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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 OAKLAND DIVISION

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

Plaintiffs,

v.

SAP AG, *et al.*,

Defendants.

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

**DECLARATION OF THOMAS S. HIXSON IN
 SUPPORT OF 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

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

1 I, Thomas S. Hixson, declare as follows:

2 1. I am an attorney licensed to practice in the State of California and before this
3 Court, and am a partner at Bingham McCutchen LLP, counsel of record for Plaintiffs Oracle
4 USA, Inc., Oracle International Corporation, Oracle EMEA Limited, and Siebel Systems, Inc.
5 (together, “Oracle”) in this action. I have personal knowledge of the facts stated below by virtue
6 of my representation of Oracle in this action. If called as a witness, I would competently testify
7 to the facts stated herein.

8 2. Any highlighting, circling or red boxes in the attached exhibits have been
9 supplied to assist in identifying the information relevant to Oracle’s Motions *in Limine*.

10 3. References to “SAP TN” refer to Defendant TomorrowNow, Inc.

11 4. The following paragraphs describe the attached evidence in order of
12 appearance in Oracle’s Motions *in Limine*. Where a witnesses’ deposition testimony is cited
13 more than once, the witness’ transcript is listed below in order of first appearance. For the
14 Court’s convenience, the following is a roadmap to the witnesses whose testimony is excerpted
15 below:

- 16 a. Christopher Faye — senior SAP AG in-house intellectual property
17 attorney
- 18 b. Arlen Shenkman — former SAP AG Director of Corporate Compliance
- 19 c. Werner Brandt — SAP AG Chief Financial Officer
- 20 d. Henning Kagermann — former SAP AG Chief Executive Officer
- 21 e. Shai Agassi — former member of SAP AG Executive Board
- 22 f. Tim Crean — SAP AG’s Chief Intellectual Property Officer
- 23 g. Thomas Ziemer — SAP AG Vice President of Service Solution
24 Management
- 25 h. Spencer Phillips — former SAP TN Senior Account Executive
- 26 i. Andrew Nelson — former SAP TN founder and Chief Executive Officer
- 27 j. Richard Cummins — Oracle Senior Director of Support Services for
28 North America

1 k. Elizabeth Shippy — Oracle Special Programs Manager in Support Sales
2 Operations

3 l. Seth Ravin — former SAP TN President and SAP America Vice
4 President, current founder and CEO of Rimini Street

5 m. Shelley Nelson — former SAP TN Vice President of Support Services

6 5. Attached as Exhibit A is a true and correct copy of a document titled January
7 7, 2005 Business Case, produced by Defendants in this case as SAP-OR00186993-7001. Oracle
8 marked this document as Plaintiffs' Deposition Exhibit 513 in its originally-produced scanned
9 "TIFF" Form. Defendants later produced the native PowerPoint version of this document.
10 Therefore, attached Exhibit A includes the first page of the copy marked as Plaintiffs' Deposition
11 Exhibit 513, and the more legible version of the same document printed from the native file
12 comprise the rest of the exhibit.

13 6. Attached as Exhibit B is a true and correct copy of pages 2 and 9 from
14 Defendants' August 13, 2008 Opposition to Plaintiffs' Motion to Compel Production of Clawed
15 Back Documents, Dkt. No. 151, containing relevant portions cited in Plaintiffs' Motion.

16 7. Attached as Exhibit C is a true and correct copy of relevant portions of the
17 Parties' August 28, 2008 Discovery Conference transcript.

18 8. Attached as Exhibit D is a true and correct copy of Plaintiffs' Deposition
19 Exhibit 430, a document dated February 2, 2005 and entitled "Investment Lifecycle RA
20 TomorrowNow," produced by Defendants in this case as SAP-OR00002183-91.

21 9. Attached as Exhibit E is a true and correct copy of relevant portions of Werner
22 Brandt's November 13, 2008 deposition transcript.

23 10. Attached as Exhibit F is a true and correct copy of relevant portions of Arlen
24 Shenkman's June 4, 2008 deposition transcript.

25 11. Attached as Exhibit G is a true and correct copy of relevant portions of
26 Henning Kagermann's September 26, 2008 deposition transcript.

27 12. Attached as Exhibit H is a true and correct copy of relevant portions of Shai
28 Agassi's January 5, 2009 deposition transcript.

1 13. Attached as Exhibit I is a true and correct copy of relevant portions of Tim
2 Crean’s February 19, 2009 deposition transcript.

3 14. Attached as Exhibit J is a true and correct copy of relevant portions of
4 Christopher Faye’s October 22, 2008 deposition transcript.

5 15. Attached as Exhibit K is a true and correct copy of relevant portions of
6 Thomas Ziemen’s September 30, 2008 deposition transcript.

7 16. Attached as Exhibit L is a true and correct copy of Plaintiffs’ Deposition
8 Exhibit 1177, an October 17, 2005 e-mail from Spencer Phillips, produced by Defendants in this
9 case as TN-OR01778421-22.

10 17. Attached as Exhibit M is a true and correct copy of relevant portions of James
11 Spencer Phillips’ July 22, 2009 deposition transcript.

12 18. Attached as Exhibit N is a true and correct copy of Plaintiffs’ Deposition
13 Exhibit 1876, a January 23, 2006 e-mail from Eric Osterloh, produced by Defendants in this case
14 as TN-OR01778633.

15 19. Attached as Exhibit O is a true and correct copy of Plaintiffs’ Deposition
16 Exhibit 1315, a January 26, 2005 article from www.eweek.com entitled “Analysts: Ellison
17 playing Hard Ball with Intellectual Property.”

18 20. Attached as Exhibit P is a true and correct copy of Plaintiffs’ Deposition
19 Exhibit 429, a January 17, 2005 e-mail from James Mackey, produced by Defendants in this case
20 as SAP-OR00187201.

21 21. Attached as Exhibit Q is a true and correct copy of Amended Response to
22 Interrogatory No. 4 from Defendant SAP TN’s October 7, 2008 First Amended Responses to
23 Plaintiff Oracle Corp.’s Third Set of Interrogatories and SAP America, Inc.’s, and SAP AG’s
24 First Amended Responses to Plaintiff Oracle Corp.’s Second Set of Interrogatories.

25 22. Attached as Exhibit R is a true and correct copy of relevant portions of
26 Christopher Faye’s 30(b)(6) March 18, 2009 deposition transcript.

27 23. Attached as Exhibit S is a true and correct copy of relevant portions of
28 Andrew Nelson’s April 29, 2009 deposition transcript.

1 24. Attached as Exhibit T is a true and correct copy of relevant portions of
2 Defendant SAP AG and SAP America, Inc.'s September 18, 2009 Written Response in Lieu of
3 Siebel Rule 30(b)(6) Testimony in Response to Topics 1-4 and 9 of Plaintiffs' August 14, 2009
4 Notice of Deposition, Topic 2 of Plaintiff's April 16, 2008 Notice of Deposition, and August 21,
5 2009 E-mail Questions from B. Hann.

6 25. Attached as Exhibit U is a true and correct copy of relevant portions of
7 Richard Cummins' 30(b)(6) September 16, 2008 and September 23, 2008 deposition transcripts.

8 26. Attached as Exhibit V is a true and correct copy of relevant portions of
9 Elizabeth Shippy's March 5, 2009 deposition transcript.

10 27. Attached as Exhibit W is a true and correct copy of a February 8-12, 2007 e-
11 mail chain involving Elizabeth Shippy, produced by Plaintiffs' in this case as ORCL00132443-
12 45.

13 28. Plaintiffs' At Risk reports, discussed in Plaintiffs' motion, have been
14 produced in this case as Excel spreadsheets. Due to the large number of columns in some of the
15 tabs in the spreadsheets, converting an entire At Risk report into .pdf format to e-file with the
16 Court would make it difficult to read. Accordingly, Plaintiffs have taken screen shots of certain
17 tabs in Defendants' Deposition Exhibit 55, the example of the At-Risk Report cited in Plaintiffs'
18 motion and produced by Plaintiffs as ORCL00032751.

19 a. Attached as Exhibit X at page 1 is a true and correct screen shot of a
20 portion of the "Worldwide" tab in ORCL00032751.

21 b. Attached as Exhibit X at page 2 is a true and correct screen shot of a
22 portion of the "JAPAC" tab in ORCL00032751.

23 c. Attached as Exhibit X at page 3 is a true and correct screen shot of a
24 portion of the "AMER_Won" tab in ORCL00032751.

25 d. Attached as Exhibit X at page 4 is a screen shot from the "DATA" tab in
26 ORCL00032751 with the cell in the "Notes" column for Hitachi Global Storage Technologies
27 selected. This screen shot is a true and correct copy of this portion of the "DATA" tab, with the
28 exception that Oracle has added a red box and a red arrow to highlight the note cited in

1 Plaintiffs' motion.

2 e. Attached as Exhibit X at page 5 is a screen shot from the "DATA" tab in
3 ORCL00032751 with the cell in the "Notes" column for CompuCom selected. This screen shot
4 is a true and correct copy of this portion of the "DATA" tab with the exception that Oracle has
5 added a red box and a red arrow to highlight the note cited in Plaintiffs' motion.

6 29. Attached as Exhibit Y is a true and correct copy of relevant portions of
7 Richard Cummins' April 21, 2009 deposition transcript.

8 30. Attached as Exhibit Z is a true and correct copy of an April 21, 2006 e-mail
9 from Robert Lachs, produced by Plaintiffs in this case as ORCL00127354. Non-relevant
10 portions of the e-mail have been redacted to protect customer information.

11 31. Oracle has produced several versions of the At Risk reports, as well as e-mails
12 and other documents, including spreadsheets, that contain portions of the At Risk reports or other
13 customer comments. One example of this is an Excel spreadsheet entitled
14 "Losses_with_back_maintenace_-_Master.xls," produced by Plaintiffs in this case as
15 ORCL00485843.

16 32. Attached as Exhibit AA is a true and correct copy of Responses to
17 Interrogatory No. 4 from Defendant TomorrowNow, Inc.'s April 15, 2009 Third Amended and
18 Supplemental Response to Plaintiff Oracle USA, Inc.'s First Set of Interrogatories.

19 33. In the pretrial meet and confer process, and in July 22, 2010 e-mail
20 correspondence, Oracle asked Defendants to identify what license agreements they rely on for
21 their affirmative defenses, and Oracle identified the specific copies of its software and support
22 materials for which it sought that information. In a July 22, 2010 e-mail, Defendants' responded
23 "Plaintiffs have publicly acknowledged that third party support can be conducted consistent with
24 Plaintiffs' and predecessors' customer licenses. Defendants have consistently stated that they
25 will rely on those licenses (see, eg, Defendants' opposition to Plaintiffs' motion for summary
26 judgment)."

27 34. Attached as Exhibit BB is a true and correct copy of relevant portions of
28 Shelley Nelson's April 18, 2008 and September 3, 2009 deposition transcripts.

1 35. Attached as Exhibit CC is a true and correct copy of relevant portions of
2 Defendants' July 14, 2009 Opposition to Plaintiffs' Motion to Compel Production of Documents
3 Related to Damages Model and Interrogatory Responses Related to Use of Plaintiffs' Intellectual
4 Property, Dkt. No. 334, containing relevant portions cited in Plaintiffs' Motion.

5 36. Attached as Exhibit DD is a true and correct copy of an April 22, 2004 e-mail
6 from Seth Ravin, produced by Defendants in this case as TN-OR00614959-61.

7 37. Attached as Exhibit EE is a true and correct copy of relevant portions of Seth
8 Ravin's May 21, 2009 and July 21, 2010 deposition transcripts.

9 38. Attached as Exhibit FF is a true and correct copy of a March 1, 2004 e-mail
10 from Andrew Nelson, produced by Defendants in this case as TN-OR00497647-48.

11 39. Attached as Exhibit GG is a true and correct copy of an Instant Message
12 conversation dated October 18, 2005, produced in native electronic form by Defendants in this
13 case and given the bates number TN-IM-20684 by Oracle.

14 40. Defendants informed Oracle early on during discovery in this matter that they
15 had no custodial data preserved for Seth Ravin. Oracle confirmed this in writing on September
16 30, 2009 (Chad Russell e-mail to counsel for Defendants re "Oracle/SAP - Custodian Issues").
17 To my knowledge, Defendants have never produced any documents designated as coming from
18 Seth Ravin's files.

19 41. Attached as Exhibit HH is a true and correct copy of Oracle USA, Inc's April
20 19, 2010 First Amended Complaint in the *Oracle USA, Inc., et al. v. Rimini Street, Inc., et al.*,
21 No. 2:10-cv-0106 (D. Nev.) litigation, Dkt. No. 36.

22 42. Attached as Exhibit II is a true and correct copy of Rimini Street Inc.'s May 6,
23 2010 Answer to Oracle's First Amended Complaint and Counterclaim in the *Oracle USA, Inc., et*
24 *al. v. Rimini Street, Inc., et al.*, No. 2:10-cv-0106 (D. Nev.) litigation, Dkt. No. 46.

25 43. Attached as Exhibit JJ is a true and correct copy of Defendants' Deposition
26 Exhibit 947, a March 29, 2010 Rimini Street press release.

27 44. Attached as Exhibit KK is a true and correct copy of a July 29, 2010 U.S.
28 Department of Justice Press Release, taken from the Justice Department's website at

1 <http://www.justice.gov/opa/pr/2010/July/10-civ-873.html>.

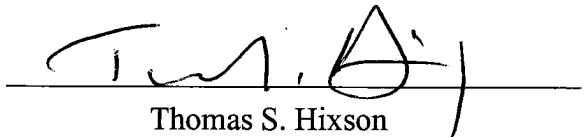
2 45. In a May 11, 2010 3:26 p.m. e-mail, Defendants' counsel Greg Lanier stated
3 to Oracle's counsel, "With regard to deposition designations, we propose exchanging
4 designations on July 16 and counter-designations on August 2."

5 46. In a June 7, 2010 10:58 a.m. e-mail, Oracle's counsel Geoff Howard stated to
6 Defendants' counsel, "we accept your proposed . . . depo designation and counter-designation
7 dates of July 16 and August 2, respectively."

8 47. On July 16, 2010 both parties served their deposition designations, and on
9 August 2, 2010 both parties served their counter-designations.

10 48. On August 5, 2010 at 4:39 a.m., Defendants' counsel Joshua Fuchs e-mailed
11 Oracle's counsel stating, "Attached are Defendants additional counter and completeness
12 designations relating to . . . Plaintiffs' 8/2/2010 counter/completeness designations." The Excel
13 spreadsheet attached to the e-mail contains 229 additional designations for 68 different
14 witnesses.

15 I declare under penalty of perjury under the laws of the United States that the
16 foregoing is true and correct and that this declaration is executed on August 5, 2010.

17
18
19 
20 Thomas S. Hixson