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22 UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 OAKLAND DIVISION

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

24 Plaintiffs,

25 v.

26 SAP AG, *et al.*,

27 Defendants.

CASE NO. 07-CV-01658 PJH (EDL)

**PLAINTIFFS' MOTIONS IN LIMINE**

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

**FILED PURSUANT TO DKT. NO. 915**

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1 statements in Oracle’s At Risk reports, described in part III, below.

2 4. Pursuant to Fed. R. Evid. 408, Oracle moves to exclude evidence of  
3 settlement discussions initiated by Defendants, described in part IV, below.

4 5. Defendants have pled, but have equivocated on whether they will assert at  
5 trial, a license defense for any of SAP TN’s conduct. In any event, Defendants have failed to  
6 provide discovery as to any license defense. In their interrogatory responses, Defendants refused  
7 to identify any specific license that allowed any particular copy. Pursuant to Fed. R. Civ. P.  
8 37(c)(1), Oracle moves to exclude evidence of licenses that supposedly authorized any of SAP  
9 TN’s infringing conduct, as well as evidence tying specific downloads by SAP TN to one or  
10 more of Oracle’s licensed products. *See* part V, below.

11 6. Pursuant to Fed. R. Evid. 403, 801 and 802, Oracle moves to exclude three  
12 statements by former SAP TN executives concerning statements purportedly made by former  
13 PeopleSoft employees, listed in part VI, below.

14 7. Pursuant to Fed. R. Evid. 402, 403 and 404, Oracle moves to exclude  
15 allegations against Oracle made in two other lawsuits:

16 a. Oracle has sued another third party support provider, Rimini  
17 Street, which was founded by a former SAP TN executive. Rimini Street has alleged  
18 counterclaims that Oracle acted maliciously and anti-competitively toward it. Oracle moves to  
19 exclude references to Rimini Street’s allegations in its counterclaims because they are irrelevant  
20 to this case, in which Defendants assert no counterclaims, and are also prejudicial and confusing.

21 b. Oracle also moves to exclude references to a federal False Claims  
22 Act lawsuit against Oracle now pending in Virginia, in which the United States government  
23 recently intervened. There is no connection at all between that case and this one.

24 8. Oracle moves to exclude 229 deposition transcript designations for 68  
25 witnesses that Defendants improperly served after the deadlines agreed to by the parties to  
26 designate and counter-designate deposition testimony for use at trial. In the alternative, Oracle  
27 moves for leave to submit supplemental counter-designations for more than 2,000 designations  
28 by Defendants which Oracle did not “counter-counter” per the parties’ agreement.

1 MEMORANDUM OF POINTS AND AUTHORITIES

2 I. MOTION NO. 1: IMPLIED BUT UNPLED ADVICE OF COUNSEL DEFENSE

3 Defendants have selectively waived the attorney-client privilege in two ways –  
4 through documents and testimony that imply favorable legal advice – that will result in a  
5 fundamental unfairness at trial. These selective waivers have allowed Defendants to take  
6 advantage of certain alleged statements and actions of their attorneys, or impute favorable  
7 conclusions to their attorneys, without allowing Oracle to explore those statements through  
8 discovery. Motions 1 and 2 seek to remedy this unfairness by holding Defendants to the  
9 defenses they have pled.

10 A critical issue in this case is the SAP AG board of directors’ choice to buy SAP  
11 TN even though the board knew that SAP TN’s operations were improper and “very likely to be  
12 challenged by Oracle” and “may be a serious liability.” Plfs’ Depo. Ex. 513 at SAP-OR-  
13 00186998 (Hixson Decl., Ex. A). The board decided to acquire SAP TN at a January 7, 2005  
14 meeting. The “business case” presented to the board at that meeting called out SAP TN’s  
15 “likely” illegality, outlined ways to create a “liability shield” to protect the parent company, and  
16 identified “legal due diligence” as a future task. *Id.* at SAP-OR0018698-99.

17 Whether the board actually sought legal advice regarding the identified illegalities  
18 in SAP TN’s operations remains unknown, because Defendants have blocked substantially all  
19 inquiry by asserting the attorney-client privilege. However, in both documents and testimony,  
20 Defendants state or imply that SAP’s attorneys somehow *did* approve SAP TN’s business model  
21 and that such approval was imperative. Defendants allow a few admittedly “legal” conversations  
22 between in-house counsel and business people to tell this story. At the same time, by asserting  
23 the privilege on the basis that they have plead no advice of counsel defense, Defendants have  
24 blocked Oracle from testing those same statements. The result is a one-sided story in  
25 Defendants’ favor and untested by cross-examination. The Court should remedy that unfairness  
26 by granting Motions 1 and 2. Magistrate Laporte has already suggested a similar remedy in  
27 connection with prior discovery motion practice related to a different document.

1           **A.     Legal Standard**

2           “Generally speaking, failure to plead an affirmative defense results in a waiver of  
3 the defense *and the exclusion of all evidence relevant to it.*” *Giese v. Pierce Chem. Co.*, 43 F.  
4 Supp. 2d 98, 113 (D. Mass. 1999) (citation omitted, emphasis supplied by court). Defendants  
5 have not pled an advice of counsel defense. *See* Defendants’ Answer and Affirmative Defenses  
6 to Fourth Amended Complaint, Dkt. No. 448 (Aug. 27, 2009). Moreover, if a party does not  
7 assert an advice of counsel defense, and blocks discovery into attorney advice, “[t]he privilege  
8 which protects attorney-client communications may not be used both as a sword and a shield.”  
9 *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1162 (9th Cir. 1992); *see also Bittaker v.*  
10 *Woodford*, 331 F.3d 715, 719 (9th Cir. 2003) (“the fairness principle . . . is often expressed in  
11 terms of preventing a party from using the privilege as both a shield and a sword.”) (citations  
12 omitted). Here, Defendants’ invocation of the attorney-client privilege in discovery means that  
13 the Court should exclude any testimony or documents where Defendants invoked the privilege to  
14 bar Oracle from testing the veracity of the testimony or document through cross-examination.  
15 *See Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186,  
16 1996 (9th Cir. 2001) (affirming exclusion of evidence related to advice of counsel defense  
17 because party invoked the attorney-client privilege during the discovery on the subject at issue).

18           Magistrate Judge Laporte followed this sword-and-shield rule previously in this  
19 case. Oracle moved to compel production of certain documents related to the “Rules of  
20 Engagement” (or “Rules”). The Rules purport to be a board-approved policy directed at, among  
21 other things, keeping SAP TN’s infringing copies of Oracle software confined to SAP TN’s  
22 systems. The Rules were drafted in part and distributed by Christopher Faye, a senior SAP in-  
23 house intellectual property attorney.

24           Defendants asserted attorney-client privilege over documents related to the Rules.  
25 Oracle contended that Defendants had engaged in a selective waiver of the attorney-client  
26 privilege as to the Rules by producing some documents and allowing witnesses to testify on  
27 some legal issues when doing so was helpful to them, but then invoking the privilege when it  
28 was not. *See* Plaintiffs’ Motion to Compel Production of Clawed Back Documents, Dkt. No. 136

1 (Aug. 1, 2008) at 8-11. Defendants denied that, but represented that “Defendants have not and  
2 will not use as a defense in this case the fact or substance of their lawyers’ contemporaneous  
3 legal analysis or legal advice relating to the creation, content, implementation, or application of  
4 the ROE.” Defendants’ Opposition to Plaintiffs’ Motion to Compel Production of Clawed Back  
5 Documents, Dkt. No. 151 (Aug. 13, 2008) at pg. 2, lines 8-10 (Hixson Decl., Ex. B); *see also id.*  
6 at pg. 9, lines 12-14.

7 Relying in part on Defendants’ representation, Judge Laporte denied portions of  
8 Oracle’s motion to compel and agreed that a motion *in limine* may be appropriate “[I]ike if they  
9 say . . . ‘well, but we adopted it [the Rules] in good faith because our lawyers told us it would  
10 work,’ you can’t say that. You’re not going to be able to say anything like that.” Aug. 28, 2008  
11 Disc. Conf. Tr. at 72:4-9 (Hixson Decl., Ex. C); *id.* at 71:22-23; *see also* Order Granting in Part  
12 Plaintiffs’ Motion to Compel Production of Clawed Back Documents, Dkt. No. 170 (Aug. 29,  
13 2008) at pg. 2, lines 19-23 (“[T]his ruling is premised on Defendants’ assurances that they will  
14 not use the Rules and attorney advice about them as both a sword and a shield in the future, e.g.,  
15 by arguing that even if the Rules turned out not to be effective in preventing intellectual property  
16 violations, they relied in good faith on the advice of counsel that the Rules would do so.”).

17 **B. The Court Should Exclude Advice of Counsel Evidence Because It Is**  
18 **Irrelevant and Barred by the Sword-and-Shield Rule**

19 The Court should preclude Defendants from presenting any evidence that SAP  
20 attorneys believed SAP TN’s conduct was legal or that implies they did. This motion does not  
21 seek to exclude statements by non-attorneys identifying the need to consult with attorneys or to  
22 obtain guidance about potential legal risk.<sup>1</sup> Rather, it is limited to statements that say or imply  
23

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24 <sup>1</sup> For example, the January 7, 2005 business case presented to the SAP AG board of directors  
25 predicts legal risk and potential litigation by Oracle. Oracle believes this document reflects the  
26 board’s understanding and acceptance of SAP TN’s illegal conduct at the time they decided to  
27 acquire the company. But while the business case lists legal due diligence as a future task (with  
28 twelve days before the deal closed), no witness has asserted (or could assert) that it reflects the  
lawyers’ conclusions about the legality of SAP TN’s business model. Plfs’ Depo. Ex. 513  
(Hixson Decl., Ex. A).

1 what conclusion the attorneys may have reached.

2 For example, Oracle moves to exclude statements from an SAP risk assessment  
3 document that was created approximately one month after SAP acquired SAP TN. The risk  
4 assessment analyzed, among other things, the risk of “[l]itigation by Oracle.” Plfs’ Depo. Ex.  
5 430 at SAP-OR00002184 (Hixson Decl., Ex. D). It contained an assertion by SAP’s Arlen  
6 Shenkman, then-director of corporate finance, stating: “SAP has carefully analyzed  
7 TomorrowNow’s support model and is convinced that *it does not interfere[] with third party*  
8 *intellectual property rights* and thus the likelihood of a successful claim is considered remote at  
9 this time.” *Id.* (emphasis supplied). The risk assessment went on to state that “SAP has  
10 carefully evaluated TomorrowNow’s support model *as part of the Due Diligence process.*  
11 Adherence to appropriate support practices ensuring that TomorrowNow *is continuing to honor*  
12 *all applicable third party intellectual property rights* will need to be monitored also going  
13 forward.” *Id.* at SAP-OR00002185 (emphasis supplied).

14 These statements, if admitted in evidence, imply that Defendants acted on the  
15 advice of counsel. They create the impression that lawyers approved TN’s operations. At the  
16 same time, Defendants have blocked all related inquiry into that implied conclusion by invoking  
17 the attorney-client privilege. For instance, when Oracle’s counsel asked SAP’s CFO: “Could  
18 you explain to me what was the careful analysis that [Mr. Shenkman] references?” (Brandt  
19 11/13/08 Depo. at 232:7-9 (Hixson Decl., Ex. E)), SAP’s counsel then instructed the witness:  
20 “Mr. Brandt, I just caution you, Ms. House’s question asks for the analysis of Mr. Shenkman or  
21 the analysis he referenced. You may disclose that, *but don’t disclose the analysis of the*  
22 *lawyers.*” *Id.* at 232:10-15 (emphasis supplied). Brandt did not answer further. *Id.*

23 Oracle deposed Shenkman himself about his assertion in the risk assessment:  
24 “*Did SAP determine in connection with the acquisition whether TomorrowNow was using*  
25 *software outside the contractual use rights?*” Shenkman 6/4/08 Depo. at 56:13-15 (emphasis  
26 supplied) (Hixson Decl., Ex. F). In response, Defendants invoked the privilege and, as  
27 instructed, Mr. Shenkman did not respond. *Id.* at 56:16-17.

28 Oracle also deposed SAP’s CEO Henning Kagermann, asking him if SAP

1 obtained legal advice about whether SAP TN's access to Oracle's software was legal, in  
2 connection with making the decision to acquire SAP TN. Defendants gave multiple instructions  
3 for him not to answer, blocking this line of questioning. Kagermann 9/26/08 Depo. at 263:19-  
4 265:6 (Hixson Decl., Ex. G). Defendants did the same for multiple other witnesses, broadly  
5 instructing them not to testify about any legal advice SAP obtained in connection with acquiring  
6 SAP TN concerning whether SAP TN's business model was legal. Agassi 1/5/09 Depo. at  
7 255:6-19 (Hixson Decl., Ex. H); Crean 2/19/09 Depo. at 106:20-108:24 (Hixson Decl., Ex. I);  
8 Faye 10/22/08 Depo. at 103:13-104:3 (Hixson Decl., Ex. J); Ziemer 9/30/08 Depo. at 171:19-  
9 178:14 (Hixson Decl., Ex. K). SAP cannot have it both ways. Because it does not rely on an  
10 advice of counsel defense but has blocked examination directed at any legal advice SAP received  
11 or gave, related to SAP TN's business model and due diligence results, it impermissibly has used  
12 the privilege as both a sword and shield.

13 Other documents and testimony create the same one-sided unfairness that results  
14 from selective waiver. An email from SAP TN Senior Account Executive Spencer Phillips on  
15 October 17, 2005 to Raytheon, an SAP TN customer, told Raytheon that Defendants' lawyers  
16 had concluded that SAP TN's conduct was legal:

17 *SAP AG attorneys (some of the best Intellectual Property legal*  
18 *minds in the software industry) concluded that TomorrowNow's*  
19 *operating procedures, which include the use of client software for*  
20 *the purposes of supporting these specific clients, is not in violation*  
21 *of the Software License Agreements written on PeopleSoft or*  
*Oracle paper. Had they determined otherwise, they would not*  
*have put their \$12 billion company at risk by acquiring*  
*TomorrowNow.*

22 Depo. Ex. 1177 at TN-OR01778422 (emphasis supplied) (Hixson Decl., Ex. L). At his  
23 deposition, Phillips reiterated that he told customers that Defendants' attorneys had approved  
24 SAP TN's business model. Phillips 7/22/09 Depo. at 125:14-127:3 (Hixson Decl., Ex. M). SAP  
25 TN salesman Eric Osterloh similarly told customers that SAP TN's business model was "fully  
26 vetted by SAP attorneys." Plfs' Depo. Ex. 1876 (Hixson Decl., Ex. N). A January 26, 2005  
27 article posted on www.eweek.com quotes a consultant saying, "the TomorrowNow guys said  
28 that, technically, because they[']re working as independent contractors and lack a formal

1 relationship with PeopleSoft or JDE, they said they can go in and make these fixes on behalf of  
2 the customer, who has the right to do these modifications. *They said their lawyers checked it out*  
3 *and it[']s in the license agreement and it[']s above-board.”* Plfs’ Depo. Ex. 1315 at pg. 2  
4 (emphasis supplied) (Hixson Decl., Ex. O). *See also* Plfs’ Depo. Ex. 429 at SAP-OR00187201  
5 (January 17, 2005 email claiming that “TN is confident of its previous analysis and the legality  
6 of the services performed”) (Hixson Decl., Ex. P).

7           When Oracle deposed Defendants’ in-house attorneys on the advice they provided  
8 concerning the legality of SAP TN’s business practices – repeated and/or implied in all of these  
9 documents and testimony – Defendants invoked the privilege. For example, Oracle asked SAP’s  
10 in-house counsel Christopher Faye if he gave an SAP TN executive “advice about whether a true  
11 downloading practice was legal or not.” Faye 10/22/08 Depo. at 149:5-7 (Hixson Decl., Ex. J).  
12 Defendants objected and instructed him not to answer. *Id.* at 149:8-9. Defendants also  
13 instructed Faye not to answer when asked if SAP TN complied with his advice on operating  
14 procedures. *Id.* at 138:7-13. Thus, unless precluded, Defendants will have the benefit of the  
15 imprimatur these statements confer (that SAP TN operated legally and that SAP tested that and  
16 administered legal advice), but Oracle will have had no opportunity to examine that legal  
17 conclusion or present contrary evidence at trial.

18           The Ninth Circuit’s decision in *Columbia Pictures Television, Inc.* demonstrates  
19 the fundamental unfairness of Defendants’ selective waiver. In that case, Columbia pictures  
20 sued Defendant C. Elvin Feltner Jr. and his company, Krypton International, for copyright  
21 infringement due to Krypton’s broadcasting several Columbia television shows after the  
22 Defendants’ licensing agreements had been terminated due to nonpayment. 259 F.3d at 1189-90.  
23 During his deposition, “Feltner refused to answer questions regarding his interactions with  
24 counsel.” *Id.* at 1196. At trial, however, “Feltner sought to rely on advice of counsel to  
25 demonstrate that his infringement was not willful.” *Id.* The district court granted the plaintiff’s  
26 motion *in limine* to bar Feltner from invoking his advice of counsel defense, and the Ninth  
27 Circuit unanimously affirmed. *Id.* at 1196. The Court of Appeals held “the district court was  
28 within its discretion in precluding Feltner from relying on advice of counsel in this case” because

1 he had sought to use the privilege as a sword and shield. *Id.* (citing William A. Schwarzer, et al.,  
2 Federal Civil Procedure Before Trial, ¶ 11:37 at 11-29 (2000) (“where the party claiming  
3 privilege during discovery wants to testify at the time of trial, the court may ban that party from  
4 testifying on the matters claimed to be privileged”). Here, too, Defendants invoked the  
5 attorney-client privilege to block discovery concerning the advice of counsel and therefore the  
6 sword-and-shield doctrine should bar them from relying on such a defense at trial.

7           Statements stating or implying that Defendants *believed* in the legality of SAP  
8 TN’s conduct also triggers the sword-and-shield problem. In *Cox v. Adm’r U.S. Steel &*  
9 *Carnegie*, 17 F.3d 1386 (11th Cir. 1994), Defendant USX was sued for a change in its pension  
10 fund policy. USX “denied any intent to assert a defense of advice of counsel.” *Id.* at 1418.  
11 Nonetheless, “[i]n the proceedings before the district court, USX ha[d] consistently taken the  
12 position that ‘[a]t the time the revised leave-of-absence policy was implemented in October,  
13 1984 . . . USX believed the policy to be lawful.’” *Id.* at 1418 (emphasis supplied). The district  
14 court and the Court of Appeals held that was an implicit assertion of the advice of counsel  
15 defense. *Id.* at 1418-19. “USX could have denied criminal intent without affirmatively asserting  
16 that it believed that its change in pension fund policy was legal.” *Id.* at 1419. “Having gone  
17 beyond mere denial, *affirmatively to assert good faith*, USX injected the issue of its knowledge  
18 of the law into the case . . . .” *Id.* (emphasis supplied).

19           The consequence for USX was that the Court of Appeals found a waiver of the  
20 attorney-client privilege. *Id.* Here, where Defendants successfully have blocked Oracle from  
21 testing the statements about what the lawyers concluded, the Court should exclude those  
22 statements. *See Columbia Pictures Television*, 259 F.3d at 1196.

## 23 **II. MOTION NO. 2: SELECTIVE ATTORNEY/CLIENT COMMUNICATIONS**

24           For the same reasons, Oracle moves *in limine* to exclude certain testimony of  
25 SAP’s in-house intellectual property counsel, Christopher Faye and Tim Crean. Their testimony,  
26 which admittedly reveals attorney-client communications, characterizes an SAP board directive  
27 as “urgent” and “mandatory” and contends that SAP believed SAP TN was making progress  
28 toward complying with the board directive. When Oracle attempted to cross-examine Faye and

1 Crean on these subjects beyond their self-serving disclosures, Defendants instructed them not to  
2 answer based on the attorney-client privilege. Accordingly, the Court should exclude their  
3 testimony under the sword-shield rule.

4 **A. Background: The Alleged “Directive”**

5 Defendants assert by interrogatory response that either before or after SAP  
6 acquired SAP TN, “[b]y March 2005, the SAP AG executive board issued a directive to  
7 TomorrowNow’s management to remove customer local environments from TomorrowNow  
8 computers.” Defendant TomorrowNow, Inc.’s First Amended Responses to Plaintiff Oracle  
9 Corp.’s Third Set of Interrogatories and SAP America, Inc.’s, and SAP AG’s First Amended  
10 Responses to Plaintiff Oracle Corp.’s Second Set of Interrogatories, dated Oct. 7, 2008, at 17  
11 (Hixson Decl., Ex. Q). Some SAP AG board members corroborate this response (although  
12 others contradict it). All witnesses agree no one ever implemented the supposed directive. The  
13 directive was supposedly recommunicated to SAP TN periodically, including in June and August  
14 2007, after Oracle filed this lawsuit. Faye 3/18/09 Depo. at 167:13-168:6, 175:10-16 (Hixson  
15 Decl., Ex. R). SAP TN only achieved compliance with the directive more than three years after  
16 it was allegedly issued – on October 31, 2008, when SAP TN shut down all business operations.  
17 *Id.* at 198:13-21.

18 SAP claims that SAP’s in-house attorney Faye communicated the directive to  
19 SAP TN. Faye claims he conveyed it to SAP TN’s CEO, Andrew Nelson, at some point within  
20 two months after the board allegedly “issued” it. *Id.* at 33:9-17, 72:7-12; *see also* Faye 10/22/08  
21 Depo. at 18:20-20:4 (Faye testifying that he was SAP’s in-house counsel) (Hixson Decl., Ex. J).  
22 Faye testified that there was “only one” reason the board issued the directive: “Legal.” Faye  
23 10/22/08 Depo. at 95:18-24 (Hixson Decl., Ex. J); *see also* Faye 3/18/09 Depo. at 113:18-114:16  
24 (Hixson Decl., Ex. R). Indeed, according to Faye, all of his communications with SAP TN  
25 executives concerning the directive were legal, in his capacity as counsel. *Id.* at 227:3-15; *see*  
26 *also* Faye 10/22/08 Depo. at 52:2-7 (Hixson Decl., Ex. J). But SAP blocked any discovery  
27 beyond the assertions themselves based on attorney-client privilege.

1           **B.       The Court Should Exclude Faye’s Testimony and Related Evidence**

2           In this motion *in limine*, Oracle does not seek to exclude SAP’s contention that  
3 the board issued the directive. However, Oracle does move to exclude Faye’s testimony, and  
4 related evidence, that the directive was urgent and mandatory or that at any time SAP believed  
5 SAP TN was making progress toward complying with it.<sup>2</sup>

6           During discovery, Defendants engaged in a classic sword-and-shield use of the  
7 privilege on those issues. They designated Faye as their Rule 30(b)(6) witness on the directive.  
8 Faye 3/18/09 Depo. at 5:20-6:6 (Hixson Decl., Ex. R). Defendants selectively allowed Faye to  
9 testify about the allegedly mandatory and urgent nature of the directive, and SAP’s alleged belief  
10 that SAP TN was complying with it. But they then invoked Faye’s status as an attorney to block  
11 questioning about why nobody at SAP did anything to enforce the directive and why SAP TN  
12 took more than three years to comply (by going out of business). Similar questions to Crean met  
13 with the same instruction not to answer.

14           **The Sword.** Faye testified that “it was a Board directive,” “they had to comply  
15 with it,” “it was urgent,” and “Greg Nelson and Andrew and I certainly had conversations about  
16 the urgency of the Board directive.” Faye 3/18/09 Depo. at 49:14-22 (Hixson Decl., Ex. R). He  
17 testified that “I was . . . making sure that he [Andrew Nelson] understood the directive and his  
18 urgency -- its urgency, rather.” *Id.* at 92:19-93:1; *see also id.* at 85:24-86:6. Faye claimed that  
19 compliance was “mandatory.” *Id.* at 55:5-10; 112:16-18, 124:10-23. He testified that “SAP’s  
20 Board insisted on compliance with its January 2005 directive.” *Id.* at 33:5-8.

21 \_\_\_\_\_  
22  
23 <sup>2</sup> Specifically, Oracle moves to exclude pages/lines 28:25-29:2 from Faye’s October 22, 2008  
24 deposition (Hixson Decl., Ex. J); pages/lines 42:20-43:1, 48:20-23; 49:5-11, 49:14-50:13, 51:12-  
25 14; 51:20-25, 112:23-113:9, 119:23-24, 120:1-5, 120:22-121:5, 124:10-11; 124:19-125:3, 128:7-  
26 10, 128:13-25, 129:3-4, 129:9-131:9, 132:5-14, 132:15-21; 132:24-133:11, and 134:13-135:8  
27 from his March 18, 2009 deposition (Hixson Decl., Ex. R); pages/lines 114:4-7, 116:11-119:3  
28 from Crean’s February 19, 2009 deposition (Hixson Decl., Ex. I); pages/lines 343:5-344:5 from  
Nelson’s April 29, 2009 deposition (Hixson Decl., Ex. S); and page 10, lines 12-26 from  
Defendant SAP AG and SAP America, Inc.’s Written Response in Lieu of Siebel Rule 30(b)(6)  
Testimony in Response to Topics 1-4 and 9 of Plaintiff’s August 14, 2009 Notice of Deposition,  
Topic 2 of Plaintiff’s April 16, 2008 Notice of Deposition, and August 21, 2009 E-mail  
Questions from B. Hann (Hixson Decl., Ex. T).

1 Faye claims that before this lawsuit was filed, SAP thought SAP TN *was* trying to  
2 comply with the directive. “From our perspective, *from what they told us*, we felt that there  
3 actually was some compliance. That although it certainly wasn’t complete, that steps were being  
4 made . . . .” *Id.* at 51:20-23 (emphasis supplied); *see also id.* at 129:23-130:18; *see also id.* at  
5 134:13-135:8 (disclaiming knowledge of SAP TN’s noncompliance with the directive as to  
6 Oracle’s Siebel-brand software).

7 **The Shield.** Defendants allowed the conclusory testimony from their attorney to  
8 support their contributory copyright liability defense, but then repeatedly invoked the attorney-  
9 client privilege to bar Oracle’s cross-examination. They blocked such questions as:

10 • “[W]hy was it the corporation decided not to put any incentives in place to  
11 comply with the Board’s directives?” *Id.* at 23:5-8 & 23:22-24 (“I don’t know of any reason  
12 other than possible privilege reasons . . .”).

13 • Why did SAP not “ask for any written reports about progress” in  
14 complying with the directive? *Id.* at 225:21-226:7.

15 • “Why did it take TomorrowNow over 3 years to comply with the Board’s  
16 directive?” *Id.* at 26:21-27:8 (“[O]ther than privileged information . . . I don’t have any  
17 information beyond that.”).

18 • “[E]ach time you checked” about compliance with the directive, “you  
19 learned that it had not happened. Correct?” Faye 10/22/08 Depo. at 87:17-24 (Hixson Decl., Ex.  
20 J).

21 • “Why weren’t Board members informed of the failure to comply with  
22 their directive until 2007?” Faye 3/18/09 Depo. at 19:2-20:15 (Hixson Decl., Ex. R).

23 • “What prompted Mr. Nelson to send” a restatement of the Board’s  
24 directive in June 2007 for new SAP TN customers? *Id.* at 168:7-16.

25 • “Why is this [June 2007 restatement of the directive] limited to *new*  
26 customers, contrary to the terms of the directive?” *Id.* at 169:11-23 (emphasis supplied).

27 • “What prompted the recommunication of the directive in August 2007?”  
28 *Id.* at 173:7-16.

1           •           “What do you know about the discussions, analyses documents or  
2 communications leading up to the decision to issue the August 2007 Board directive?” *Id.* at  
3 174:24-175:9.

4           Efforts to test the truth of this testimony with Faye’s direct supervisor, Crean, met  
5 with similar results. Crean testified that Faye’s only role in continuing to discuss the directive  
6 with SAP TN was to provide “legal advice,” and refused to answer questions such as whether  
7 SAP ever concluded SAP TN could comply with the directive. Crean 2/19/2009 Depo. at 125:8-  
8 20, 128:10-14 (Hixson Decl., Ex. I); *see id.* at 123:1-7 (invoking the privilege in response to the  
9 question “So you don’t have any recollection of whether TomorrowNow had complied with the  
10 directive by the time the litigation started?”).

11           The Court should exclude Faye’s and Crean’s testimony that the directive was  
12 urgent and mandatory or that SAP thought SAP TN was complying with it. As Magistrate Judge  
13 Laporte stated with respect to the Rules of Engagement, a motion *in limine* is proper to exclude  
14 this attorney testimony, and Defendants have conceded they may not rely on an advice of  
15 counsel defense at trial. See part I.A., above. With the Rules, SAP attempted to create an  
16 imaginary “firewall” between it and SAP TN in order to claim ignorance about SAP TN’s  
17 operations. With the directive, SAP attempts to shift the blame to SAP TN for failing to remove  
18 the software from its systems, absolving itself of contributory liability in the process. SAP uses  
19 its attorneys’ testimony to create the impression that SAP *intended* for the directive to be  
20 mandatory and urgent, and that although its wholly owned subsidiary failed to comply with it for  
21 more than three years, SAP at least *believed* its subsidiary was trying to comply. But, at the  
22 same time, Defendants have invoked the attorney-client privilege to bar meaningful cross-  
23 examination into basic facts that could undermine the attorney testimony that the directive was  
24 urgent and mandatory or that SAP believed SAP TN was complying with it.

25           Defendants’ use of the attorney-client privilege as both a sword and a shield is  
26 improper. Accordingly, the Court should grant motion *in limine* No. 2.

27 **III. MOTION NO. 3: CUSTOMER STATEMENTS IN AT RISK REPORTS**

28           Oracle moves *in limine* to exclude customer statements referred to in its At Risk

1 reports on the ground that they are out of court statements from third parties and thus  
2 inadmissible hearsay. Fed. R. Evid. 801, 802.

3 **A. The At Risk Reports**

4 From May 2005 to January 2008, Oracle maintained At Risk reports containing  
5 information about customers who told Oracle they were considering dropping Oracle support in  
6 favor of support from a third party, such as SAP TN. Cummins 9/16/08 30(b)(6) Depo. at 89:7-  
7 11, 90:1-4, 205:8-10, 207:12-17, 211:8-13 (Hixson Decl., Ex. U); Cummins 9/23/08 30(b)(6)  
8 Depo. at 320:23-321:17 (Hixson Decl., Ex. U); Shippy 3/5/09 Depo. at 49:6-11 (Hixson Decl.,  
9 Ex. V). Oracle began keeping the At Risk reports because “we were seeing losses to  
10 TomorrowNow, and so we wanted to make sure that we tracked those losses very specifically.”  
11 Cummins 9/16/08 30(b)(6) Depo. at 90:8-10 (Hixson Decl., Ex. U). Oracle’s Richard Cummins  
12 designed the report and managed the team that created and maintained it. *Id.* at 89:1-6, 205:24-  
13 25. The report was in the form of a spreadsheet that was updated and modified over time, *id.* at  
14 206:16-207:4, 215:16-19, and distributed internally within Oracle. *Id.* at 204:13-15; Cummins  
15 9/23/08 30(b)(6) Depo. at 317:2-3, 320:10-16 (Hixson Decl., Ex. U).

16 Oracle did not affirmatively seek out and systematically identify potentially at  
17 risk customers. Cummins 9/16/08 30(b)(6) Depo. at 190:21-191:1, 216:16-23 (Hixson Decl., Ex.  
18 U); Cummins 9/23/08 30(b)(6) Depo. at 303:24-304:3, 304:17-22 (Hixson Decl., Ex. U). Rather,  
19 “[t]he At Risk report is only listing customers *who tell us* they are evaluating other 3rd party  
20 support providers.” ORCL00132444 (internal Oracle email from Elizabeth Shippy) (emphasis  
21 supplied) (Hixson Decl., Ex. W).

22 There are several categories of information in the reports, such as the number of  
23 customers at risk, the contract revenue amounts, and win/loss statistics. This motion *in limine* is  
24 directed only to the customer comments in the reports. These are contained in the “notes” fields,  
25 which recite the reasons the customer gave for possibly dropping Oracle support. Using  
26 Defendants’ Deposition Exhibit 55 as an example, the notes field for Hitachi Global Storage  
27 Technologies states: “Customer requested cancellation 1/27/06 because they are using highly  
28 customized backlevel HRMS apps, also advised using only 8 of 48 licensed apps. Hitachi is in a

1 low margin business and is trying to cut costs.” Hixson Decl., Ex. X at pg. 4; *see also* Hixson  
2 Decl., ¶ 28 (explaining the layout of the At Risk reports and the excerpts presented with this  
3 motion). Similarly, the notes field for CompuCom in that exhibit states: “Customer has no plans  
4 to upgrade sw or hdwr within the next 3-5 years. Exec teams wants to sign contract w/TN.”  
5 Hixson Decl., Ex. X at pg. 5.

6 The process for recording customer comments in the At Risk reports was not  
7 mandatory nor were there any strict protocol or audits; rather, if a customer told the Oracle  
8 support sales representative any reasons for dropping or considering dropping support, the rep  
9 was supposed to paraphrase and email that information to Elizabeth Shippy, who then pasted the  
10 explanation into the notes column in the report. Cummins 9/16/08 30(b)(6) Depo. at 216:16-23  
11 (Hixson Decl., Ex. U); Cummins 4/21/09 Depo. at 235:18-25 (Hixson Decl., Ex. Y); Cummins  
12 9/23/08 30(b)(6) Depo. at 269:5-10, 269:16-18 (“The information came in, Beth told me that she  
13 cut and pasted it directly from the e-mail into the database.”) (Hixson Decl., Ex. U); Shippy  
14 3/5/09 Depo. at 49:3-5, 54:19-22, 56:2-11 (Hixson Decl., Ex. V).

15 The customer comments in the notes field were simply a record of what the rep  
16 indicated that the customer said. Oracle did not verify whether the comments were accurate, and  
17 they were not particularly or uniformly reliable. “[T]he information came from customers as  
18 best we could get it. Customers were not, you know, customers give you what they want -- want  
19 you to have. So there’s certainly limitations with that.” Cummins 9/23/08 30(b)(6) Depo. at  
20 269:22-25 (Hixson Decl., Ex. U). The “[s]ales reps reported this as part of their overall job,” *id.*  
21 at 270:1-2, but the “information was only as good as what they” – the customers – “gave her.”  
22 *Id.* at 270:7-8; *see also id.* at 270:11-15; Shippy 3/5/09 Depo. at 92:15-17 (“[T]his report was as  
23 good as the information that we received from the rep, which then received the information  
24 directly from the customer.”) (Hixson Decl., Ex. V). Sometimes customers gave inaccurate  
25 information to Oracle concerning their at risk status. *E.g.*, ORCL00127354 (internal Oracle  
26 email from Robert Lachs to Rick Cummins stating, “It turns out [customer] was purposefully  
27 dishonest (or ‘vague’ as they elect to phrase it) keeping us at bay while a) not telling us the  
28 renewal was at risk . . .”) (Hixson Decl., Ex. Z).

**1           B.       The Court Should Exclude the Hearsay Customer Comments**

2           The Court should grant Oracle’s motion *in limine* to exclude the customer  
3 comments in the At Risk reports from evidence because they are inadmissible hearsay. *See, e.g.,*  
4 *Knauff v. Dorel Juvenile Grp.*, No. SA:08-CV-336XR, 2010 U.S. Dist. LEXIS 1041, at \*12-15  
5 (W.D. Tex. Jan. 6, 2010) (granting motion *in limine* to exclude incident reports summarizing  
6 claims or complaints from consumers because they were inadmissible second level hearsay).

7           Assuming for the purposes of this motion only that the At Risk reports themselves  
8 come within the business records exception to the hearsay rule in Fed. R. Evid. 803(6), the  
9 customer comments contained within the reports are an inadmissible second level of hearsay:  
10 “The problem of customer-supplied information can be analyzed as ‘hearsay within hearsay.’ In  
11 such ‘double hearsay’ situations, each statement must qualify under some exemption or  
12 exception to the hearsay rule.” *United States v. Arteaga*, 117 F.3d 388, 396 n.12 (9th Cir. 1997);  
13 Fed. R. Evid. 805. Thus, “[c]ourts that have applied this principle to [business] records have  
14 generally held that customer-supplied information on [the recorded forms], which is not verified,  
15 should be excluded . . . .” *Arteaga*, 117 F.3d at 395.

16           Here, the customer-supplied information in the At Risk reports does not come  
17 within any exception to the hearsay rule. The customer comments are not business records  
18 because “[t]hat exception applies only if the person furnishing the information to be recorded is  
19 ‘acting routinely, under a duty of accuracy, with employer reliance on the result, or in short in  
20 the regular course of business.’” *United States v. Pazsint*, 703 F.2d 420, 424 (9th Cir. 1983)  
21 (holding that witness statements in a police report were inadmissible hearsay) (internal citation  
22 omitted). “The fact that statements made by strangers to the business become part of its records,  
23 such as the complaints which were placed in the . . . files, does not make them business records  
24 unless they are verified by the business and thus adopted and become the business’s own  
25 statements.” *Alexander v. CIT Tech. Financing Servs., Inc.*, 217 F. Supp. 2d 867, 880 (N.D. Ill.  
26 2002) (citation omitted).

27           Here, Oracle did not verify the accuracy of the customers’ comments but simply  
28 pasted them into the notes field of the At Risk reports. As Oracle recognized, the customer’s

1 comments might or might not be truthful. The comments are hearsay and thus inadmissible to  
2 prove the truth of the matter asserted, i.e., that the customers really did cancel support or  
3 consider canceling support for the stated reasons.<sup>3</sup> See *Rowland v. Am. Gen. Fin.*, 340 F.3d 187,  
4 194-95 (4th Cir. 2003) (customer complaint inadmissible as double hearsay, even when  
5 contained within official records that came within a hearsay exception).

#### 6 **IV. MOTION NO. 4: EVIDENCE OF SETTLEMENT DISCUSSIONS**

7 Pursuant to Fed. R. Evid. 408, Oracle moves *in limine* to exclude any evidence of  
8 settlement discussions between the parties.

9 In November 2007, Defendants requested a meeting that included Oracle's  
10 General Counsel, Dorian Daley, SAP AG's General Counsel, Michael Junge, and outside  
11 counsel. During that meeting, Junge and SAP's attorneys initiated settlement discussions. The  
12 meeting ended with no settlement and no agreement to continue the discussions. Declaration of  
13 Dorian Daley In Support of Defendants' Administrative Motion to Seal, Dkt. No. 457 (Aug. 31,  
14 2009) at ¶2. The parties did agree, however, that the discussions were confidential settlement  
15 discussions governed by Federal Rule of Evidence 408, *id.* ¶ 3, and the parties have so stipulated  
16 to this Court. Stipulation Regarding Defendants' Administrative Motion to Seal, Dkt. No. 439  
17 (Aug. 26, 2009), pg. 2. Accordingly, evidence of these settlement discussions should be  
18 excluded.

19 Despite the protected nature of these discussions, Defendants used them to  
20 support an allegation in their Answer to the Fourth Amended Complaint. The argument appears  
21 to be that when Oracle rejected Defendants' proposal to buy or take back customers from  
22 Defendants, Oracle failed to mitigate its damages. If that were true, then all rejected settlement  
23

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24 <sup>3</sup> In the voluminous Oracle production, there are several versions of the At Risk report, numerous  
25 emails with portions of the At Risk Report excerpted or which likewise forward customer  
26 hearsay, and other spreadsheets similar to the At Risk Report to track potentially returning  
27 customers which also contain a comparably inadmissible customer comments field. Hixson  
28 Decl., ¶ 31; e.g., ORCL00485843 (Losses\_with\_back\_maintenace\_-\_Master.xls spreadsheet).  
For the reasons set forth in the text above, Oracle moves to exclude these other occurrences of  
customer comments being recorded in internal Oracle documents.

1 proposals would come into evidence for the same reason. Oracle believes the language in the  
2 Answer is improper because it violates Rule 408, and is inadmissible for the same reason. At  
3 Oracle’s insistence, Defendants filed a motion to seal that portion of the Answer and the Court  
4 granted that motion. Order Granting Defendants’ Administrative Motion to Seal, Dkt. No. 529  
5 (Nov. 2, 2009).

6 The Court should likewise grant this motion *in limine* No. 4 to exclude evidence  
7 of settlement discussions between the parties. Rule 408 bars the admission of evidence of  
8 compromise negotiations if offered to prove liability for, invalidity of, or amount of a claim that  
9 was disputed as to validity or amount, or to impeach through a prior inconsistent statement or  
10 contradiction. Fed. R. Evid. 408(a)(1)-(2). The Rule applies here, the parties have agreed it  
11 applies, and the Court has previously so held. Accordingly, this motion *in limine* should be  
12 granted. *See, e.g., Richards v. City of Topeka*, 173 F.3d 1247, 1253 (10th Cir. 1999); *Affiliated*  
13 *Manufs., Inc. v. Aluminum Co. of Am.*, 56 F.3d 521, 526-30 (3rd Cir. 1995).

14 **V. MOTION NO. 5: EVIDENCE NOT IN INTERROGATORY RESPONSES**

15 The next issue involves Defendants’ undefined license defense to the more than  
16 5,000 copies of Oracle’s software applications on SAP TN’s computers, and the more than 9  
17 million downloads of support materials SAP TN took from Oracle’s website and stored on its  
18 systems (millions more were destroyed). Defendants made each copy from software licensed by  
19 Oracle to a particular customer, or downloaded the support materials using the credentials of a  
20 particular customer. Defendants admit they made and kept these copies. They also assert a  
21 “license” defense to these copies. License is an affirmative defense. That means Defendants  
22 have the burden to identify a specific license allegedly applicable to each copy they made. *See*  
23 *Bourne v. Walt Disney Co.*, 68 F.3d 621, 631 (2d Cir. 1995); *Michaels v. Internet Entm’t Grp.*,  
24 *Inc.*, 5 F. Supp. 2d 823, 831, 834 (C.D. Cal. 1998). Defendants refused to provide this  
25 information in their discovery responses (and again in pre-trial meet and confer discussions).  
26 Accordingly, pursuant to Fed. R. Civ. P. 37(c)(1), Oracle now moves to exclude from trial (1)  
27 any defense evidence of agreements, whether express or implied, that supposedly authorized  
28 some or all of SAP TN’s conduct (this includes the “exemplars” listed in their Interrogatory

1 response because Defendants never link those to any specific copies); and (2) any defense  
2 evidence that purports to tie specific downloads by SAP TN to particular license agreements.

3 **A. Defendants Do Not Identify Specific Agreements Relating to Actual Copies**

4 In their Answer, Defendants pled that their *use* of Oracle’s copyrighted material  
5 was lawful or consented to under “agreements between Plaintiffs and their customers and/or  
6 former customers.” Defendants’ Answer and Affirmative Defenses to Fourth Amended  
7 Complaint, Dkt. No. 448 (Aug. 27, 2009) at pg. 24 (second and third affirmative defenses).  
8 Oracle propounded Interrogatory No. 4, asking Defendants to “[i]dentify all ‘agreements  
9 between Plaintiffs and their customers and/or former customers’ on which you base the  
10 contentions made in Your Answer’s Affirmative Defenses, including but not limited to  
11 Identifying which terms of those agreements form the basis of Your contentions.” Defendant  
12 TomorrowNow, Inc.’s Third Amended and Supplemental Response to Plaintiff Oracle USA,  
13 Inc.’s First Set of Interrogatories, April 15, 2009 at 7 (Hixson Decl., Ex. AA).

14 Defendants refused to identify specific licenses or specific copies in their  
15 response. Instead, they identified four “illustrative agreements” and “do[] not address each and  
16 every customer contract, of which there are many.” *Id.* at 8. Defendants’ response then  
17 enumerated “exemplar agreements” on which they “currently” based their contentions – at least  
18 as of April 2009, when they last supplemented their response. *Id.* They did not link these  
19 exemplars to any specific copy of Oracle software made and kept on Defendants computers.

20 In the pretrial meet and confer process, Oracle again asked Defendants to identify  
21 what license agreements they relied on for their second and third affirmative defenses, and  
22 identified the specific copies for which it sought that information. Defendants responded in only  
23 general terms that “Plaintiffs have publicly acknowledged that third party support can be  
24 conducted consistent with Plaintiffs’ and predecessors’ customer licenses. Defendants have  
25 consistently stated that they will rely on those licenses (see, e.g., Defendants’ opposition to  
26 Plaintiffs’ motion for summary judgment).” Hixson Decl., ¶ 33. But which licenses? Relating  
27 to what copies? Defendants never say, even now on the eve of trial.

28 One reason that Defendants have not yet identified a single license authorizing

1 any of their more than 9 millions downloads is that they have consistently contended they cannot  
2 technically do so. For instance, SAP TN’s Vice President of Global Support Services Shelly  
3 Nelson testified that “there is no way to actually verify [which] credential was used to download  
4 those particular items.” Shelly Nelson 9/3/09 Depo. at 569:13-571:2 (Hixson Decl., Ex. BB); *see*  
5 *also* Defendants’ Opposition to Plaintiffs’ Motion to Compel, July 14, 2009, Dkt. 334, p. 7 n.9  
6 (“Defendants have always acknowledged that there is no known technical way to specifically tie  
7 a downloaded item on TN’s systems to a Customer Connection ID and password.”) (Hixson  
8 Decl., Ex. CC). Thus, Defendants have not only abandoned their multiple opportunities to  
9 identify licenses relevant to their defenses, they have affirmatively asserted they cannot do so.

10 **B. The Court Should Exclude Evidence Not in the Interrogatory Responses**

11 Based on these discovery failures, the Court should exclude any evidence in  
12 support of Defendants’ license defenses. Fed. R. Civ. P. 26(e)(1)(A) states in relevant part: “A  
13 party who . . . has responded to an interrogatory . . . must supplement or correct its disclosure or  
14 response . . . in a timely manner if the party learns that in some material respect the disclosure or  
15 response is incomplete or incorrect, and if the additional or corrective information has not  
16 otherwise been made known to the other parties during the discovery process or in writing.”  
17 Fed. R. Civ. P. 37(c)(1) states in turn that “[i]f a party fails to provide information or identify a  
18 witness as required by Rule 26(a) or 26(e), *the party is not allowed to use that information or*  
19 *witness to supply evidence . . . at a trial*, unless the failure was substantially justified or is  
20 harmless.” (emphasis supplied). Rule 37(c)(1) is “a ‘self-executing,’ ‘automatic’ sanction to  
21 ‘provide[] a strong inducement for disclosure of material . . . .’” *Yeti by Molly Ltd. v. Deckers*  
22 *Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (quoting Advisory Committee notes).  
23 Courts exclude evidence from trial under Rule 37(c) where a party did not timely disclose it in  
24 response to an interrogatory. *See e.g., Cambridge Elecs. Corp. v. MGA Elecs., Inc.*, 227 F.R.D.  
25 313, 323-24 (C.D. Cal. 2004).

26 If Defendants attempt to introduce any agreements in support of their affirmative  
27 license defense (or consent defense), or attempt to introduce evidence that ties specific  
28 downloads to particular license agreements, their failure to provide that information during

1 discovery was not substantially justified or harmless. Defendants downloaded millions of files  
2 from Oracle’s websites. Indeed, they have conceded liability on Oracle’s computer fraud claims  
3 for that conduct. They also made thousands of copies of Oracle software (though only have  
4 admitted copyright infringement liability for 295 of these copies). Defendants have the written  
5 license agreements between Oracle and its customers in their possession because Oracle  
6 produced them. Indeed, Oracle produced literally thousands of license agreements and related  
7 contract documents for the hundreds of customers at issue. None of those agreements authorized  
8 SAP TN’s conduct. But Oracle should not be forced to guess which sentences in which  
9 agreements and for which customers, Defendants might attempt to rely on for a license defense.  
10 That was the purpose of the interrogatories Oracle served. Further, Defendants’ Interrogatory  
11 response makes no mention at all of any implied agreements, which would clearly have  
12 necessitated follow up discovery had Defendants made such a contention. Allowing Defendants  
13 to introduce evidence at trial that they failed to identify in discovery violates Rule 37(c)(1) and  
14 undermines the Rule’s purpose to assure fairness at trial and “eliminate[] surprise.” *Licciardi v.*  
15 *TIG Ins. Grp.*, 140 F.3d 357, 363 (1st Cir. 1998) (internal citation omitted).

16 **VI. MOTION NO. 6: HEARSAY CONCERNING LOCKHEED MARTIN**

17 Oracle moves *in limine* under Rules 403, 801, and 802 to exclude three statements  
18 of SAP TN executives concerning statements allegedly made by two former PeopleSoft  
19 employees about Lockheed Martin, an SAP TN customer:

- 20 • An email from SAP TN Vice President Seth Ravin in which he stated that  
21 Lockheed Martin sought permission from PeopleSoft to deliver a CD of PeopleSoft software to  
22 SAP TN and then wrote: “PeopleSoft’s Greg Stevenson then wrote me and asked me if they  
23 need to provide authorization. Greg Stevenson at PeopleSoft followed up a few minutes later by  
24 phone and he said he was going to let Lockheed Martin know that there was no issue with them  
25 sending us the CD’s [*sic*].” TN-OR00616959 (Hixson Decl., Ex. DD).<sup>4</sup>

26 \_\_\_\_\_  
27 <sup>4</sup> The substance of this email was repeated by one of SAP TN’s witnesses during her deposition.  
28 See Shelly Nelson 4/18/08 Depo. at 352:5-353:1 (Hixson Decl., Ex. BB). That merely adds

(Footnote Continued on Next Page.)

1           •       Deposition testimony by Ravin in which he was presented with the email  
2 identified above and repeated his claim that Mr. Stevenson told him that he would tell Lockheed  
3 Martin there was no issue with Lockheed Martin sending certain CDs to SAP TN. Ravin 5/21/09  
4 Depo. at 239:4-7, 240:8-19 (Hixson Decl., Ex. EE).

5           •       An email from SAP TN President and CEO Andrew Nelson in which he  
6 wrote: “a senior PeopleSoft representative recommended Lockheed Martin consider  
7 TomorrowNow Extended Support as a solution! Backed with internal staff recommendations -  
8 and PeopleSoft’s direct referral - Lockheed Martin executives, Lockheed Martin Purchasing, and  
9 Seth moved into serious discussions.” TN-OR00497647 (Hixson Decl., Ex. FF).

10                 This evidence is inadmissible for four reasons. *First*, the two emails are hearsay  
11 by SAP TN employees, Ravin and Nelson, and fall within no exception to the hearsay rule.  
12 Irrespective of whether the underlying statements purportedly made by the two PeopleSoft  
13 employees would be admissible, the emails are not. *See In re Oracle Corp. Secs. Litig.*, No. C  
14 01-00988, 2009 U.S. Dist. LEXIS 50995, at \*27-28 (N.D. Cal. June 16, 2009) (reports by third  
15 parties of statements purportedly made by Oracle officials were inadmissible hearsay).

16                 *Second*, Ravin’s testimony and the two emails should be excluded because there  
17 is no basis to construe the statements attributable to Stevenson and the unidentified PeopleSoft  
18 employees as admissions under Fed. R. Evid. 801(d)(2). There is no evidence that Stevenson  
19 was authorized to make any statement regarding PeopleSoft’s license terms and what Lockheed  
20 Martin could do with the CDs. There is no evidence as to whether the unidentified PeopleSoft  
21 had authorization to make the statement that Nelson attributes to him or her. *See, e.g., Lemos v.*  
22 *Alderwoods Grp., Inc.*, No. 1:06-cv-01152, 2007 WL 2254363, at \*7-8 (E.D. Cal. Aug. 3, 2007)  
23 (proponent “bears the burden of establishing a foundation from which to conclude that the  
24 statement was within a hearsay exclusion”) (internal citation omitted).

25                 *Third*, excluding these statements is necessary because evidence produced by

26 \_\_\_\_\_  
(Footnote Continued from Previous Page.)

27 another level of hearsay, and Oracle moves to exclude this excerpt of Nelson’s testimony as well.  
28

1 Defendants long after the close of discovery now indicates that SAP TN intentionally sought to  
2 create false and self-serving emails, which further highlights why statements such as these  
3 should not be admitted. *See* TN-IM-20684 (TN employee wrote: “Please do not put in e-mail  
4 that you copied code or program from one environment to another . . . pull the file from [another  
5 source] and send me a note that you got the file from one of these two sources”) (emphasis  
6 added) (Hixson Decl., Ex. GG). SAP TN also failed to preserve Ravin’s emails, so there is no  
7 way for Oracle to determine whether there are similar statements that would prove the falsity of  
8 the statements in his email and at his deposition about what Stevenson said. Hixson Decl., ¶ 40.  
9 Given these facts, the hearsay rule should apply with even greater force.

10 *Fourth*, all three statements should be excluded under Rule 403 because admitting  
11 them would be confusing for the jury and unfairly prejudicial to Oracle. Oracle’s copyrights and  
12 licenses govern whether PeopleSoft customers were permitted to ship CDs containing  
13 copyrighted materials to SAP TN, not the purported statement by Stevenson with regard to a  
14 single customer, Lockheed Martin. Defendants’ purpose in attempting to introduce this evidence  
15 is plain: they are seeking to rely on Ravin’s and Nelson’s self-serving statements regarding one  
16 customer to justify SAP TN’s downloading, copying, and use of millions of copies of Oracle’s  
17 copyrighted materials. If this evidence comes in, the jury would be misled into believing that  
18 PeopleSoft somehow authorized the conduct at issue in this case, which is false. Oracle  
19 therefore asks that this evidence be excluded.

## 20 **VII. MOTION NO. 7: EVIDENCE OF OTHER LITIGATION**

21 Oracle moves *in limine* to exclude references to allegations made against it in two  
22 other lawsuits – *Oracle USA, Inc., et al. v. Rimini Street, Inc., et al.*, No. 2:10-cv-0106 (D. Nev.  
23 filed Jan. 25, 2010) and *United States ex rel. Frascella v. Oracle Corp., et al.*, No. 1:07cv:529  
24 (E.D. Va. filed May 29, 2007).

25 In the *Rimini Street* action, Oracle sued Rimini Street and its founder (and former  
26 SAP TN employee) Seth Ravin for copyright infringement and related claims. Hixson Decl., Ex.  
27 HH (Oracle USA, Inc’s First Amended Complaint). Rimini Street has counterclaimed for libel,  
28 declaratory relief and unfair competition. Hixson Decl., Ex. II (Rimini Street Inc.’s Answer to

1 Oracle’s First Amended Complaint and Counterclaim). The case is at the pleading stage, and the  
2 district court in Nevada has not made any factual findings or, as of this writing, any legal rulings  
3 on the parties’ respective motions to dismiss.

4 This Court should exclude references to Rimini Street’s counterclaims against  
5 Oracle, e.g., Defs.’ Depo. Ex. 947 (Rimini Street press release about its counterclaims against  
6 Oracle) (Hixson Decl., Ex. JJ), deposition testimony by Seth Ravin repeating Rimini Street’s  
7 allegations of unfair conduct by Oracle, *see* Ravin 7/21/10 Depo. at 346:25-347:15, 348:3-  
8 355:14, 355:20-357:12, 361:19-363:25 (Hixson Decl., Ex. EE), and communications between  
9 Oracle and Rimini Street relating to Rimini Street’s allegations in its counterclaims. Rimini  
10 Street’s allegations are not relevant to any determination of liability in this action and are  
11 therefore inadmissible for that purpose under Fed. R. Evid. 402. Further, admitting those  
12 pleadings or communications that reference them would be highly likely to confuse the jury and  
13 be unfairly prejudicial. Defendants in this case allege no counterclaims, and because Ravin was  
14 previously employed by SAP TN, it could be difficult for the jurors to separate the two lawsuits  
15 in their minds. Accordingly, this evidence is also inadmissible under Fed. R. Evid. 403 and 404.

16 The *United States v. Oracle* action is a False Claims Act case that was filed in the  
17 Eastern District of Virginia in which the United States recently intervened. July 29, 2010 U.S.  
18 Department of Justice Press Release (Hixson Decl., Ex. KK). The United States’ allegations  
19 concerning Oracle’s disclosures during negotiations for a contract with the government are  
20 wholly unrelated to the present lawsuit. Any references to the allegations in that case are  
21 irrelevant and inadmissible under Fed. R. Evid. 402 and unduly prejudicial and improper  
22 character evidence under Fed. R. Evid. 403 and 404.

## 23 **VIII. MOTION NO. 8: UNTIMELY DEPOSITION DESIGNATIONS**

24 Finally, Oracle moves *in limine* to exclude 229 “counter-counter” deposition  
25 transcript designations for 68 witnesses that Defendants served after the deadline agreed to by  
26 the parties. Alternatively, Oracle moves for leave to submit its own supplemental “counter-  
27 counter” designations analogous to those that Defendants unilaterally added in violation of the  
28 parties’ agreement.

