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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

22 ORACLE CORPORATION, *et al.*,

23 Plaintiffs,

24 v.

25 SAP AG, *et al.*,

26 Defendants.

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

**JOINT DISCOVERY CONFERENCE
 STATEMENT**

Date: May 28, 2008

Time: 3:00 p.m.

Courtroom: E, 15th Floor

Judge: Hon. Elizabeth D. Laporte

1 Pursuant to the Court's May 7, 2008 Order, Plaintiffs Oracle Corporation, Oracle USA,
2 Inc., and Oracle International Corporation (collectively, Oracle) and Defendants SAP AG, SAP
3 America, Inc., and TomorrowNow, Inc. (collectively, Defendants) hereby submit this Joint
4 Discovery Conference Statement. Although the Parties have made substantial progress on
5 discovery and continue to meet and confer to resolve issues, there are several issues related to the
6 scope of discovery that remain unresolved.

7 **1. Discovery Limitations**

8 The Parties continue to meet and confer on various methods aimed at reducing the volume
9 and enhancing the usefulness of each side's respective document productions. The Parties agree
10 that limitations on the potentially massive scope of discovery in this case are sensible; although
11 we have been unable as of yet to come to a specific agreement. Two primary means of limiting
12 the volume of documents have been discussed: search terms and restrictions on the number of
13 custodians whose documents must be reviewed and produced. Each is addressed below.

14 **a. Search Terms**

15 The Parties have exchanged lists of search terms, which can be used by each Party as a
16 means of narrowing the scope of electronic documents to be reviewed. These search terms would
17 not decrease the size of the document collection – only the size of the document review. At this
18 time, the Parties are testing and further refining a list of search terms. The Parties have met and
19 conferred a number of times over the past two weeks on this issue, and agree that the use of
20 search terms is a potentially beneficial way of narrowing the scope of discovery, provided testing
21 proves that the terms are both accurate and result in a sufficiently narrowed review set. The
22 Parties hope that, with further efforts to refine the terms to capture the responsive documents on
23 both sides, an agreement can be reached without judicial action.

24 **b. Number of Custodians**

25 At the May 6, 2008 hearing before this Court, the Parties reported that we would consider
26 limitations on the number of Party custodians whose entire cache of documents required review
27 and production. Since that time, the Parties have met and conferred on several occasions and
28 exchanged numerous emails, all in an attempt to come to an agreement on these limitations. The

1 Parties have agreed in concept that limits on the number of custodians with potentially responsive
2 information are appropriate, provided suitable alternatives to the responsive custodial information
3 exist and there is some flexibility to add (or subtract) custodians as discovery progresses and
4 warrants. However, Oracle and Defendants have not yet reached agreement on either the
5 numerical limit or the process by which that limit should be reached.

6 Defendants initially named 66 custodians from TomorrowNow and 30 from SAP America
7 and SAP AG combined, and proposed limiting production of documents from all Defendants to
8 only these 96. While Oracle embraced the idea of a custodian limit, it responded that it could not
9 evaluate a limit of 96 custodians until it received further information regarding the total universe
10 of Defendants' potentially responsive documents. Accordingly, Defendants agreed to, and did,
11 provide organization charts for SAP America and SAP AG (similar charts had already been
12 provided by the Parties for Oracle and TomorrowNow). The Parties also agreed to exchange lists
13 identifying (1) Party custodians that could hold responsive documents, and (2) non-custodial
14 "general" or "central" sources of responsive information that may provide supplements to the
15 identified custodial information. Oracle subsequently provided a list of approximately 414 Oracle
16 custodians who potentially held responsive documents and identified 179 of them by name.¹
17 Defendants provided a list of 629 custodians from SAP America and SAP AG combined who
18 potentially held responsive documents, identifying 121 by name, and stated that all of the
19 approximately 177 active TomorrowNow employees potentially held responsive documents.

20 Further discussions followed, during which the Parties clarified the scope of the
21 documents which were potentially encompassed within the identified custodial and non-custodial
22 sources and which had been or would be better found in targeted searches and discussed the
23 subjects to which those sources would be most likely relevant. Using this information, including
24 the TomorrowNow and SAP organization charts and Defendants' list of potentially responsive
25 custodians, Oracle specifically named an additional 33 custodians from SAP and TomorrowNow

26 _____
27 ¹ The Parties' potential custodians do not include certain employees who have been
28 (and will be) the subject of targeted searches for specific documents or types of documents.
"Custodians" are those whose entire collection of documents must be considered for review for
responsive documents, including by the possible use of search terms.

1 who it proposed Defendants initially add to the 96-custodian list initially proffered by them. In
2 response, Defendants offered to increase the numerical limit to 110 custodians, with an automatic
3 right to later add five more without leave of court and allow the parties to identify the specific
4 custodians as discovery progresses (i.e., reserve custodian spots). Hearing from Defendants that
5 some of Oracle's additional proposed 33 custodians may not make sense, Oracle offered to have
6 further discussions to be convinced. Oracle disagrees that the proposed "reserve" is adequate
7 under the circumstances.

8 The Parties continue to meet and confer on this issue. The Parties require some additional
9 time to continue to meet and confer about the various custodial and non-custodial information
10 sources recently disclosed by both sides, about the scope of potentially responsive documents
11 held by the 33 additional custodians proposed by Oracle, and about how additional custodians
12 could be identified for production in the future. The Parties expect to have their positions settled
13 upon by the Discovery Conference scheduled for May 28, 2008, and will be able to discuss either
14 their agreement or, failing agreement, their respective positions with the Court at that time.

15 **2. Privilege Logs**

16 In the initial Joint Case Management Conference Statement, filed August 28, 2007, the
17 Parties expressly stipulated out of the privilege log requirements stated in *Burlington Northern v.*
18 *District Court*, 408 F.3d 1142, 1149 (9th Cir. 2005). The Parties at that time stipulated that the
19 production of privilege logs within 45 days after the production of a Party's documents is
20 reasonable and would be sufficient to preserve the Party's privilege objections. The Parties also
21 agreed that communications with outside counsel need not be logged or disclosed. During
22 subsequent meet and confer discussions, the Parties further agreed that the 45-day period for
23 privilege logs begins to run from the production from which the privileged material was withheld,
24 and also agreed that communications occurring after March 22, 2007 and involving in-house
25 counsel need not be logged or disclosed.

26 Accordingly, the Parties request that the Court modify its May 2, 2008, Order Regarding
27 Discovery Procedures to reflect the stipulations between the Parties above. If the Court is
28 agreeable, the Parties will provide an appropriate form of stipulated Order for the Court's

1 signature.

2 **3. Remote Access**

3 The Parties have also spent substantial amounts of time continuing to meet and confer on
4 a method for review and potential production of numerous TomorrowNow servers, which are
5 physically located outside California. Defendants have objected to actual production of these
6 servers primarily on burden grounds. Oracle and Defendants met and conferred twice in the last
7 week and reached preliminary agreement on a protocol to begin reviewing these servers remotely
8 in an effort to make production from them more efficient. To that end, the current proposal
9 includes a protocol that would allow Oracle to identify for review and production materials that
10 are being made available through the remote access exercise. It remains to be seen whether the
11 remote access method will work as envisioned, but the Parties have agreed to try. The Parties
12 have made significant progress in coming to this agreed remote access proposal and will continue
13 to meet and confer to iron out the remaining details, with the expectation that Defendants' experts
14 would have the technical infrastructure ready for the preliminary review by approximately June
15 15.

16 **4. Inadvertent Production of Documents and Spousal Privilege Objections**

17 The Parties continue to meet and confer regarding the privilege status of documents
18 produced by Defendants. In addition, Oracle is also meeting and conferring with counsel for a
19 TomorrowNow employee regarding the propriety of certain spousal privilege objections asserted
20 during her deposition. Defendants required Oracle to destroy copies of the documents that they
21 contend were inadvertently produced and privileged. Oracle disagrees with the privilege analysis
22 on both subjects, but has complied with the destruction request, except for the original copy on
23 the production CD from Defendants, which has been sequestered for use only in connection with
24 any motion to compel, consistent with Paragraph 15 of the Protective Order. Defendants disagree
25 with Oracle's interpretation of Paragraph 15. No agreements have been reached, but there will be
26 continued meet and confer discussions on these issues with the expectation that the issues can
27 either be agreed, narrowed, or submitted to the Court for resolution in the near future.

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5. Defendants' Discovery Denied By the Special Master Without Prejudice

In his three reports and recommendations, the Special Discovery Master (formerly appointed in this case) denied Defendants discovery on a variety of subject matters, but did so as to certain of them without prejudice. Defendants intend to renew their efforts to obtain discovery into these areas, and will meet and confer with Oracle in an attempt to either reach an agreement or to define the issues to be presented to the Magistrate Judge for decision.

DATED: May 22, 2008

BINGHAM McCUTCHEN LLP

By: /s/ Geoffrey M. Howard
Geoffrey M. Howard

Attorneys for Plaintiffs
Oracle Corporation, Oracle International Corporation, and Oracle USA, Inc.

In accordance with General Order No. 45, Rule X, the above signatory attests that concurrence in the filing of this document has been obtained from the signatory below.

DATED: May 22, 2008

JONES DAY

By: /s/ Jason McDonell
Jason McDonell

Attorneys for Defendants
SAP AG, SAP AMERICA, INC., and TOMORROWNOW, INC.