative Update 1 for JD Edwards	April 26, 2007	TX 6-541-042

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

Title of Work	Date of Registration	Registration Number
EnterpriseOne 8.12 Cumulative Update 16 for JD Edwards World A7.3	April 26, 2007	TX 6-541-031
Cumulative Update 6 for JD Edwards World A8.1	May 1, 2007	TX 6-545-421
Cumulative Update 1 for JD Edwards EnterpriseOne 8.11 SP1	April 26, 2007	TX 6-541-039

Table A-4: J.D. Edwards Cumulative Update Registrations

Title of Work	Date of Registration	Registration Number
Database of Documentary Customer Support Materials for J.D. Edwards Software	July 1, 2009	TXu1-607-455
Changes to Daylight Savings Time for 2007 (DST)	April 26, 2007	TX 6-541-025
ESU for JD Edwards EnterpriseOne Xe	May 3, 2007	TX 6-541-051
ESU for JD Edwards EnterpriseOne 8.0	April 26, 2007	TX 6-541-046
ESU for JD Edwards EnterpriseOne 8.9	April 26, 2007	TX 6-541-036
ESU for JD Edwards EnterpriseOne 8.10	April 26, 2007	TX 6-541-037
ESU for JD Edwards EnterpriseOne 8.11	April 26, 2007	TX 6-541-035
ESU for JD Edwards EnterpriseOne 8.11 SP1	April 26, 2007	TX 6-541-027
ESU for JD Edwards EnterpriseOne 8.12	April 26, 2007	TX 6-541-045
Code Change for JD Edwards World A7.3	April 26, 2007	TX 6-541-043
Code Change for JD Edwards World A8.1	April 26, 2007	TX 6-541-044
E1: 07/77: Quantum for Payroll Tax v.280	April 26, 2007	TX 6-541-022
E1: 1099: Year 2006 1099 ESUs	April 26, 2007	TX 6-541-024
EAP WTHD06: 1099 IRS changes for the year 2006	April 26, 2007	TX 6-541-023
JD Edwards World -- 1099 Changes for Tax Year 2006	April 26, 2007	TX 6-541-026
ECRM89: Common Errors on Mobile Sales	April 26, 2007	TX 6-541-020
GM--Grants issues resolved by FMS ESA 8.9 Bundle #10-653723 (Oct 06)	April 26, 2007	TX 6-541-021

Table A-5: Oracle Updates and Support Materials Registrations for Oracle's J.D. Edwards-branded Products

Title of Work	Date of Registration	Registration Number
Siebel 6.3 Initial Release and Documentation	June 29, 2009	TX 6-941-989
Siebel 7.0.5 Initial Release and Documentation	June 29, 2009	TX 6-941-988
Siebel 7.5.2 Initial Release and Documentation	June 29, 2009	TX 6-941-990
Siebel 7.7.1 Initial Release and Documentation	June 29, 2009	TX 6-941-993
Siebel 7.8 Initial Release and Documentation	June 29, 2009	TX 6-941-995
Siebel 8.0 Initial Release and Documentation	June 29, 2009	TX 6-942-000
Siebel 8.1.1 Initial Release and Documentation	June 29, 2009	TX 6-942-001

Table A-6: Siebel Application Registrations

Title of Work	Date of Registration	Registration Number
Database of Documentary Customer Support Materials for Siebel Software	July 1, 2009	TXu1-607-453

Table A-7: Oracle Updates and Support Materials Registrations for Oracle's Siebel-branded Products

Title of Work	Date of Registration	Registration Number
Oracle 8i Enterprise Edition, release 2 (8.1.6)	February 2, 2001	TX 5-222-106
Oracle9i Database Enterprise : Edition Release 2	June 13, 2003	TX 5-673-282
Oracle Database 10g: Release 2	June 29, 2009	TX 6-942-003
Oracle Relational Database Management System (RDBMS): Release 8.0.4	November 21, 2001	TX 5-392-842
Oracle Relational Database Management System (RDBMS), Release 8.0.5	November 21, 2001	TX 5-392-861
Oracle9i Database Enterprise : Edition Release 1	June 13, 2003	TX 5-673-281
Oracle Database 10g: Release 1	January 16, 2009	TX 6-938-648

Table A-8: Oracle Database Registrations

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.2 (Civil) (modified).

COPYRIGHT INTEREST—-DERIVATIVE WORK

A copyright owner is entitled to exclude others from creating derivative works based upon the owner's copyrighted work. The term derivative work refers to a work based on one or more pre-existing works, and includes any form in which the pre-existing work is recast, transformed, or adapted. Accordingly, the owner of a copyrighted work is entitled to exclude others from recasting, transforming or adapting the copyrighted work without the owner's permission.

The owner of a derivative work may enforce the right to exclude others in an action for copyright infringement.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.13 (Civil) (modified)

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SECONDARY LIABILITY (COPYRIGHT INFRINGEMENT) ORACLE MODULE

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

SECONDARY COPYRIGHT LIABILITY— STIPULATED VICARIOUS

INFRINGEMENT

One defendant may be liable for copyright infringement committed by another defendant based on principles of vicarious liability. Here, SAP America and SAP AG agree they are vicariously liable for the infringements of Oracle's copyrights committed by TomorrowNow. As a result, defendants agree:

1)   SAP America and SAP AG each received a direct financial benefit from the infringing activity of TomorrowNow; and,

2)   SAP America and SAP AG each had the right and ability to supervise or control the infringing activity of TomorrowNow.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.20 (Civil) (modified); *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *Ellison v. Robertson*, 357 F.3d 1072, 1076 (9th Cir. 2004) ("A defendant is vicariously liable for copyright infringement if he enjoys a direct financial benefit from another's infringing activity and 'has the right and ability to supervise' the infringing activity.") (quoting *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001)); *Fonovisa, Inc. v. Cherry Auction, Inc.*, 76 F.3d 259, 262-63 (9th Cir. 1996) ("one may be vicariously liable [for infringement] if he has the right and ability to supervise the infringing activity and also has a direct financial interest in such activities").

SECONDARY LIABILITY—CONTRIBUTORY INFRINGEMENT

In addition to vicarious liability, a defendant may also be liable for copyright infringement committed by another defendant based on separate principles of contributory liability. While SAP America and SAP AG agree that they are vicariously liable for the agreed infringements of Oracle's copyrights committed by TomorrowNow, they do not agree to contributory liability. In order to prove SAP America or SAG AG is liable for contributory infringement, Oracle International must show by a preponderance of the evidence that:

        1)   The defendant knew or had reason to known of the infringing activity of TomorrowNow; and,

        2)   The defendant intentionally induced or materially contributed to TomorrowNow's infringing activity.

In order to prove the first element of knowledge, a defendant need not have knowledge of the specific infringing acts or specific copies; it is sufficient to show the defendant knew or had reason to know that infringing copies of the copyrighted works were being made by the infringing party – in other words, that TomorrowNow was making infringing copies of Oracle works.

In order to prove the second element of inducing or contributing to the infringing activity, a defendant may intentionally induce infringement if it encourages the infringing activities through its words or actions, and it may materially contribute to infringing activity if it assists in that activity or provides the site and facilities of infringement.

A defendant who knows that infringing material is available on computer systems under its control, who could take measures to prevent further infringement, and who fails to take such steps satisfies the two elements for contributory infringement.

If you find that Oracle International proved each of these elements, then your verdict should be for Oracle International on the issue of contributory infringement. If you find that Oracle International has failed to prove any of these elements for SAP America and/or SAP AG, your verdict should be for the SAP America and/or SAP AG on the issue of contributory

1 infringement.

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3 Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.21 (Civil)

4 (modified); *Perfect 10 v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007); *A&M Records, Inc.*

5 *v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001); *Fonovisa, Inc. v. Cherry Auction, Inc*., 76 F.3d

6 259, 264 (9th Cir. 1996); *Gershwin Publ'g Corp. v. Columbia Artists Mgmt., Inc*., 443 F.2d

7 1159, 1162 (2d Cir. 1971) ("one who, with knowledge of the infringing activity, induces, causes

8 or materially contributes to the infringing conduct of another, may be held liable as a

9 'contributory' infringer").

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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SECONDARY LIABILITY (COPYRIGHT INFRINGEMENT) DEFENDANTS' MODULE

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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2 <u>**CONTRIBUTORY INFRINGEMENT (SAP AMERICA)**</u>

3   Oracle International asserts a claim for copyright infringement against defendant

4 TomorrowNow. TomorrowNow has agreed to liability under that claim for purposes of this

5 case. You may therefore assume TomorrowNow is liable for copyright infringement. Thus, you

6 may consider Oracle International's claim that SAP America contributorily infringed Oracle

7 International's copyrights. To prove contributory infringement, Oracle International must prove

8 both of the following elements by a preponderance of the evidence:

9   1)   SAP America knew or had reason to know of the infringing activity of

10   TomorrowNow; and

11   2)   SAP America intentionally induced or materially contributed to

12   TomorrowNow's infringing activity.

13 Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.21 (Civil)

14 (modified).

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

CONTRIBUTORY INFRINGEMENT (SAP AG)

Oracle International asserts a claim for copyright infringement against defendant TomorrowNow. TomorrowNow has agreed to liability under that claim for purposes of this case. You may therefore assume TomorrowNow is liable for copyright infringement. Thus, you may consider Oracle International's claim that SAP AG contributorily infringed Oracle International's copyrights. To prove contributory infringement, Oracle International must prove both of the following elements by a preponderance of the evidence:

1) SAP AG knew or had reason to know of the infringing activity of TomorrowNow; and

2) SAP AG intentionally induced or materially contributed to TomorrowNow's infringing activity.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.21 (Civil) (modified).

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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COPYRIGHT DAMAGES
ORACLE MODULE

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COPYRIGHT DAMAGES—INTRODUCTION

You must determine Oracle's damages resulting from the copyright infringement agreed to by the Defendants and any additional copyright infringement, including contributory infringement, that you find Oracle International has proven. Oracle International is entitled to recover the actual damages suffered as a result of the infringement from all of the defendants you found liable for infringement, whether directly or indirectly. In addition to its actual damages, Oracle International is also entitled to recover any profits that each defendant made that are attributable to their infringement. Oracle International must prove damages by a preponderance of the evidence.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.22 (Civil) (modified).

Proposed Instruction No. 9-B (Plaintiffs)

2 **COPYRIGHT DAMAGES—ACTUAL DAMAGES**

3   As the copyright owner, Oracle International is entitled to recover the actual

4 damages suffered as a result of Defendants' infringement. Actual damages means the amount of

5 money adequate to compensate Oracle for the reduction of the fair market value of the

6 copyrighted work caused by the infringement.

7   The reduction of the fair market value of the copyrighted work is the amount a

8 willing buyer would have been reasonably required to pay a willing seller at the time of the

9 infringement for the actual use made by the defendants of Oracle's work.

10   You must determine what would have been the result of this negotiation in order

11 to establish the fair market value. The fair market value is an objective measure of Oracle

12 International's damages that is meant to approximate the fair market value of all of the

13 copyrights defendants infringed, calculated at the time the infringement commenced, which the

14 parties agree (if the infringement is proved) is January 19, 2005 for the PeopleSoft, JD Edwards

15 and database copyrights infringed, and September 29, 2006 for the Siebel copyrights infringed.

16   The fair market value of the rights infringed does not depend on whether any

17 specific defendant in this case would have actually chosen to pay the fair market value of the

18 rights infringed, or whether Oracle would have actually agreed to sell to that specific defendant

19 at those terms. The fact the parties have different views on the value of a potential license does

20 not prevent Oracle International from recovering the full fair market value of the rights that were

21 infringed.

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23 Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.23 (Civil)

24 (modified); *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir. 2004); *Frank*

25 *Music Corp. v. Metro-Goldwyn-Mayer, Inc.*, 772 F.2d 505, 513 (9th Cir. 1985); *see also On*

26 *Davis v. The Gap*, 246 F.3d 152, 171-72 (2d Cir. 2001); *Getaped.com, Inc. v. Cangemi,* 188 F.

27 Supp.2d 398, 404-06 (S.D.N.Y. 2002); II Paul Goldstein, *Copyright* 12.1.1.1 at 12:13 (2d ed.

28 2000); Order Denying Defendants' Motion for Partial Summary Judgment Dkt. 628 at 4-5.

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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COPYRIGHT DAMAGES—ACTUAL DAMAGES CONTINUED

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3   While it is Oracle International's burden to prove actual damages by a

4 preponderance of the evidence, there is no precise formula for determining actual damages.

5 Determining the fair market value of the rights infringed may involve some uncertainty, and

6 Oracle International is not required to establish its actual damages with precision.

7   In general, you should construe actual damages to favor the victims of

8 infringement; keeping in mind the objective of copyright law is to enable copyright owners to

9 capture the full value of their rights.

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11 Authority: ABA Model Jury Instruction 1.7.2 (Copyright); *On Davis v. The Gap*, 246 F.3d 152,

12 166-67 (2d Cir. 2001); *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir.

13 2004); Order Denying Defendants' Motion for Partial Summary Judgment, Dkt. No 628 at 4-5

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COPYRIGHT DAMAGES—ACTUAL DAMAGES CONTINUED

In determining the fair market value of the rights infringed, you must consider the entire scope of infringement, including all works infringed, whether or not any Defendant made any additional use of the work after copying it.

Authority: *Wall Data, Inc. v. Los Angeles County Sheriff's Dept*., 447 F.3d 769, 775 n.3, 786-87 (9th Cir. 2006) (upholding damages award based on 3,962 infringing software copies where the evidence showed that some of these copies of the "software would remain installed, but unused" in the defendant's workstations).

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

COPYRIGHT DAMAGES—ACTUAL DAMAGES CONTINUED

Your calculation of the fair market value of the rights infringed must be based on the negotiation that would have taken place at the time the infringement first occurred, rather than a negotiation taking place now or one using information that would not have been available to the parties at the time.

You may consider any reasonable predictions made by any party about the financial value or other non-monetary benefits they expected to receive from the rights that were infringed.

In this trial, you have heard evidence of things that happened after the infringement first began. That evidence can be considered only to the extent that it might provide some insight into the expectations of the parties at the time the infringement first began, or some insight into the amount a willing buyer would have been reasonably required to pay a willing seller at the time of the infringement.

You may not limit or increase the fair market value of the rights infringed based on the actual profits TomorrowNow or any other defendant made, or did not make, as a result of the actual, vicarious and/or contributory infringement. So if, for example, you conclude that TomorrowNow was unsuccessful in exploiting its infringement and did not make a profit by virtue of its infringement, or that SAP America or SAP AG did not make a profit by virtue of their vicarious and/or contributory infringement, that should not diminish the fair market value of the rights infringed, and consequently should not diminish the amount of damages that you award.

Authority: Model Patent Jury Instructions for the Northern District of California, Instruction 5.7; *Interactive Pictures Corp. v. Infinite Pictures, Inc.*, 274 F. 3d 1371, 1384-85 (Fed. Cir. 2001); *Snellman v. Ricoh Co., Ltd.*, 862 F.2d 283, 289-90 (Fed. Cir. 1989); *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970).

Proposed Instruction No. 9-F (Joint)

2 **COPYRIGHT DAMAGES—ACTUAL DAMAGES CONTINUED**

3   You heard witnesses from each side discuss the so-called "Georgia-Pacific

4 factors" that relate to the measurement of the fair market value of the rights infringed. You

5 should consider each of these factors, and any other factors presented to you on the question of

6 fair market value, so long as you conclude a particular factor is informative to your decision and

7 not unduly speculative. Evidence of fair market value should not be considered speculative so

8 long as it provides a reasonable basis on which to estimate fair market value.

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10 Authority: *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir. 2004); *McRoberts*

11 *Software, Inc. v. Media 100, Inc*., 329 F.3d 557, 566-67 (7th Cir. 2003); *Georgia-Pacific Corp. v.*

12 *U.S. Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970).

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

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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COPYRIGHT DAMAGES
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10 # ORACLE MODULE

11 # (CONTINUED)

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

Proposed Instruction No. 9-G (Plaintiffs)

<u>**COPYRIGHT DAMAGES—ACTUAL DAMAGES CONTINUED**</u>

3   While Oracle International is entitled to the full fair market value of the rights

4 Defendants infringed as damages, a portion of Oracle International's damages may be

5 represented by the profits Oracle would have made absent the infringement. Oracle International

6 is not required to pursue or prove lost profits in order to recover the full fair market value of the

7 rights Defendants infringed. To show lost profits, Oracle International must show that

8 Defendants' copyright infringement was a substantial factor in causing the lost profits.

9   In determining the amount of Oracle International's actual damages you may

10 consider evidence of Oracle International's lost profits presented by either party, but Oracle

11 International's lost profits do not serve as a limit on the amount of Oracle International's actual

12 damages, as measured by the fair market value of all of the rights defendants infringed, directly,

13 vicariously or contributorily.

14 Authority: Model Instruction 12.8.2 Damages — Actual Damages, Federal Civil Jury
Instructions of the Seventh Circuit (citing *Taylor v. Meirick*, 712 F.2d 1112, 1120-1121 (7th Cir.
15 1983)); *Lucky Break Wishbone Corp. v. Sears Roebuck & Co.*, 2010 WL 1391359, *3 (9th Cir.
16 2010) (unpublished) (finding that "[t]he jury is not restricted . . . to awarding lost profits" where
evidence of lost profits and a fair market value of a lost license fee were presented to the jury,
17 defendant claimed that lost profits were appropriate actual damage measurement, and defendant
claimed jury award was too high to account for appropriate deduction of costs to arrive at lost
18 profits); *Polar Bear Prods. Inc. v. Timex Corp.*, 384 F.3d 700, 708-710 (9th Cir. 2004)
(evaluating a claim for both a fair market value lost license fee and lost profits as additive actual
19 damages); Order on Denying Defendants' Motion for Partial Summary Judgment, Dkt. No. 628
20 at 2-3 ("General tort principles of causation and damages apply when analyzing compensatory
damage awards for copyright infringement."); *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th
21 953, 968-69 (1997) ("California has definitively adopted the substantial factor test of the
Restatement Second of Torts for cause-in-fact determinations…. The substantial factor standard,
22 however, has been embraced as a clearer rule of causation [than the 'but for' test]—one which
subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations,
23 such as those involving independent or concurrent causes in fact.").

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COPYRIGHT DAMAGES—INFRINGERS' PROFITS

In addition to actual damages, Oracle International is entitled to any profits made by any defendant that are attributable to the actual, vicarious, and/or contributory infringement. You may not include in an award of infringers' profits any amount that you took into account in determining actual damages.

You may make an award of the Defendants' profits only if you find that Oracle International has shown a defendant received revenue related directly or indirectly to the infringement. That defendant's profit is then determined by subtracting all expenses from the defendant's gross revenue.

The defendant's gross revenue is all of the defendant's receipts associated with the actual, vicarious, and/or contributory infringement. Oracle International has the burden of proving the defendant's gross revenue by a preponderance of the evidence.

Expenses are all costs incurred in producing the defendant's gross revenue. The defendant has the burden of proving the defendant's expenses by a preponderance of the evidence.

Unless you find that a portion of the profit from the use of the copyrighted work is attributable to factors other than use of the copyrighted work, all of the profit is to be attributed to the infringement. The defendant has the burden of proving the portion of the profit, if any, attributable to factors other than infringing the copyrighted work.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.24 (Civil) (modified); *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir. 2004).

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13 **COPYRIGHT DAMAGES**

14 **DEFENDANTS' MODULE**

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Proposed Instruction No. 9-A (Defendants)

2   <u>**COPYRIGHT—DAMAGES**</u>

3   Oracle International asserts a claim for copyright infringement against defendant

4   TomorrowNow. TomorrowNow has agreed to liability under that claim for purposes of this

5   case. You may therefore assume TomorrowNow is liable for copyright infringement and must

6   determine whether Oracle International should be awarded any damages. Oracle International

7   may be entitled to recover the actual damages suffered, if any, as a result of the infringement. In

8   addition, Oracle International also may also be entitled to recover any profits of the defendants

9   attributable to the infringement. You may not include an award of defendants' profits if you

10   already took that amount into account in determining actual damages. Oracle International must

11   prove damages by a preponderance of the evidence, and it is for you to determine what damages,

12   if any, have been proved. Your award must be based upon evidence and not upon speculation,

13   guesswork, or conjecture.

14   No copyright infringement damages of any type or in any amount may be

15   awarded to Oracle USA or Siebel Systems.

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17   Ninth Circuit Manual of Model Jury Instructions, Instruction 17.22 (Civil) (modified).

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Proposed Instruction No. 9-B (Defendants)

<u>COPYRIGHT—ACTUAL DAMAGES</u>

3   The copyright owner is entitled to recover the actual damages suffered as a result

4 of the infringement. Actual damages may be measured either as lost profits or as fair market

5 value damages. Fair market value damages means the amount of money adequate to compensate

6 the copyright owner for the reduction of the fair market value of the copyrighted work caused by

7 the infringement; fair market value damages may not be speculative. The reduction of the fair

8 market value of the copyrighted work is the amount a willing buyer would have been reasonably

9 required to pay a willing seller at the time of the infringement for the actual use made by the

10 defendant of the plaintiff's work. That amount also could be represented by the lost license fees

11 the plaintiff would have received for the defendant's unauthorized use of the plaintiff's work.

12   A copyright owner may elect to pursue either a fair market value or a lost profits

13 calculation of its actual damages. Similarly, a defendant may elect to offer its own calculation of

14 either a fair market value or lost profits calculation of actual damages. Neither the copyright

15 holder nor the defendant is constrained by the other's choice of measurement. If you decide to

16 award damages, you should elect the measure of damages that you determine best represents the

17 actual damages suffered as a result of the infringement, subject to the other instructions provided

18 to you.

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20 Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 17.23 (Civil) (modified);

21 *On Davis v. The Gap*, Inc., 246 F.3d 152, 167 (2d Cir. 2001); Order Denying Defendants'

22 Motion for Partial Summary Judgment at 3 (D.I. 628).

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

1   **Proposed Instruction No. 9-C (Defendants)**

2   **COPYRIGHT—ACTUAL DAMAGES—FAIR MARKET VALUE EVIDENCE**

3   If you decide that the best measure of actual damages is the fair market value of a

4 license based on a hypothetical negotiation, your determination of the value of actual damages is

5 not limited to consideration of evidence that was known to the parties at or before the time

6 infringement began. You may consider events and facts that occurred after the date of a

7 hypothetical negotiation when determining the amount of a hypothetical license.

8

9 Authority: *Lucent Tech. Inc. v. Gateway Inc.*, 580 F.3d 1301 (Fed. Cir. 2009) (citation omitted)

10 (concluding the Federal Circuit has "observed that the hypothetical negotiation analysis 'permits

11 and often requires a court to look to events and facts that occurred thereafter and that could not

12 have been known to or predicated by the hypothesized negotiators'"); *Sinclair Refining Co. v.*

13 *Jenkins Petroleum Process Co.,* 289 U.S. 689, 698 (1933) (recognizing that factual

14 developments occurring after the date of a hypothetical negotiation can inform damages

15 calculation).

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Proposed Instruction No. 9-D (Defendants)

<u>**COPYRIGHT—DAMAGES—**</u>

<u>**ORACLE INTERNATIONAL'S LOST PROFITS**</u>

4   The plaintiff has the initial burden of proving a causal relationship between the

5   alleged infringement and lost profits that resulted from the alleged infringement. Plaintiff must

6   prove that, but for the alleged infringement, it would not have suffered lost profits. Plaintiff

7   must prove that the infringement was the proximate cause of its loss by proving that the

8   existence and amount of the loss was the natural and probable consequence of the alleged

9   infringement. If you find that the plaintiff has not carried its initial burden, then you shall not

10   make an award of lost profits.

11   If you find that the plaintiff carried its initial burden, then the burden shifts to the

12   defendant to show that all or some portion of the claimed lost profits were not caused by the

13   alleged infringement. Among other things, defendant may show that customers would have

14   ceased purchasing support services from plaintiff even had the alleged infringement not

15   occurred. Additionally, defendant may show that the existence and amount of the claimed lost

16   profits were not the natural and probable consequences of the alleged infringement alone, but

17   were the result of other factors.

18   You may award lost profits only to the extent that plaintiff has carried its initial

19   burden and defendant has failed to show that all or some portion of the lost profits were not

20   caused by the alleged infringement. In that case, you may award only that portion of the lost

21   profits that were caused by the alleged infringement.

22   In determining causation of alleged lost profits, you may take into account all the

23   diverse factors which might bear upon why customers ceased purchasing support services from

24   plaintiff.

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26   Authority: Ninth Circuit Manual Model Jury Instruction 17.23 (modified); 17 U.S.C. § 504(b);

27   *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir. 2004); *Data Gen. Corp. v.*

28   *Grumman Sys. Support Corp.*, 36 F.3d 1147, 1172 n.44 (1st Cir. 1994) (affirming "the adequacy

1   of the district court's instructions on causation," particularly an instruction that the jury may

2   consider "all the diverse factors which . . . might bear upon" causation").

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

COPYRIGHT—DAMAGES—DEFENDANTS' PROFITS

In addition to actual damages, the copyright owner may be entitled to profits of the defendant caused by the alleged infringement. You may not include in an award of defendants' profits any duplicative profits, that is, any amount that you took into account in determining actual damages.

The plaintiff has an initial burden of proving a causal relationship between the alleged infringement and the defendant's non-duplicative profits generated from the alleged infringement. Proof of causation by plaintiff for indirect profits as alleged in this case is particularly important because indirect profits claims are often more attenuated than claims for direct profits. Plaintiff must prove that, but for the alleged infringement, defendant would not have made the profits. Plaintiff must prove that the alleged infringement was the proximate cause of defendant's profits by proving that the existence and amount of the profits was the natural and probable consequence of the alleged infringement. If you find that plaintiff has not carried its initial burden, then you shall not make an award of defendant's profits.

If you find that plaintiff has carried its initial burden, then the burden shifts to the defendant to show that some or all of the claimed defendant's profits were not caused by the alleged infringement. Among other things, defendant may show that customers would have purchased SAP products and services even had the alleged infringement not occurred. Additionally, defendant may show that the existence and amount of its profits were not the natural and probable consequences of the alleged infringement alone, but were the result of other factors.

You may award defendant's profits only to the extent that plaintiff carried its initial burden and defendant failed to show that some or all of the alleged profits were not caused by the alleged infringement, in which case you may award only that portion of the profits that was caused by the alleged infringement. You may not award any profits of defendant that are remotely and speculatively attributable to the alleged infringement.

In determining causation of defendant's alleged profits, you may take into account

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

1   all the diverse factors which might bear upon why customers purchased products or services

2   from defendant.

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4   Authority: Ninth Circuit Model Jury Instruction 17.24 (modified); 17 U.S.C. § 504(b); *Polar*

5   *Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 709 (9th Cir. 2004); *Data Gen. Corp. v.*

6   *Grumman Sys. Support Corp.*, 36 F.3d 1147, 1172 n.44 (1st Cir. 1994) (affirming "the adequacy

7   of the district court's instructions on causation," particularly an instruction that the jury may

8   consider "all the diverse factors which . . . might bear upon" causation").

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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CFAA
ORACLE MODULE

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

Proposed Instruction No. 10-A (Plaintiffs)

STIPULATED VIOLATIONS OF FEDERAL COMPUTER FRAUD AND ABUSE ACT

(18 U.S.C. § 1030 *et seq.*)

In addition to the copyright claims, Defendants agree that TomorrowNow violated five provisions of the Federal Computer Fraud and Abuse Act ("CFAA"). I will now instruct you on the provisions of the CFAA, and the damages you may award based on the agreed violations the CFAA.

Authority: None. Transitional instruction.

Proposed Instruction No. 10-B (Plaintiffs)

FEDERAL COMPUTER FRAUD AND ABUSE ACT

OBTAINING INFORMATION FROM A PROTECTED COMPUTER IN VIOLATION

OF 18 U.S.C. § 1030(a)(2)(C)

First, Defendants agree that TomorrowNow committed computer fraud in

violation of Section 1030(a)(2)(c) of Title 18 of the United States Code, including the following

facts:

        1)   TomorrowNow intentionally accessed an Oracle computer or computer

              system;

        2)   TomorrowNow accessed the Oracle computer or computer system without

              authorization, or in a way that exceeded authorized access;

        3)   TomorrowNow obtained information from the Oracle computer or

              computer system; and,

        4)   Caused loss of at least $5,000.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 8.79 (Criminal)

(modified); 18 U.S.C. § 1030(a)(2)(C) (2006) (paraphrased); Defendants' Answer and

Affirmative Defenses to First Amended Complaint, Dkt. No. 36, ¶113 (admitting that the

computer system or systems that Defendants accessed for CFAA claim constituted a "protected

computer" within the meaning of 18 U.S.C. § 1030(e)(2)).

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

FEDERAL COMPUTER FRAUD AND ABUSE ACT

ACCESSING A PROTECTED COMPUTER IN VIOLATION OF 18 U.S.C. § 1030(a)(4)

Second, Defendants agree that TomorrowNow committed computer fraud in violation of Section 1030(a)(4) of Title 18 of the United States Code, including the following facts:

1) TomorrowNow knowingly accessed an Oracle computer or computer system;

2) TomorrowNow accessed the Oracle computer or computer system without authorization or in a manner that exceeded authorized access;

3) TomorrowNow did so with intent to defraud;

4) By accessing the Oracle computer or computer system, TomorrowNow furthered the intended fraud;

5) By accessing the Oracle computer or computer system, TomorrowNow obtained anything of value; and,

6) Caused loss of at least $5,000.

Authority: Ninth Circuit Manual of Model Jury Instructions 3.17 and 8.81 (Criminal) (modified); 18 U.S.C. 1030(a)(4) (2006) (paraphrased); Defendants' Answer and Affirmative Defenses to First Amended Complaint, Dkt. No. 36, ¶113 (admitting that the computer system or systems that Defendants accessed for CFAA claim constituted a "protected computer" within the meaning of 18 U.S.C. § 1030(e)(2)).

Proposed Instruction No. 10-D (Plaintiffs)

2   **FEDERAL COMPUTER FRAUD AND ABUSE ACT**

3   **DAMAGE TO A PROTECTED COMPUTER IN VIOLATION OF**

4   **18 U.S.C. § 1030(a)(5)(A)(i)**

5   Third, Defendants agree that TomorrowNow committed computer fraud in

6   violation of Section 1030(a)(5)(A)(i) of Title 18 of the United States Code, including the

7   following facts:

8   1)   TomorrowNow knowingly caused the transmission of a program,

9   information, code or command to an Oracle computer or computer system;

10   2)   As a result of this conduct, TomorrowNow intentionally caused any

11   impairment, however slight, to the integrity or availability of any data,

12   program, system or information on the Oracle computer or computer

13   system;

14   3)   TomorrowNow's conduct was without authorization; and,

15   4)   Caused loss of at least $5,000.

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18   Authority: Ninth Circuit Manual of Model Jury Instructions, Instructions 8.83 (Criminal)

19   (modified); 18 U.S.C. 1030(a)(5)(A)(i) (2006) (paraphrased); 18 U.S.C. 1030(a)(5)(B) (2006)

20   (paraphrased); *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078 (9th Cir. 2004); *Register.com v.*

21   *Verio, Inc.*, 126 F. Supp. 2d 238, 251-52 (S.D.N.Y. 2001); Defendants' Answer and Affirmative

22   Defenses to First Amended Complaint, Dkt. No. 36, ¶113 (admitting that the computer system or

23   systems that Defendants accessed for CFAA claim constituted a "protected computer" within the

24   meaning of 18 U.S.C. § 1030(e)(2)).

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

FEDERAL COMPUTER FRAUD AND ABUSE ACT

DAMAGE TO A PROTECTED COMPUTER IN VIOLATION OF 18 U.S.C. §

1030(a)(5)(A)(ii)

Fourth, Defendants agree that TomorrowNow committed computer fraud in violation of Section 1030(a)(5)(A)(ii) of Title 18 of the United States Code, including the following facts:

1)   TomorrowNow intentionally accessed an Oracle computer or computer system;

2)   TomorrowNow's access was without authorization;

3)   As a result of this conduct, TomorrowNow recklessly caused any impairment, however slight, to the integrity or availability of any data, program, system or information; and,

4)   Caused loss of at least $5,000.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instructions 8.83 (Criminal) (modified); 18 U.S.C. § 1030(a)(5)(A)(ii) (2006) (paraphrased); 18 U.S.C. § 1030(a)(5)(B) (2006) (paraphrased); *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078 (9th Cir. 2004); *Register.com v. Verio, Inc.*, 126 F. Supp. 2d 238, 251-52 (S.D.N.Y. 2001); Defendants' Answer and Affirmative Defenses to First Amended Complaint, Dkt. No. 36, ¶113 (admitting that the computer system or systems that Defendants accessed for CFAA claim constituted a "protected computer" within the meaning of 18 U.S.C. § 1030(e)(2)).

FEDERAL COMPUTER FRAUD AND ABUSE ACT

DAMAGE TO A PROTECTED COMPUTER IN VIOLATION OF 18 U.S.C. §

1030(a)(5)(A)(iii)

Fifth, Defendants agree that TomorrowNow committed computer fraud in violation of Section 1030(a)(5)(A)(iii) of Title 18 of the United States Code, including the following facts:

1) TomorrowNow intentionally accessed an Oracle computer or computer system;

2) TomorrowNow's access was without authorization;

3) As a result of that conduct, TomorrowNow caused any impairment, however slight, to the integrity or availability of any data, program, system or information; and,

4) Caused loss of at least $5,000.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instructions 8.83 (Criminal) (modified); 18 U.S.C. § 1030(a)(5)(A)(iii) (2006) (paraphrased); 18 U.S.C. § 1030(a)(5)(B) (2006) (paraphrased); *Theofel v. Farey-Jones*, 359 F.3d 1066, 1078 (9th Cir. 2004); *Register.com v. Verio, Inc.*, 126 F. Supp. 2d 238, 251-52 (S.D.N.Y. 2001); Defendants' Answer and Affirmative Defenses to First Amended Complaint, Dkt. No. 36, ¶113 (admitting that the computer system or systems that Defendants accessed for CFAA claim constituted a "protected computer" within the meaning of 18 U.S.C. § 1030(e)(2)).

Proposed Instruction No. 10-G (Plaintiffs)

FEDERAL COMPUTER FRAUD AND ABUSE ACT—DAMAGES

(18 U.S.C. § 1030 *et seq.*)

Based on TomorrowNow's agreed violations of the five sections of the CFAA described above, you may award Oracle USA and/or Oracle International damages under the CFAA if you find that the violations were a substantial factor in causing the damages. These damages should include:

    1)   costs of responding to the violation;

    2)   costs of conducting a damage assessment;

    3)   costs of restoring the system and data to its prior condition;

    4)   lost revenues or costs due to interruption of service;

    5)   costs of investigating the violation;

    6)   costs of identifying the violation; and,

    7)   the value of any business these Plaintiffs lost as a result of the violation of the CFAA.

It is these Plaintiffs' burden to prove its damages by a preponderance of the evidence.

Authority: 18 U.S.C. § 1030(g); *Creative Computing*, 386 F.3d 930, 935 (9th Cir. 2004); *SuccessFactors, Inc. v. Softscape, Inc.*, 544 F. Supp. 2d 975 at 980-81 (N.D. Cal. 2008).

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CFAA
DEFENDANTS' MODULE

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Proposed Instruction No. 10-A (Defendants)

VIOLATION OF FEDERAL COMPUTER FRAUD AND ABUSE ACT

(18 U.S.C. § 1030 *et seq.*)—DAMAGES

Oracle International and Oracle USA assert a claim for violations of five provisions of the Federal Computer Fraud and Abuse Act ("CFAA") against defendant TomorrowNow. TomorrowNow has agreed to liability under that claim for purposes of this case. You may therefore assume TomorrowNow is liable under the CFAA claim and will be asked to address the damages, if any, that should be awarded.

Oracle International and Oracle USA are limited in their recovery to any lost support profits from the TomorrowNow customers and costs of investigation that each is able to prove that it suffered as a result of the violation(s). Oracle International and Oracle USA must each prove damages by a preponderance of the evidence, and it is for you to determine what damages, if any, have been proved. Your award must be based upon evidence and not upon speculation, guesswork, or conjecture.

No Computer Fraud and Abuse Act damages of any type or in any amount may be awarded to Siebel Systems.

Authority: 18 U.S.C. § 1030(g) (2007); Plaintiffs' Fourth Amended Complaint (D.I. 418); Order Denying Defendants' Motion for Partial Summary Judgment (D.I. 628) at 3.

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

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

COMPUTER FRAUD AND ABUSE ACT—DEFINITIONS

For purposes of the Computer Fraud and Abuse Act:

"Economic damages" means the economic loss that a plaintiff has suffered as a direct result of a defendant's conduct.

Authority: 18 U.S.C. §1030(e); Black's Legal Dictionary, Abridged 8th Edition (2005); *Czech v. Wall St. on Demand, Inc.*, No. 09-180 (DWF/RLE), 2009 U.S. Dist. LEXIS 114125 (D. Minn. Dec. 8, 2009); *Kalow & Springnut, LLP v. Commence Corp.*, No. 07-3442 (FLW), 2008 U.S. Dist. LEXIS 48036 (D.N.J. June 23, 2008).

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CDAFA
ORACLE MODULE

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

STIPULATED VIOLATIONS OF CALIFORNIA COMPUTER DATA ACCESS AND

FRAUD ACT

(CAL. PENAL CODE § 502 *et seq.*)

Defendants agree that TomorrowNow violated four sections of California Penal Code Section 502, known as the California Computer Data Access and Fraud Act ("CDAFA"). I will now instruct you on the law regarding the applicable provisions of California Penal Code Section 502, and the damages you may award based on the agreed violations of Penal Code Section 502.

Authority: None. Transitional instruction.

VIOLATION OF CALIFORNIA COMPUTER DATA ACCESS AND FRAUD ACT

(CAL. PENAL CODE § 502(c)(2))

First, Defendants agree that TomorrowNow committed computer fraud in violation of California Penal Code section 502(c)(2), because TomorrowNow knowingly accessed and without permission took, copied, or made use of data from an Oracle USA and/or Oracle International computer or computer system including supporting documentation for Oracle computer programs. Oracle USA and/or Oracle International contend that these violations caused one or more of these Plaintiffs suffered damage or loss.

Authority: Cal. Penal Code § 502(c)(2) (paraphrased); Cal. Penal Code § 502(e) (paraphrased).

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

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

<u>VIOLATION OF CALIFORNIA COMPUTER DATA ACCESS AND FRAUD ACT</u>

<u>(CAL. PENAL CODE § 502(c)(3))</u>

Second, Defendants agree that TomorrowNow committed computer fraud in violation of California Penal Code section 502(c)(3), because TomorrowNow knowingly and without permission used or caused to be used the computer services of Oracle USA and/or Oracle International. Oracle USA and/or Oracle International contend that these violations caused one or more of these Plaintiffs suffered damage or loss.

Authority: Cal. Penal Code § 502(c)(3) (paraphrased); Cal. Penal Code § 502(e) (paraphrased).

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

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

Proposed Instruction No. 11-D (Plaintiffs)

VIOLATION OF CALIFORNIA COMPUTER DATA ACCESS AND FRAUD ACT

(CAL. PENAL CODE § 502(c)(6))

Third, Defendants agree that TomorrowNow committed computer fraud in violation of California Penal Code section 502(c)(6), because TomorrowNow knowingly and without permission provided or assisted in providing a means of accessing any of the computers, computer systems, and/or computer networks of Oracle USA and/or Oracle International. Oracle USA and/or Oracle International contend that these violations caused one or more of these Plaintiffs suffered damage or loss.

Authority: Cal. Penal Code § 502(c)(6) (paraphrased); Cal. Penal Code § 502(e) (paraphrased).

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

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

VIOLATION OF CALIFORNIA COMPUTER DATA ACCESS AND FRAUD ACT

(CAL. PENAL CODE § 502(c)(7))

Fourth, Defendants agree that TomorrowNow committed computer fraud in violation of California Penal Code section 502(c)(7), because TomorrowNow knowingly and without permission accessed or caused to be accessed any of the computers, computer systems, or computer networks of Oracle USA and/or Oracle International. Oracle USA and/or Oracle International contend that these violations caused one or more of these Plaintiffs suffered damage or loss.

Authority: Cal. Penal Code § 502(c)(7) (paraphrased); Cal. Penal Code § 502(e) (paraphrased).

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CDAFA
ORACLE MODULE
(CONTINUED)

CALIFORNIA COMPUTER DATA ACCESS AND FRAUD ACT—DAMAGES

(CAL. PENAL CODE § 502(e))

Based on TomorrowNow's agreed violations of the above sections of California Penal Code section 502, you may award damages to Oracle USA and/or Oracle International. These damages should include amounts sufficient to compensate these Plaintiffs for the harm they suffered as a result of any violations, including any expenditure reasonably and necessarily incurred to verify that their computers, computer systems, computer networks, and/or data was or was not altered, damaged, or deleted by the access.

In addition, based on TomorrowNow's admissions of fraud in connection with its violations California Penal Code sections 502(c)(2), (c)(3), (c)(6) or (c)(7), you may additionally award punitive or exemplary damages, as set forth in the instructions on punitive damages I will give you later.

Authority: Cal. Penal Code §§ 502(e)(1), 502(e)(4) (paraphrased).

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

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CDAFA
DEFENDANTS' MODULE

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COMPUTER DATA ACCESS AND FRAUD ACT

(CAL. PENAL CODE § 502 *et seq.*)—DAMAGES

Oracle USA and Oracle International assert a claim against TomorrowNow for violation of four sections of California Penal Code Section 502, known as the California Computer Data Access and Fraud Act ("CDAFA"). TomorrowNow has agreed to liability under that claim for purposes of this case. You may therefore assume TomorrowNow is liable under the CDAFA and will be asked to address the damages, if any, that should be awarded. Oracle International and Oracle USA are entitled to recover only compensatory damages suffered as a result of the violation(s). "Compensatory damages" are limited to any expenditure reasonably and necessarily incurred by the owner or lessee to verify that a computer system, computer network, computer program, or data was or was not altered, damaged, or deleted by the access.

Oracle International and Oracle USA must each prove damages by a preponderance of the evidence, and it is for you to determine what damages, if any, have been proved. Your award must be based upon evidence and not upon speculation, guesswork, or conjecture.

No Computer Data Access and Fraud Act damages of any type or in any amount may be awarded to Siebel Systems.

Authority: Cal. Penal Code § 502(e)(1) (2010).

BREACH OF CONTRACT
ORACLE MODULE

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

Proposed Instruction No. 12-A (Plaintiffs)

INTRODUCTION TO BREACH OF CONTRACT, INTERFERENCE

AND TRESPASS TO CHATTEL CLAIMS – LIABILITY ESTABLISHED

In addition to the claims on which I have instructed you so far, Defendants agree

that TomorrowNow is liable for breach of contract and trespass to chattels. Further, Defendants

agree that TomorrowNow is liable for intentional interference with prospective economic

advantage and negligent interference with prospective economic advantage. I will instruct you

on the elements of each of these four claims. After I have instructed you on the elements of

these claims, I will instruct you on the damages you may award to Oracle based on

TomorrowNow's agreed violations of these laws.

Authority: None. Transitional instruction.

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

BREACH OF CONTRACT

To gain access to Oracle's customer support websites, each user must agree to abide by terms of use for those websites, creating a contract between Oracle USA and the user. Defendants agree that TomorrowNow agreed to these terms of use, but then violated that contract by engaging in conduct that the contract prohibited. Oracle USA claims that TomorrowNow's breach of contract caused harm for which TomorrowNow should pay.

Authority: CACI No. 303 (modified)

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BREACH OF CONTRACT DEFENDANTS' MODULE

Proposed Instruction No. 12-A (Defendants)

2 <u>**BREACH OF CONTRACT—DAMAGES**</u>

3   Oracle USA asserts a claim for breach of contract against defendant

4 TomorrowNow. TomorrowNow has agreed to liability under that claim for purposes of this

5 case. You may therefore assume TomorrowNow is liable under the breach of contract claim and

6 will be asked to address the damages, if any, that should be awarded. You may award Oracle

7 USA compensatory damages for that breach. In order to determine damages, you must decide

8 how much money will compensate Oracle USA for the harm caused by the breach. The Court

9 will separately instruct you on the meaning of compensatory damages in this case.

10   To recover damages for any harm, Oracle USA must prove:

11   1) That the harm was likely to arise in the ordinary course of events from the

12   breach of the contract; or

13   2) That when the contract was made, both parties could have reasonably

14   foreseen the harm as the probable consequence of the breach.

15   Oracle USA must also prove the amount of its damages. It does not have to prove

16 the exact amount of damages; however, you must not speculate or guess in awarding damages.

17   Oracle USA has made claims against TomorrowNow for breach of contract,

18 intentional interference with prospective economic advantage, negligent interference with

19 prospective economic advantage, and trespass to chattels. The same damages that resulted from

20 more than one claim can only be awarded once.

21   No breach of contract damages of any type or in any amount may be awarded to

22 Oracle International or Siebel Systems.

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24 Authority: CACI 350. Introduction to Contract Damages (modified); CACI 361. Plaintiff May

25 Not Recover Duplicate Contract and Tort Damages (modified).

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INTERFERENCE
ORACLE MODULE

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INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

Defendants agree that TomorrowNow wrongfully interfered with Oracle USA's and Oracle International's economic relationships with current and prospective purchasers and licensees of Oracle's support services and software. I will now instruct you on the law regarding intentional and negligent interference with prospective economic advantage.

Authority: None. Transitional instruction.

THEORY OF INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

Defendants agree that TomorrowNow's conduct prevented Oracle USA and Oracle International from continuing advantageous relationships with current and prospective purchasers and licensees of Oracle's support services and software. Oracle USA and Oracle International seek to recover money damages from TomorrowNow for the agreed interference with their prospective economic advantage.

Authority: ABA Model Jury Instruction 2.2.1 (Business Torts); *Buxbom v. Smith,* 23 Cal. 2d 535 (Cal. 1944).

INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

Defendants agree that TomorrowNow intentionally interfered with a relationship between Oracle USA or Oracle International and current and prospective purchasers and licensees of Oracle's support services and software that probably would have resulted in an economic benefit to one or more of these Plaintiffs.

If you find that TomorrowNow's agreed interference was a substantial factor in causing Oracle USA and/or Oracle International harm, you should consider the question of the amount of money damages under instructions I will give you.

Authority: BAJI § 7.82; ABA Model Jury Instruction 2.2.2 (Business Torts); B F. O'Malley, J. Grenig & W. Lee, Federal Jury Practice and Instructions §127.01 (5th ed. 2001) (modified).

NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE

Defendants agree that TomorrowNow negligently interfered with relationships between Oracle USA or Oracle International and current and prospective purchasers and licensees of Oracle's support services and software that probably would have resulted in an economic benefit to one or more of these Plaintiffs.

If you find that TomorrowNow's agreed interference was a substantial factor in causing Oracle USA and/or Oracle International harm, you should consider the question of the amount of money damages under instructions I will give you.

Authority: CACI No. 2204 (modified).

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11 **INTERFERENCE**

12 **DEFENDANTS' MODULE**

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Proposed Instruction No. 13-A (Defendants)

INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC

ADVANTAGE—DAMAGES

4   Oracle International and Oracle USA assert a claim for intentional interference

5   with prospective economic advantage against defendant TomorrowNow. TomorrowNow has

6   agreed to liability under that claim for purposes of this case. You may therefore assume

7   TomorrowNow is liable under that claim and will be asked to address the damages, if any, that

8   should be awarded.

9   To recover compensatory damages for profits lost due to TomorrowNow's

10 intentional interference with prospective economic advantage, Oracle International and Oracle

11 USA must each prove with reasonable certainty that each, respectively would have earned profits

12 but for TomorrowNow's conduct. The Court will separately instruct you on the meaning of

13 compensatory damages in this case.

14   The amount of lost profits need not be calculated with mathematical precision, but

15 there must be a reasonable basis for computing the loss.

16   To the extent that you award any damages for intentional interference with

17 prospective economic advantage, you may not award damages for the same conduct under the

18 negligent interference with prospective economic advantage claim.

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20 Authority: CACI 2202. Intentional Interference With Prospective Economic Advantage

21 (modified); CACI 3903N. Lost Profits (Economic Damages) (modified).

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

NEGLIGENT INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE—

DAMAGES

Oracle International and Oracle USA assert a claim for negligent interference with prospective economic advantage against defendant TomorrowNow. TomorrowNow has agreed to liability under that claim for purposes of this case. You may therefore assume TomorrowNow is liable under that claim and will be asked to address the damages, if any, that should be awarded.

To recover compensatory damages for profits lost due to TomorrowNow's negligent interference with prospective economic advantage, Oracle International and Oracle USA must each prove that it is reasonably certain that each, respectively would have earned profits but for TomorrowNow's conduct. The Court will separately instruct you on the meaning of compensatory damages in this case.

The amount of lost profits need not be calculated with mathematical precision, but there must be a reasonable basis for computing the loss.

To the extent that you award any damages for intentional interference with prospective economic advantage, you may not award damages for the same conduct under the negligent interference with prospective economic advantage claim.

Authority: CACI 2204 Negligent Interference With Prospective Economic Advantage (modified); *Avago Techs U.S., Inc. v. Venture Corp. Ltd.*, No. C 08-03248 JW, 2008 WL 5383367, at *6 (N.D. Cal. Dec. 22, 2008); CACI 3903N. Lost Profits (Economic Damages) (modified).

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TRESPASS TO CHATTELS
ORACLE MODULE

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TRESPASS TO CHATTELS

Defendants agree that TomorrowNow wrongfully trespassed on Oracle USA's access-restricted, internet-based customer support websites, computer systems and computer networks, which are Oracle USA's personal property. Oracle USA further contends that TomorrowNow's trespass caused it damage.

Authority: CACI Instruction No. 2101 (modified); *eBay, Inc. v. Bidder's Edge*, 100 F. Supp. 2d 1058, 1069-70 (N.D. Cal. 2000) ("In order to prevail on a claim for trespass based on accessing a computer system, the plaintiff must establish: (1) defendant intentionally and without authorization interfered with plaintiff's possessory interest in the computer system; and (2) defendant's unauthorized use proximately resulted in damage to plaintiff.") (internal citations omitted).

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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TRESPASS TO CHATTELS
DEFENDANTS' MODULE

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<u>TRESPASS TO CHATTELS—DAMAGES</u>

Oracle USA asserts a claim for trespass to chattels against defendant TomorrowNow. Specifically, Oracle USA claims that TomorrowNow wrongfully trespassed on its personal property. TomorrowNow has agreed to liability under that claim for purposes of this case. You may therefore assume TomorrowNow is liable under that claim and will be asked to address the damages, if any, that should be awarded.

To recover compensatory damages for harm to personal property, Oracle USA must prove the reduction in the value of its customer support websites, access-restricted internet-based support systems, and/or copies of Software and Support Materials on those support systems, or the reasonable cost in repairing this property, whichever is less. To recover compensatory damages for profits lost due to TomorrowNow's conduct constituting trespass to chattels, Oracle USA must prove with reasonable certainty that it would have earned profits but for TomorrowNow's conduct. The Court will separately instruct you on the meaning of compensatory damages in this case.

Authority: CACI 2101 Trespass to Chattels – Essential Factual Elements (modified); *Intel v. Hamidi*, 30 Cal. 4th 1342, 1348 (Cal. 2003); CACI 3903J. Damage to Personal Property (Economic Damage) (modified).

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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DAMAGES (GENERALLY)
ORACLE MODULE

STATE LAW CLAIMS—DAMAGES

You have already been instructed on damages available for copyright infringement, violation of the Computer Fraud and Abuse Act and violation of California Penal Code section 502. Based on Defendants' admissions that TomorrowNow is liable on Oracle's state law claims for breach of contract, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, or trespass to chattels, you may also award damages. I will now instruct you on the law regarding damages for these claims.

Authority: None. Transitional instruction.

STATE LAW CLAIMS—DAMAGES—LIABILITY ESTABLISHED

It is the duty of the Court to instruct you about the measure of damages. By instructing you on damages, the Court does not mean to suggest for which party your verdict should be rendered.

If you find that TomorrowNow's violations of the following state laws – breach of contract, intentional interference with prospective economic advantage, negligent interference with prospective economic advantage, and trespass to chattels – was a substantial factor in causing any damage to Oracle USA and/or Oracle International, you must determine Oracle's damages.

These Plaintiffs have the burden of proving damages by a preponderance of the evidence. Damages means the amount of money that will reasonably and fairly compensate a plaintiff for any injury you find was caused by one or more of the Defendants. The following instructions enumerate the types of damages you should consider.

It is for you to determine what damages, if any, have been proved.

Your award must be based upon evidence and not upon speculation, guesswork or conjecture.

Authority: Instructions 5.1 and 5.2, Ninth Circuit Manual of Model Jury Instructions (Civil) (modified); CACI 3901 (modified).

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

AMENDED JOINT PROPOSED JURY INSTRUCTIONS

STATE LAW CLAIMS—AVAILABLE DAMAGES

Two kinds of damages can be considered for these claims. They are compensatory damages and punitive damages.

Compensatory damages will consist of the amount of money that will reasonably and fairly compensate these Plaintiffs for any injury you find that TomorrowNow's acts were a substantial factor in causing.

Punitive damages are damages that you may award not as compensation to the Plaintiffs but to punish TomorrowNow for its behavior and to dissuade the Defendant and others from acting the same way in future, similar situations.

Authority: ABA Model Jury Instruction 2.10.1 (Business Torts) (modified); CACI 3901 (modified).

CAUSATION – SUBSTANTIAL FACTOR

A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm. Conduct is not a substantial factor in causing harm if the same harm would have occurred without that conduct.

Authority: CACI 430; Order on Denying Defendants' Motion for Partial Summary Judgment, Dkt. No. 628 at 2-3 ("General tort principles of causation and damages apply when analyzing compensatory damage awards for copyright infringement."); *Rutherford v. Owens-Illinois, Inc.*, 16 Cal. 4th 953, 968-69 (1997) ("California has definitively adopted the substantial factor test of the Restatement Second of Torts for cause-in-fact determinations…. The substantial factor standard, however, has been embraced as a clearer rule of causation [than the 'but for' test]—one which subsumes the 'but for' test while reaching beyond it to satisfactorily address other situations, such as those involving independent or concurrent causes in fact.").

Proposed Instruction No. 15-E (Plaintiffs)

STATE LAW CLAIMS -- COMPENSATORY DAMAGES

3   Based on Defendants' admissions that TomorrowNow's acts constitute breach of

4   contract, intentional interference with prospective economic advantage, negligent interference

5   with prospective economic advantage, and trespass to chattels, it is my duty to tell you what

6   damages the Plaintiffs are entitled to recover.

7   You may award a Plaintiff such a sum as you believe, from the evidence, will

8   fairly and reasonably compensate it for any damage it has suffered by reason of TomorrowNow's

9   acts complained of and agreed to, and for the anticipated profits of which a Plaintiff was

10   deprived, provided they are of such a nature to be beyond the speculative stage.

11   In determining compensatory damages on these claims, you may consider

12   whether a Plaintiff suffered any measurable loss of profits as a result of a Defendant's conduct.

13   In this case, Oracle USA and Oracle International claim that their support sales and software

14   licensing businesses were affected because of loss of profits they might have earned but for the

15   conduct of TomorrowNow.

16   For lost profits to be recovered there must be a reasonable basis for computing

17   them. Ordinarily, it is sufficient for this purpose to show actual past profits and losses.

18   Although they cannot be taken as an exact measure of future or anticipated profits, you, the jury,

19   should consider those past profits and losses together with the uncertainties and contingencies by

20   which they probably would have been affected. Losses and profits that are mere guesses,

21   speculative, remote, or uncertain should not be considered.

22   Damages, if any, should be restricted to such losses, if any, as are proved by facts

23   from which their existence is logically and legally inferable. The general rule on the subject of

24   damages is that all damages resulting necessarily, immediately, and directly from the wrong are

25   recoverable, and not those that are contingent and uncertain or mere speculation.

26   Although a qualified person may make estimates concerning probable profits or

27   losses of a going business, you should, in weighing all such evidence, take into consideration,

28   among other things, the truth or falsity of the basis of such estimates; the knowledge or lack of

1   knowledge of the witnesses of all of the conditions on which the estimate is based; whether the

2   facts assumed as a basis for an estimate rest upon actual accounts and records kept in the

3   ordinary course of business rather than in uncertain recollections; and knowledge of the witness

4   in the particular line of business about which the witness testifies. From all of the evidence in

5   this case bearing on the subject, you should determine for yourselves the probability or

6   improbability, and the amount, of profits anticipated by the plaintiff.

7   The difficulty or uncertainty in ascertaining or measuring the precise amount of

8   any damages does not preclude recovery, and you, the jury, should use your best judgment in

9   determining the amount of such damages, if any, based upon the evidence.

10   That a defendant did not actually anticipate or contemplate that these losses would

11   occur is not a relevant factor for you to consider.

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13   Authority: ABA Model Jury Instruction 2.10.2 (Business Torts) (modified).

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Proposed Instruction No. 15-F (Plaintiffs)

STATE LAW CLAIMS-- PUNITIVE DAMAGES

Based on the agreed violations of the California Computer Data Access and Fraud Act, trespass to chattels, and intentional interference with prospective economic advantage, you may, but are not required to, award punitive damages. The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff.

These Plaintiffs have the burden of proving by a preponderance of the evidence that punitive damages should be awarded, and, if so, the amount of any such damages.

You may award punitive damages only if you find that a defendant's conduct that harmed a plaintiff was fraudulent, malicious, oppressive or in reckless disregard of a plaintiff's rights. Conduct is fraudulent if based on intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a plaintiff of property or legal rights or otherwise causing injury. Conduct is malicious if it is accompanied by ill will, or spite, or if it is for the purpose of injuring a plaintiff. Conduct is in reckless disregard of a plaintiff's rights if, under the circumstances, it reflects complete indifference to a plaintiff's rights, or if a Defendant acted in the face of a perceived risk that its actions would violate a plaintiff's rights. An act or omission is oppressive if a defendant injured or damaged or otherwise violated the rights of a plaintiff with unnecessary harshness or severity, such as by the misuse or abuse of authority or power or by the taking advantage of a plaintiff's weakness or misfortune.

If you find that punitive damages are appropriate, you must use reason in setting the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes but should not reflect bias, prejudice or sympathy toward any party. In considering the amount of any punitive damages, consider the degree of reprehensibility of the defendant's conduct. In addition, you may consider the relationship of any award of punitive damages to any actual harm inflicted on one or more of the Plaintiffs.

Punitive damages may be awarded even if you award these Plaintiffs only

1   nominal, and not compensatory, damages.

2

3   Authority: Instruction 5.5, Ninth Circuit Manual of Model Jury Instructions (Civil) (modified);

4   Cal. Civ. Code § 3294; Cal. Penal Code § 502.

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DAMAGES (GENERALLY) DEFENDANTS' MODULE

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

1	**Proposed Instruction No. 15-A (Defendants)**
2	<u>**DAMAGES—BUT FOR CAUSATION**</u>
3	In order to collect damages on any claim from any defendant, a plaintiff must
4	prove that, but for the conduct of the defendant, the plaintiff would not have suffered harm.
5	A but for cause is the cause without which the harm could not have occurred. A
6	plaintiff must therefore prove that the plaintiff would not have suffered the harm had it not been
7	for the defendant's conduct.
8	If you find that a plaintiff would have suffered the complained-of harm whether
9	or not the defendant engaged in the complained-of conduct, you may not award damages based
10	on that conduct.
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12	Authority: *Polar Bear Prods., Inc. v. Timex Corp.*, 384 F.3d 700, 708 (9th Cir. 2004); *Harper &*
13	*Row Publishers, Inc. v. Nation Enters.*, 471 U.S. 539, 567 (1985); Cal. Civ. Code § 3333;
14	*Creative Computing v. Getloaded.com LLC*, 386 F.3d 930 (9th Cir. 2004).
15	
16	**[Plaintiffs do not propose jury instructions be read on but for causation, as Plaintiffs**
17	**contend that substantial factor is the appropriate test.]**
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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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DAMAGES—NO DUPLICATIVE DAMAGES

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3   A plaintiff is not entitled to recover twice for the same injury. You may not

4 include, in any award of damages, any duplicative damages; that is, you may not include any

5 amount that you took into account in determining damages for another claim which is based

6 upon the same conduct.

7

8 Authority: *Sparaco v. Lawler, Matusky, Skelly Engineers LLP*, 313 F. Supp. 2d 247, 250

9 (S.D.N.Y. 2004).

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11 **[Plaintiffs do not propose jury instructions be read on duplicative damages, and propose**

12 **instead that this issue be referenced in the verdict form. Plaintiffs propose to draft an**

13 **alternative instruction, however, if the Court desires a jury instruction on this subject.]**

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

DAMAGES—COMPENSATORY DAMAGES AND PRECLUDED DAMAGES

"Compensatory damages" mean damages that a plaintiff is entitled to recover for injury caused by a legal wrong that has been proven.

Because of prior Court rulings in this case, you may not award certain categories of compensatory damages to any plaintiff. These may not be awarded directly or indirectly under the guise of some other name or classification, including as part of any claim by plaintiff for the alleged reduction of the fair market value of the copyrighted works at issue.

You may not award any of the following categories of damages to any of the plaintiffs:

1)   Alleged damages relating to any customers who did not become customers of defendant TomorrowNow, including but not limited to any alleged damages relating to any pricing discounts.

2)   Alleged damages relating to any alleged lost license sale opportunities, including any lost opportunities to sell more software ("upsell") or different software ("cross-sell") licenses.

3)   Alleged damages relating to any Oracle software products that were not supported by defendant TomorrowNow.

4)   Alleged damages relating to claimed harm to Oracle's goodwill.

5)   Alleged damages relating to alleged "costs" Defendants saved in virtue of the accused conduct.

Authority: Order Granting Defendants' Motion for Preclusion of Certain Damages Evidence (D.I. 482); Order (D.I. 532); Order (D.I. 762); Fed. R. Evid. 401.

[Plaintiffs do not propose jury instructions be read on evidence that has purportedly been precluded, which Plaintiffs contend are not the subject of any inference and an issue for the Court. Plaintiffs believe jury instructions are not the appropriate vehicle for deciding

1   evidentiary objections, but to the extent the Court desires an instruction to assist the jury

2   in determining issues of fact, Plaintiffs propose the Parties draft something that accurately

3   reflects the Court's orders, rather than something that Plaintiffs contend is overbroad.]

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

DAMAGES—PUNITIVE DAMAGES—BACKGROUND

Plaintiffs Oracle International and Oracle USA seek punitive damages against TomorrowNow based on their claims for violation of the Computer Data Access and Fraud Act (Cal. Penal Code § 502(c)(2), (3), (6), (7)) and intentional interference with prospective economic advantage. If you have awarded damages against TomorrowNow on one or both of those claims, you should then consider whether to award punitive damages against TomorrowNow based on that claim and, if so, how much. Oracle USA and Oracle International have the burden of proving by clear and convincing evidence that punitive damages should be awarded with respect to these claims, and, if so, the amount of any such damages.

You may not award punitive damages with respect to any other claim by any of the plaintiffs.

You may not award punitive damages against SAP AG or SAP America.

The purposes of punitive damages are to punish a defendant and to deter similar acts in the future. Punitive damages may not be awarded to compensate a plaintiff.

You may award punitive damages only if you find that TomorrowNow's conduct that harmed Oracle USA and Oracle International was malicious, oppressive, or fraudulent.

"Malice" means that the defendant acted with intent to cause injury or that the defendant's conduct was despicable and was done with a willful and knowing disregard of the rights or safety of the plaintiff.

A person acts with knowing disregard when he or she is aware of the probable dangerous consequences of his or her conduct and deliberately fails to avoid those consequences.

"Oppression" means that the defendant's conduct was despicable and subjected the plaintiff to cruel and unjust hardship in knowing disregard of its rights, such as by the misuse or abuse of authority or power or by the taking advantage of some weakness or disability or misfortune of the plaintiff.

"Fraud" means that the defendant intentionally misrepresented or concealed a material fact and did so intending to harm the plaintiff.

1   There is no fixed formula for determining the amount of punitive damages, and

2   you are not required to award any punitive damages.

3   If you find that punitive damages are appropriate, you must use reason in setting

4   the amount. Punitive damages, if any, should be in an amount sufficient to fulfill their purposes

5   but should not reflect bias, prejudice, or sympathy toward any party.

6   In considering the amount of any punitive damages, you may not set the amount

7   of any punitive damages in order to punish TomorrowNow for any harm to anyone other than

8   Oracle USA and Oracle International.

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11   Authority: Ninth Circuit Manual of Model Jury Instruction 5.5 (modified); CACI 3945

12   (modified).

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

DAMAGES—PUNITIVE DAMAGES

COMPUTER DATA ACCESS AND FRAUD ACT

In order for you to award any punitive damages against TomorrowNow in connection with the Computer Data Access and Fraud Act claim—Cal. Penal Code § 502(c)(2), (3), (6), (7)—Oracle USA and Oracle International must each prove one of the following by clear and convincing evidence:

    1)   That the conduct constituting malice, oppression, or fraud was committed by one or more officers, directors, or managing agents of TomorrowNow, who acted on behalf of TomorrowNow; or

    2)   That the conduct constituting malice, oppression, or fraud was authorized by one or more officers, directors, or managing agents of TomorrowNow; or

    3)   That one or more officers, directors, or managing agents of TomorrowNow knew of the conduct constituting malice, oppression, or fraud and adopted or approved that conduct after it occurred.

An employee is a "managing agent" if he or she exercises substantial independent authority and judgment in his or her corporate decision making such that his or her decisions ultimately determine corporate policy.

If you decide to award punitive damages against TomorrowNow with respect to Oracle USA's and Oracle International's Computer Data Access and Fraud Act claim—Cal. Penal Code § 502(c)(2), (3), (6), (7)—you should consider all of the following factors in determining the amount:

    (a)   How reprehensible was TomorrowNow's conduct? In deciding how reprehensible TomorrowNow's conduct was, you may consider, among other factors:

        1)   Whether the conduct caused physical harm;

        2)   Whether TomorrowNow disregarded the health or safety of others;

1   3)   Whether Oracle USA and Oracle International were financially weak or

2   vulnerable and TomorrowNow knew Oracle USA and Oracle International

3   were financially weak or vulnerable and took advantage of them;

4   4)   Whether TomorrowNow's conduct involved a pattern or practice; and

5   5)   Whether TomorrowNow acted with trickery or deceit.

6   (b)   Is there a reasonable relationship between the amount of punitive damages and

7 Oracle USA's and Oracle International's harm that TomorrowNow knew was likely to occur

8 because of its conduct?

9   (c)   In view of TomorrowNow's financial condition, what amount is necessary to

10 punish it and discourage future wrongful conduct? You may not increase the punitive award

11 above an amount that is otherwise appropriate merely because TomorrowNow, SAP America, or

12 SAP AG has substantial financial resources.

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15 Authority: Ninth Circuit Manual of Model Jury Instruction 5.5 (modified); CACI 3945

16 (modified).

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

Proposed Instruction No. 15-F (Defendants)

<u>DAMAGES—PUNITIVE DAMAGES</u>

<u>INTENTIONAL INTERFERENCE WITH PROSPECTIVE ECONOMIC ADVANTAGE</u>

4   In order for you to award any punitive damages against TomorrowNow in

5   connection with the intentional interference with prospective economic advantage claim, Oracle

6   USA and Oracle International must each prove one of the following by clear and convincing

7   evidence:

8   1)   That the conduct constituting malice, oppression, or fraud was committed

9   by one or more officers, directors, or managing agents of TomorrowNow,

10   who acted on behalf of TomorrowNow; or

11   2)   That the conduct constituting malice, oppression, or fraud was authorized

12   by one or more officers, directors, or managing agents of TomorrowNow;

13   or

14   3)   That one or more officers, directors, or managing agents of

15   TomorrowNow knew of the conduct constituting malice, oppression, or

16   fraud and adopted or approved that conduct after it occurred.

17   An employee is a "managing agent" if he or she exercises substantial independent

18   authority and judgment in his or her corporate decision making such that his or her decisions

19   ultimately determine corporate policy.

20   If you decide to award punitive damages against TomorrowNow with respect to

21   Oracle USA's and Oracle International's intentional interference with prospective economic

22   advantage claim, you should consider all of the following factors in determining the amount:

23   (a)   How reprehensible was TomorrowNow's conduct? In deciding how

24   reprehensible TomorrowNow's conduct was, you may consider, among other factors:

25   1)   Whether the conduct caused physical harm;

26   2)   Whether TomorrowNow disregarded the health or safety of others;

27   3)   Whether Oracle USA and Oracle International were financially weak or

28   vulnerable and TomorrowNow knew Oracle USA and Oracle International

1   were financially weak or vulnerable and took advantage of them;

2   4)   Whether TomorrowNow's conduct involved a pattern or practice; and

3   5)   Whether TomorrowNow acted with trickery or deceit.

4   (b)   Is there a reasonable relationship between the amount of punitive damages and

5   Oracle USA's Oracle International's harm that TomorrowNow knew was likely to occur because

6   of its conduct?

7   (c)   In view of TomorrowNow's financial condition, what amount is necessary to

8   punish it and discourage future wrongful conduct? You may not increase the punitive award

9   above an amount that is otherwise appropriate merely because TomorrowNow, SAP America, or

10 SAP AG has substantial financial resources.

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13 Authority: Ninth Circuit Manual of Model Jury Instruction 5.5 (modified); CACI 3945

14 (modified); *Ramona Manor Convalescent Hospital v. Care Enters.*, 225 Cal. Rptr. 120, 132 (Cal.

15 Dist. Ct. App. 1986).

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

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CLAIMS INVOLVING EQUITABLE ISSUES ORACLE MODULE

Oracle proposes the following jury instructions for claims involving equitable issues.

EQUITABLE CLAIMS

In addition to the claims on which I have already instructed you, Defendants agree that TomorrowNow violated laws against unfair competition, unjust enrichment and which require an accounting against TomorrowNow. I will instruct you on the elements of each of these claims, and the relief you are permitted to provide for each claim.

Authority: None. Transitional instruction.

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

Proposed Instruction No. 16-B (Plaintiffs)

<u>**UNFAIR COMPETITION**</u>

<u>**(CAL. BUS. & PROF. CODE § 17200 *et seq.*)**</u>

4   Defendants agree that TomorrowNow violated California's Unfair Competition

5   Law, which prohibits business practices that are unlawful, fraudulent or unfair.

6

7   Authority: Cal. Bus. & Prof. Code § 17200; *Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co.*,

8   20 Cal. 4th 163, 180 (Cal. 1992); William L. Stern, <u>Bus. & Prof. C. § 17200 Practice</u>, §§ 3:12-

9   3:13 (2010) (paraphrased).

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

Proposed Instruction No. 16-C (Plaintiffs)

<u>**UNFAIR COMPETITION—RESTITUTION**</u>

<u>**(CAL. BUS. & PROF. CODE § 17200 *et seq.*)**</u>

4   Based on the agreed violations of section 17200, you must decide whether to

5   award monetary restitution to the Plaintiffs and the amount of restitution, if any. If you decide to

6   award monetary restitution, it must be limited to money or property that TomorrowNow took

7   from the Plaintiffs, or money or property in which the Plaintiffs had a vested interest.

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9   Authority: Cal. Bus. & Prof. Code § 17203; *Korea Supply Co. v. Lockheed Martin Corp.*, 29

10 Cal. 4th 1134, 1136-37, 1149 (Cal. 2003).

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UNJUST ENRICHMENT/RESTITUTION

Defendants agree that TomorrowNow was unjustly enriched by its access to and use of Oracle's software and software support materials. The doctrine of unjust enrichment is an equitable principle based on the idea that one person should not be able to unjustly enrich himself at the expense of another. The principle of unjust enrichment goes beyond merely restoring what a plaintiff actually lost. Where a benefit has been received by the defendant but the plaintiff has suffered no corresponding loss, the enrichment of the defendant may be unjust, and the defendant may be under a duty to give the plaintiff the amount by which the defendant has been enriched. The emphasis, therefore, is on the wrongdoer's enrichment, not the victim's loss. A person acting in conscious disregard of the rights of another should be required to disgorge all profit in order to benefit the injured party and deter the perpetrator from committing unlawful actions again. Principles of unjust enrichment, therefore, may compel a defendant to surrender all money or the value of all benefits obtained through an unfair business practice regardless of whether those amounts represent money taken directly from the victims of that unfair practice. A benefit is conferred not only when one adds to the property of another, but also when one saves the other from expense or loss.

Authority: *County of San Bernardino v. Walsh*, 158 Cal. App. 4th 533, 542 (Cal. Ct. App. 2007) (citing *Ward v. Taggart*, 51 Cal. 2d 736, 741-42 (Cal. 1959)); Restatement (First) of Restitution § 1, cmt. E; *Ghirardo v. Antonioli*, 14 Cal. 4th 39, 51 (Cal. 1996); *Cal. Fed. Bank v. Matreyek*, 8 Cal. App. 4th 125, 132 (Cal. Ct. App. 1992); *Ajaxo, Inc. v. E*Trade Grp., Inc*., 135 Cal. App. 4th 21 (Cal. Ct. App. 2005).

Proposed Instruction No. 16-E (Plaintiffs)

2   <u>**UNJUST ENRICHMENT/RESTITUTION DAMAGES**</u>

3   Based on Defendants' admissions that TomorrowNow was unjustly enriched at

4 Oracle's expense, you should determine the amount by which the Defendants were unjustly

5 enriched as damages and restore that to Oracle.

6

7 Authority: *AccuImage Diagnostics Corp. v. Terarecon, Inc.*, 260 F. Supp. 2d 941, 958 (N.D.

8 Cal. 2003) (citing *Lectrodryer v. SeoulBank*, 77 Cal. App. 4th 723 (Cal. Ct. App. 2000)).

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AMENDED JOINT PROPOSED JURY INSTRUCTIONS

Proposed Instruction No. 16-F (Plaintiffs)

<u>**AN ACCOUNTING**</u>

3   Defendants agree that, as a result of TomorrowNow's conduct, Plaintiffs are owed

4   an accounting of the income and gross profits that TomorrowNow obtained through its wrongful

5   conduct. The duty to account arises where there is a relationship between the parties or other

6   circumstances that require an accounting in equity, and an unknown balance is due that cannot be

7   ascertained without an accounting.

8

9   Authority: Mathew Bender California Forms of Pleading and Practice, §7.12[1]; *Teselle v.*

10   *McLoughlin*, 173 Cal. App. 4th 156, 179-80 (Cal. Ct. App. 2009) (relationship necessary to

11   claim for accounting may be formed where defendant possesses money or property it is obliged

12   to surrender to plaintiff).

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CLAIMS SEEKING EQUITABLE RELIEF DEFENDANTS' MODULE

14 **Defendants do not propose jury instructions be read on claims for equitable relief, which**

15 **must ultimately be decided by the Court, but propose to draft them if the Court desires the**

16 **jury's assistance in deciding disputes of fact.**

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