EXHIBIT 28

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18 TOMORROWNOW, INC.

19   UNITED STATES DISTRICT COURT

20   NORTHERN DISTRICT OF CALIFORNIA

21   OAKLAND DIVISION

22 ORACLE USA, INC., et al.,   Case No. 07-CV-1658 PJH (EDL)

23   Plaintiffs,   **DEFENDANT TOMORROWNOW,
        v.   INC.'S EIGHTH AMENDED AND**
24   **SUPPLEMENTAL RESPONSE TO**
   SAP AG, et al.,   **PLAINTIFF ORACLE**
25   **CORPORATION'S FIRST SET OF**
            Defendants.   **INTERROGATORIES (SET ONE)**
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18 **INTERROGATORY NO. 3:**

19   Describe in as much detail as possible how You access, store, maintain, retrieve and

20 provide any support materials to Your Customers, including Software and Support Materials,

21 including but not limited to Identifying on what computers, servers or other devices the Software

22 and Support Materials are stored, the names of Person(s) who have access to the Software and

23 Support Materials, how those Software and Support Materials are accessed by Your Employees

24 and Customers, and describing any policies, procedures, protocols or safeguards involved in the

25 provision of Software and Support Materials to Customers, including ensuring they have a valid

26 license for the material.

27 **RESPONSE TO INTERROGATORY NO. 3:**

28   THIS RESPONSE IS DESIGNATED AS CONFIDENTIAL INFORMATION.

1   TomorrowNow objects that this interrogatory seeks information not reasonably calculated

2   to lead to the discovery of admissible evidence to the extent that it seeks information about

3   unspecified "support materials" other than the Software and Support Materials at issue in this

4   case. TomorrowNow further objects that this interrogatory is compound, is actually several

5   interrogatories, is wholly or partially duplicative of several other interrogatories served by Oracle

6   (including Nos. 6, 7, 8, 10 and 12 of this set and 1, 2 and 4 of the set served by Oracle USA Inc.),

7   and is unduly burdensome and oppressive to the extent it seeks a narrative answer as to a laundry

8   list of disparate subjects. Subject to and without waiving the foregoing objections and the

9   General Objections and Responses, TomorrowNow responds by incorporating by reference and

10   relies on its responses to Interrogatories Nos. 6, 7, 8, 10 and 12 of this set and Interrogatories 1, 2

11   and 4 of the set served by Oracle USA Inc., including those documents cited in those responses.

12   TomorrowNow further responds as follows: TomorrowNow has accessed, downloaded and/or

13   stored Software and Support Materials on behalf of its new customers. TomorrowNow has done

14   so after receiving from the customer certain representations and warranties that the customer is

15   entitled to permit TomorrowNow such access on its behalf. TomorrowNow's policy was only to

16   conduct downloads for a customer using the specific password and user id. provided by that

17   customer and only before the relevant Maintenance End Date for that customer. Until recently,

18   TomorrowNow conducted the downloads and stored the relevant materials on its computers. The

19   downloads were conducted by TomorrowNow's employees using certain laptop and desktop

20   computers as well as dedicated download servers located at TomorrowNow's data center in

21   Bryan, Texas. TomorrowNow then transferred and stored downloaded materials on certain file

22   servers, the relevant files and file folders from which will be included in TomorrowNow's

23   document production and on which TomorrowNow relies to further respond to this interrogatory

24   pursuant to Rule 33(d). TomorrowNow set forth the policies and procedures governing the

25   downloading and storage of relevant materials in procedure documentation, including emails,

26   which will be included in TomorrowNow's document production and on which TomorrowNow

27   relies to further respond to this interrogatory pursuant to Rule 33(d). Beginning in July 2007,

28   TomorrowNow revised its procedures to have its customers conduct all appropriate downloads

they wish to be conducted from the customers' own computers, and to store any such downloaded

materials on the customers' computers. Beginning in July 2007, TomorrowNow may on occasion

assist or advise its customers in conducting downloads, but it is TomorrowNow's policy that each

customer makes the ultimate decision regarding which materials that customer downloads.

TomorrowNow has taken other steps to update its business processes, in part to address the

uncertainty caused by Oracle's allegations and Oracle's refusal to provide information underlying

its claims. Documents describing these process changes will be included in TomorrowNow's

document production and on which TomorrowNow relies to further respond to this interrogatory

pursuant to Rule 33(d).

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 3:

THIS SUPPLEMENTAL RESPONSE IS DESIGNATED AS CONFIDENTIAL

INFORMATION.

TomorrowNow further responds that its policies and procedures documents include but

are not limited to TN-OR00001278 – TN-OR00004196. Downloaded material (in native format)

includes but is not limited to TN-OR00004203, TN-OR00005106 and TN-OR00005147.

TomorrowNow reserves the right to further supplement this response as necessary during the

course of document production.

SECOND SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 3:

THIS SECOND SUPPLEMENTAL RESPONSE IS DESIGNATED AS

CONFIDENTIAL INFORMATION.

This compound interrogatory would require TomorrowNow to chronicle information that

involved numerous employees, took place over several years, and is too complex and detailed to

describe in an interrogatory response. Pursuant to Rule 33(d), TomorrowNow points Plaintiffs to

the SAS database, which is a tool TomorrowNow used to chronicle its business efforts to service

clients. *See* TN-OR 03775478, TN(Hard drive).67, TN-OR 04446717, TN(Disc).173, TN-OR

04446719, TN(Hard drive).75. Further, in addition to the policies and procedures cited above,

policies and procedures documents related to the provision of Software and Support Materials to

Customers include, but are not limited to, SAP-OR00251437, TN-OR00411402, TN-

1 OR00209243, TN-OR00209244, TN-OR03775488, SAP-OR00631478. For information

2 regarding how TomorrowNow stores and maintains Software and Support Materials, including

3 the identification of the computers, servers or other devices the Software and Support Materials

4 are stored, TomorrowNow relies on all of its current responses to Interrogatory No. 11 of this set,

5 which is incorporated by reference.

6 The most complete record of the TomorrowNow employees who had access to the

7 Software and Support Materials prior to the wind down of TomorrowNow can be derived from

8 the SAS database. *See* TN-OR 03775478, TN(Hard drive).67, TN-OR 04446717, TN(Disc).173,

9 TN-OR 04446719, TN(Hard drive).75. The SAS database also contains the most complete record

10 of how TomorrowNow employees accessed those Software and Support Materials. *Id.* The most

11 complete record regarding the fixes TomorrowNow provided its customers can be derived from

12 TN-OR 00009557, TN(Disc).9, TN-OR04497673, TN(Disc).186 (client fixes from Web 01,

13 DCWEB01); TN-OR04497668, TN(Hard drive).78 (client fixes from Mail 03).   In addition,

14 some of the overly broad and unduly burdensome information that this request seeks can be

15 derived from the hours of overlapping 30(b)(6) testimony. *See* October 29, 2007 Deposition of

16 Bill Thomas Pursuant to Rule 30(b)(6); October 29-30, 2007 Deposition of Mark Kreutz

17 Pursuant to Rule 30(b)(6); October 30, 2007 Deposition of Shelley Nelson Pursuant to Rule

18 30(b)(6); December 6, 2007 Deposition of Shelley Nelson Pursuant to Rule 30(b)(6); February 6-

19 7, 2008 Deposition of John Baugh Pursuant to Rule 30(b)(6); February 19, 2008 Deposition of

20 Mark Kreutz Pursuant to Rule 30(b)(6); June 25, 2008 Deposition of Rod Russell Pursuant to

21 Rule 30(b)(6); April 1, 2008 Deposition of Kathy Williams Pursuant to Rule 30(b)(6); April 1,

22 2008 Deposition of Catherine Hyde Pursuant to Rule 30(b)(6).

23 **SIEBEL SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 3:**

24 THIS SIEBEL SUPPLEMENTAL RESPONSE IS DESIGNATED AS CONFIDENTIAL

25 INFORMATION.

26 This compound interrogatory would require TomorrowNow to chronicle information that

27 involved numerous employees, took place over several years, and is too complex and detailed to

28 describe in an interrogatory response. Pursuant to Rule 33(d), TomorrowNow points Plaintiffs to

1 the SAS database, which is a tool TomorrowNow used to chronicle its business efforts to service

2 clients, certain files and folders in the Data Warehouse, and the production of certain policy and

3 procedure documents.

4   The most complete record of the TomorrowNow employees who had access to any

5 software and support materials for the Seibel service line prior to the wind down of

6 TomorrowNow can be derived from the SAS database. *See* TN-OR03727374, TN (Disc). 157

7 (Siebel.nsf) and TN-OR04446719, TN(Hard Drive).75 (same Siebel.nsf file). The SAS database

8 also contains the most complete record of how TomorrowNow employees accessed those

9 software and support materials. *Id.* Further, SAS is the most complete record regarding the

10 services and materials, if any, provided to a TomorrowNow customer with respect to a specific

11 customer case. *Id.* Additionally, information related to the services and information provided to

12 certain customers in response to specific cases is also located on one of the Data Warehouse

13 servers. *See* TN-OR 04232660, TN(Hard Drive).68 (NCSERV1\Development\Fixes by TN).

14   For information regarding how TomorrowNow stored and maintained software and

15 support materials, including the identification of the computers, servers or other devices the

16 software and support materials are stored on, TomorrowNow relies on all of its current responses

17 to Interrogatory No. 11 of this set, including the Siebel supplemental response, which is

18 incorporated by reference.

19   TomorrowNow further responds that its policies and procedures documents related to

20 providing third party support for Siebel product lines include, but are not limited to, TN-

21 OR07097693 to TN-OR07099072 on TN-OR06756453, TN (Disc).249. Moreover, as referenced

22 above, applicable policies and procedures documents related to the provision of software and

23 support materials to customers also include, but are not limited to, TN-OR07099596, TN-

24 OR00411402, TN-OR03775488, SAP-OR00631478.

25   In addition, some of the overly broad and unduly burdensome information that this

26 interrogatory seeks is the subject of requested Rule 30(b)(6) deposition testimony provided by

27 TomorrowNow on September 17, 2009 and has already been the subject of prior individual

28 testimony. *See* October 23, 2007 Amended Notice of Deposition of TomorrowNow, Inc.

1 Pursuant to Fed. R. Civ. P. 30(b)(6), Topic 13 ("The manner in which Software and Support

2 Materials, or any support product developed by You, derived by You, or otherwise obtained by

3 You, is maintained, archived, indexed and transmitted to any Customer, including descriptions of

4 hardware and software Used and where this hardware or software is physically located") and

5 Topic 14 ("The use, distribution, transmission or other communication of Software and Support

6 Materials including without limitation (a) the use, distribution, transmission or other

7 communication of Software and Support Materials within SAP TN or between SAP TN, SAP

8 America, and/or SAP AG; (b) the use, distribution, transmission or other communication of

9 Software and Support Materials into, within, or out of any database or storage device, method, or

10 application; (c) the use, distribution, transmission or other communication of Software and

11 Support Materials between You and Your Customers; (d) the hardware and software Used for any

12 such use, distribution, transmission or other communication identified in this paragraph; and (e)

13 any 'separate systems,' 'firewalls,' or other methods or devices that prevent the distribution,

14 transmission or other communication of Oracle's Software and Support Materials from You to

15 SAP AG and SAP America.") (*See* Plaintiffs' June 23, 2009 E-mail Correspondence requesting

16 Rule 30(b)(6) deposition testimony regarding TomorrowNow's support of Siebel products on

17 these topics); March 13, 2009 Deposition of John Tanner.

18 Finally, TomorrowNow incorporates by reference and relies on its current responses,

19 including to the extent applicable the Siebel supplemental response, to Interrogatories Nos. 6, 7, 8

20 and 12 of this set and Interrogatory No. 1 of the first set served by Oracle USA Inc, including all

21 of the documents cited in those responses.

22 **FOURTH SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 3:**

23 THIS FOURTH SUPPLEMENTAL RESPONSE IS DESIGNATED AS

24 CONFIDENTIAL INFORMATION.

25 TomorrowNow has provided further deposition testimony that is responsive to the overly

26 broad and unduly burdensome information that this request seeks. *See, e.g.,* December 5, 2008

27 Deposition of Matthew Bowden; February 12, 2008 and May 12, 2009 Depositions of Catherine

28 Hyde; March 12, 2008 Deposition of John Tanner; April 10, 2009 Deposition of Patti VonFeldt;

1   June 16, 2009 Deposition of Keith Shankle; June 16, 2009 Deposition of Pete Surette; August 13,

2   2009 Deposition of John Baugh; September 3, 2009 Deposition of S. Nelson; September 17, 2009

3   Deposition of Michael Garafola and John Tanner Pursuant to Rule 30(b)(6); September 22, 2009

4   Deposition of Peggy Lanford; October 9, 2009 Deposition of Desmond Harris.

5   **ORACLE DATABASE AMENDED INTERROGATORY NO. 3:**

6   Describe in as much detail as possible how You access, store, maintain, retrieve and

7   provide any support materials to Your Customers, including Software and Support Materials,

8   including but not limited to by Identifying on what computers, servers or other devices the

9   Software and Support Materials are stored, the names of Person(s) who have access to the

10   Software and Support Materials, how those Software and Support Materials are accessed by Your

11   Employees and Customers, and describing any policies, procedures, protocols or safeguards

12   involved in the provision of Software and Support Materials to Customers, including ensuring

13   they have a valid license for the material.

14   **ORACLE DATABASE SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 3:**

15   THIS ORACLE DATABASE SUPPLEMENTAL RESPONSE IS DESIGNATED AS

16   CONFIDENTIAL INFORMATION.

17   TomorrowNow objects to Plaintiffs' modification of this request by inserting the word

18   "by" in the phrase "but not limited to [by] . . . " as an improper attempt to alter this admittedly

19   overly broad, unduly burdensome, compound, vague and ambiguous request outside of the

20   parties' discovery agreements. TomorrowNow reserves the right to assert that Oracle Database

21   Amended Interrogatory No. 3 should be counted as an additional interrogatory against Plaintiffs'

22   total allotted interrogatories.   Subject to and without waving all of the foregoing objections,

23   TomorrowNow provides the following supplemental response:

24   TomorrowNow did not provide Oracle database applications, including any updates or

25   patches to those applications, to TomorrowNow customers as part of its services. Likewise,

26   TomorrowNow did not provide support services or corresponding support materials for Oracle's

27   database components and/or applications, including any updates or patches to those applications,

28   to TomorrowNow customers as part of its services.

1   At least some of the environments maintained on behalf of TomorrowNow's customers on

2   TomorrowNow's network used an Oracle database platform as a component. With regard to how

3   these database related components were accessed, and by whom, as part of TomorrowNow's

4   servicing of its customers, TomorrowNow incorporates by reference its current responses to this

5   request above and its current responses to Plaintiff's Fifth Set of Interrogatories to Defendant

6   TomorrowNow, Inc. and Fourth Set of Interrogatories to Defendants SAP AG and SAP America,

7   Inc. Interrogatory Nos. 123 and 124. TomorrowNow incorporates by reference each document

8   cited in those responses as part of its supplemental response to this interrogatory. As noted in

9   response to Interrogatory No. 124, TomorrowNow reasonably believes that no systematic or

10   centralized records were maintained regarding from whom or where these Oracle database

11   components were obtained. To the extent any of these database components contain

12   updates/patches or other support materials, these support materials likely would have been

13   obtained from the website metalink.oracle.com and would be stored in the TN Software Library

14   locations identified in response to Interrogatory No. 124. TomorrowNow is not currently aware of

15   specific instances in which it applied patches or updates to the initial instance of any database

16   components referenced in response to Interrogatory No. 124.

17   Moreover, for information regarding how TomorrowNow stored and maintained any

18   Oracle database related components, including the identification of specific servers,

19   TomorrowNow incorporates by reference into this response all of its current responses to

20   Interrogatory No. 11 of this set, including the Oracle Database supplemental response, and its

21   current response to Plaintiff's Fifth Set of Interrogatories to Defendant TomorrowNow and

22   Fourth Set of Interrogatories to Defendants SAP AG and SAP America, Inc. Interrogatory Nos.

23   123 and 124.   Further, TomorrowNow is not aware of any policies specific to Oracle database

24   related components other than those identified above.

25   In addition, some of the overly broad and unduly burdensome information that this

26   interrogatory seeks has already been the subject of requested Rule 30(b)(6)deposition testimony

27   on which former TomorrowNow employee John Baugh testified in February 2008. *See*

28   Defendant TomorrowNow, Inc.'s January 22, 2008 Response to Plaintiff Oracle's Second

30(b)(6) Notice of Deposition of TomorrowNow, Topic 1(b) (designating John Baugh to testify to "The manner and method by which Customer Local Environments were created, stored, and Used by You"); Topic No. 1 (c) (designating John Baugh to testify to "The identity of all PSFT and JDE Customers for whom You created any type of Customer Local Environment"); Topic No. 1 (d) (designating John Baugh to testify to "The total number of Customer Local Environments created for each identified Customer"); Topic No. 1 (l) (designating John Baugh to testify to "The process by which Customer Local Environments were Used as part of the ordinary course of business for [] TN, including without limitation to on-boarding of new Customers; support of Customer cases, issues, and problems; reactive and proactive development of bug fixes, updates, patches, explanations, or regulatory changes for Customers; research into and design of those changes; troubleshooting for Customers; and testing of other operating system levels"). Moreover, the overly broad and unduly burdensome information that this interrogatory seeks is also the subject of additional requested Rule 30(b)(6) deposition testimony and has already been the subject of prior individual testimony. *See* September 30, 2009 Notice of Deposition of TomorrowNow, Inc. Pursuant to Fed. R. Civ. P. 30(b)(6), Topic 1 ("The identification by release, version, and/or filename of any Oracle Database Software in []TN's possession at any time or which []TN obtained, Copied, or used for any purpose"), Topic 2 ("The identification of []TN's computers, servers, or other hardware on which any Oracle Database Software ever resided"), Topic 3 ("The manner, method, and purposes for which [] TN used any Oracle Database Software which ever existed on its Systems"), Topic 4 ("The identification of any Customers for which []TN used any Oracle Database Software on its Systems to provide support services"), Topic 5 ("The manner and method by which []TN used any Oracle Database Software on its Systems to provide support services to Customers"), Topic 6 ("The original source of any Oracle Database Software which ever existed on []TN's Systems and the manner or method by which []TN acquired or accessed each such original source"), Topic 7 ("Any [] TN policies or procedures related to [] TN's Copying or Use of Oracle Database Software");April 23, 2009 Deposition of George Lester; September 3, 2009 Deposition of Shelley Nelson. Pursuant to Rule 33(d),

1 | Defendants rely on all documents and files cited and/or incorporated above to further respond to

2 | this interrogatory.

3 | **SUPPLEMENTAL RESPONSE TO ORACLE DATABASE SUPPLEMENTAL**

4 | **RESPONSE TO INTERROGATORY NO. 3:**

5 | THIS SUPPLEMENTAL RESPONSE IS DESIGNATED AS CONFIDENTIAL

6 | INFORMATION.

7 | TomorrowNow has provided further deposition testimony that is responsive to the overly

8 | broad and unduly burdensome information that this request seeks. *See, e.g.,* December 4, 2009 of

9 | Bill Thomas to Rule 30(b)(6); December 3, 2009 of John Baugh.

16 | TEXT REMOVED - NOT RELEVANT TO MOTION

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22 **<u>INTERROGATORY NO. 7</u>:**

23   Describe in as much detail as possible any policies or procedures related to Downloading

24 Software and Support Materials, as referred to in ¶¶ 9, 72 and 73 of the Answer, including but not

25 limited to identifying whether that policy is oral or written, the dates of creation and any

26 modification of the policy, and identifying the names of all Persons involved in drafting,

27 reviewing, revising, authorizing, approving, implementing, or enforcing that policy.

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RESPONSE TO INTERROGATORY NO. 7:

THIS RESPONSE IS DESIGNATED AS CONFIDENTIAL INFORMATION.

Subject to and without waiving the General Responses and Objections, TomorrowNow responds as follows: TomorrowNow's policies and procedures relating to downloading of relevant Software and Support Materials were created by certain TomorrowNow employees over time and were updated on an ongoing basis. The policies and procedures are set forth in numerous procedural documents, emails and related policy documents, and the personnel responsible for management of downloading are set forth in TomorrowNow's organization charts, which documents will be included in TomorrowNow's document production and on which TomorrowNow relies to further respond to this interrogatory pursuant to Rule 33(d).

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 7:

THIS SUPPLEMENTAL RESPONSE IS DESIGNATED AS CONFIDENTIAL INFORMATION.

TomorrowNow further responds that its policies and procedures documents include but are not limited to TN-OR00001278 – TN-OR00004196. Personnel who have been or are currently responsible for management of downloading include but are not limited to: Shelley Nelson, Laura Sweetman, Mark Kreutz, Keith Shankle, Peter Surette, Greg Nelson, Mark Meyer, Desmond Harris and Peggy Lanford. TomorrowNow reserves the right to further supplement this response as necessary during the course of document production.

SECOND SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 7:

THIS SECOND SUPPLEMENTAL RESPONSE IS DESIGNATED AS CONFIDENTIAL INFORMATION.

TomorrowNow further responds that before the litigation, TomorrowNow's policies and procedures relating to downloading of relevant Software and Support Materials included the following: (1) TomorrowNow was to download each customer's materials individually, by customer, never sharing materials between customer; (2) TomorrowNow was to use a specific customer's login ID only to download that customer's materials; (3) TomorrowNow was to only use a customer's current and valid login ID, assigned to the customer by the vendor; and (4)

1   TomorrowNow was never to download materials on behalf of a customer past that customer's

2   maintenance end date. *See, e.g.,* TN-OR00411402. Pursuant to Rule 33(d), TomorrowNow

3   responds that its policies and procedures documents related to downloading include but are not

4   limited to TN-OR00001462– TN-OR00001476, TN-OR0000213 –TN-OR00002142, TN-

5   OR00002143–TN-OR00002148, TN-OR00002192–TN-OR00002210, TN-OR00002374–TN-

6   OR00002380, TN-OR00002402–TN-OR00002413, TN-OR00002415–TN-OR00002426, TN-

7   OR00002548–TN-OR00002602, TN-OR00002765–TN-OR00002782, TN-OR00003649–TN-

8   OR00003660, TN-OR00003828–TN-OR00003833, TN-OR00003881–TN-OR00003886, TN-

9   OR00003951–TN-OR00003961, TN-OR00004120–TN-OR00004169. TomorrowNow further

10 incorporates by reference all of its current responses to Interrogatory No. 12.

11   After the litigation, TomorrowNow management issued the directive to change certain

12 business processes related to downloading. These changes were memorialized in the

13 TomorrowNow Compliance Guidelines of Support Services, V1 and V2. *See* SAP-OR00631478

14 –SAP-OR00631496, TN-OR03775488–TN-OR03775511. The TomorrowNow executives and/or

15 employees involved with the changes to the download process were Mark White, Martin Breuer,

16 Harry Schoennagel, Mel Gadd, Mark Kreutz, John Tanner, Shelley Nelson, Rod Russell, John

17 Baugh, Tab Brown, Broderick Ellis, Larry Garcia, Paul Henville, Chris Jackson, Tom Leier,

18 Florence Leong, Gordon Robinson, and Kathy Williams. Both versions of the Compliance

19 Guidelines state that downloading must be performed by the client, and TomorrowNow

20 employees are prohibited from directly engaging in downloading activities. *Id.* Automated

21 downloading tools could no longer be used after the business process changes went into effect.

22 *Id.* TomorrowNow employees were permitted to provide "broad guidance" to customers with

23 respect to the types of information the customers should download, but TomorrowNow

24 employees were prohibited from making specific recommendations regarding the software and

25 support materials that should be downloaded. *Id. See, e.g.,* SAP-OR00251437, TN-

26 OR02813156–TN-OR02813157, TN-OR02813158–TN-OR02813159 (other changes to the

27 download policies and procedures). Pursuant to Rule 33(d), TomorrowNow relies upon each

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1 document cited in the Response and all Supplemental Responses to further respond to this

2 interrogatory.

3 **ORACLE DATABASE AMENDED INTERROGATORY NO. 7:**

4   Describe in as much detail as possible any policies or procedures related to Downloading

5 Software and Support Materials, including but not limited to identifying whether that policy is

6 oral or written, the dates of creation and any modification of the policy, and identifying the names

7 of all Persons involved in drafting, reviewing, revising, authorizing, approving, implementing, or

8 enforcing that policy

9 **ORACLE DATABASE SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 7:**

10   THIS ORACLE DATABASE SUPPLEMENTAL RESPONSE IS DESIGNATED AS

11 CONFIDENTIAL INFORMATION.

12   TomorrowNow further supplements that it is not aware of any policies or procedures

13 relating to downloading of relevant software and support materials specific to Oracle database

14 components aside from TomorrowNow's general policies and procedures referenced above.

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19   TEXT REMOVED - NOT RELEVANT TO MOTION

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INTERROGATORY NO. 10:

Describe in as much detail as possible all instances in which a Customer has provided You with a password for use in Downloading Software and Support Materials, including but not limited to Identifying all related Documents, Communications, or "warrant[ies]" provided by the Customer (as used in ¶¶ 71-72 of Your Answer), and indicating in each instance which Software and Support Materials the Customer authorized You to Download with the password.

RESPONSE TO INTERROGATORY NO. 10:

THIS RESPONSE IS DESIGNATED AS CONFIDENTIAL INFORMATION.

TomorrowNow objects that this interrogatory is compound and that it is unduly burdensome and overbroad to the extent it seeks a narrative answer with respect to all of TomorrowNow's relevant customers. Subject to and without waiving the foregoing objections and the General Objections and Responses, TomorrowNow responds as follows: Some of TomorrowNow customers have provided TomorrowNow with what the customers represented to be current, valid passwords and user ids. Customers further represented in their contracts with TomorrowNow and/or documentation relating to initiating service with TomorrowNow that they were entitled to provide TomorrowNow with such information and access to software and support materials. The specific information requested by this interrogatory can be derived or ascertained from TomorrowNow's contracts as well as onboarding documentation received from and email communications with TomorrowNow's relevant customers, all of which will be included in TomorrowNow's document production and on which TomorrowNow relies to further respond to this interrogatory pursuant to Rule 33(d).

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 10:

THIS SUPPLEMENTAL RESPONSE IS DESIGNATED AS CONFIDENTIAL INFORMATION.

TomorrowNow further responds that its customer contracts include but are not limited to: TN-OR00000027 – TN-OR00001007 and TN-OR 00004204 – TN-OR00004276; and that its

1   onboarding documentation includes but is not limited to TN-OR00001008 – TN-OR00001277.

2   TomorrowNow reserves the right to further supplement this response as necessary during the

3   course of document production.

4   **SECOND SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 10:**

5   THIS SECOND SUPPLEMENTAL RESPONSE IS DESIGNATED AS

6   CONFIDENTIAL INFORMATION.

7   TomorrowNow further responds as follows: As part of the onboarding process,

8   TomorrowNow customers regularly provided TomorrowNow access to the customers' respective

9   Customer Connection user IDs and passwords for use in downloading software and support

10   materials. TomorrowNow customers provided their passwords to TomorrowNow through e-mail

11   communications, in response to Urgent Steps letters, and/or included them in Pre-Install

12   Questionnaires. The user IDs and passwords are stored in a variety of locations, including on

13   Download Request forms, in DotProject, and in multiple locations within the SAS database.

14   TomorrowNow customers represented in their contracts with TomorrowNow, including the

15   accompanying exhibits and/or in the documentation relating to initiating service with

16   TomorrowNow, that they were entitled to provide TomorrowNow with such information and

17   access to software and support materials. The Product Verification forms completed by the

18   TomorrowNow JDE World and OneWorld customers also informed TomorrowNow of the

19   product information the customers were running in production and for which they desired

20   TomorrowNow support.

21   TomorrowNow customers sometimes provided TomorrowNow with their respective user

22   IDs and passwords in response to an e-mail request. *See, e.g.*, TN-OR00069136-TN-

23   OR00069138, TN-OR00077544-TN-OR77546, TN-OR00089430-TN-OR00089431, TN-

24   OR00177660-TN-OR00177661, TN-OR00184523-TN-OR00184525. Further, e-mail

25   communications containing a user ID and password can be derived or ascertained from

26   TomorrowNow's onboarding documents received from and e-mail communications with

27   TomorrowNow's customers that are located within TomorrowNow's document production, and

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the burden of deriving or ascertaining the answer to this interrogatory is substantially the same for

both parties. Thus, TomorrowNow relies on Rule 33(d) to further respond to this interrogatory.

TomorrowNow also received user IDs and passwords from TomorrowNow customers in

response to Urgent Steps Letters and on the Pre-Install Questionnaires TomorrowNow provided

to its customers.   The standard TomorrowNow PeopleSoft Urgent Steps letter sent to

TomorrowNow customers reminded customers to "Complete and return the Pre-Install

Questionnaire" and "Please make sure to fill in the section for the Customer Connection

Username and Password. . . . We will download all Updates & Fixes for your product release, red

papers, and platform information." *See, e.g.*, TN-OR00184963-TN-OR00184964. Some

customers would provide their respective user IDs and passwords in response to the Urgent Steps

Letter. *See, e.g.*, TN-OR00056147, TN-OR00064944-TN-OR00064946, TN-OR00065864-TN-

OR00065868, TN-OR00081437-TN-OR00081438, TN-OR00173285-TN-OR00173287, TN-

OR00183955-TN-OR00183957, TN-OR00092059-TN-OR00092060, TN-OR00308821-TN-

OR00308822. The Urgent Steps Letters can be located by running a search for "Urgent Steps

Letters" in TomorrowNow's document production. Further, user IDs and passwords received by

TomorrowNow in response to Urgent Steps Letters can be derived or ascertained from

TomorrowNow's onboarding documents received from and e-mail communications with

TomorrowNow's customers that are located within TomorrowNow's document production, and

the burden of deriving or ascertaining the answer to this interrogatory is substantially the same for

both parties. Thus, TomorrowNow relies on Rule 33(d) to further respond to this interrogatory.

Other customers included their respective user IDs and passwords on the Pre-Install

Questionnaire that the customers sent to TomorrowNow after receiving an Urgent Steps letter.

See, e.g., TN-OR00215378-TN-OR00215380, TN-OR00215381-TN-OR00215382, TN-

OR00475082-TN-OR00475084, TN-OR00475085-TN-OR00475086, TN-OR00173349, TN-

OR00173350-TN-OR00173351, TN-OR00173352-TN-OR00173353. Examples of Pre-Install

Questionnaires containing Customer Connection user IDs and passwords can be found at: TN-

OR00185602-TN-OR00185603, TN-OR00184985-TN-OR00184986, TN-OR00185006-TN-

OR00185007, TN-OR00185014-TN-OR00185015, TN-OR00199550-TN-OR00199551, TN-

OR00185022-TN-OR00185023, TN-OR00185041-TN-OR00185042, TN-OR00199935-TN-

OR00199936, TN-OR00208806-TN-OR00208807, TN-OR00211801-TN-OR00211802, TN-

OR00208864-TN-OR00208865, TN-OR00215665-TN-OR00215666, TN-OR00214943-TN-

OR00214944, TN-OR00251397-TN-OR00251398, TN-OR00311267-TN-OR00311268, TN-

OR00311405-TN-OR00311406, TN-OR00313360-TN-OR00313361, TN-OR00314141-TN-

OR00314142, TN-OR00173525-TN-OR00173526, TN-OR00171689-TN-OR00171691, TN-

OR00173946-TN-OR00173947, TN-OR00173339-TN-OR00173340, TN-OR00173352-TN-

OR00173353, TN-OR00176222-TN-OR00176224, TN-OR00176621-TN-OR00176623, TN-

OR00176662-TN-OR00176664, TN-OR00176100-TN-OR00176101, TN-OR00180152-TN-

OR00180153, TN-OR00184007-TN-OR00184008. Additional Pre-Install Questionnaires can be

located by running a search over TomorrowNow's production for "Pre-Install Questionnaire" in

the full text with document type "Word." Further, Pre-Install Questionnaires containing user ID

and password information can be derived or ascertained from TomorrowNow's onboarding

documents received from and e-mail communications with TomorrowNow's customers that are

located within TomorrowNow's document production, and the burden of deriving or ascertaining

the answer to this interrogatory is substantially the same for both parties. Thus, TomorrowNow

relies on Rule 33(d) to further respond to this interrogatory.

TomorrowNow often stored customer user IDs and passwords on Download Request

forms, which were used by certain TomorrowNow JDE World and OneWorld individuals. *See,*

e.g., TN-OR00056036- TN-OR00056037, TN-OR00001002-TN-OR00001007, TN-

OR00000479-TN-OR0000484, TN-OR0000094-TN-OR0000096, TN-OR00000588-TN-

OR00000590, TN-OR00000253-TN-OR00000258, TN-OR00000625-TN-OR0000627, TN-

OR00000313-TN-OR00000318, TN-OR00000715-TN-OR00000721, TN-OR00000319-TN-

OR00000324, TN-OR00000749-TN-OR00000754, TN-OR00000811-TN-OR00000816, TN-

OR00000817-TN-OR00000822, TN-OR00000839-TN-OR00000845, TN-OR00000846-TN-

OR00000852, TN-OR00000428-TN-OR00000430, TN-OR00000889-TN-OR00000892, TN-

OR00005995-TN-OR00006000, TN-OR00008908-TN-OR00008911, TN-OR00006915-TN-

OR00006920, TN-OR00008953-TN-OR00008959, TN-OR00005256-TN-OR00005258, TN-

OR00008989-TN-OR00008994, TN-OR00007969-TN-OR00007974, TN-OR00005387-TN-

OR00005392, TN-OR00007243-TN-OR00007248, TN-OR00007324-TN-OR00007329, TN-

OR00006477-TN-OR00006482, TN-OR00005789-TN-OR00005794, TN-OR00005834-TN-

OR00005836, TN-OR00007424-TN-OR00007427, TN-OR00000990-TN-OR00000995, TN-

OR00000490-TN-OR00000495, TN-OR00000057-TN-OR00000061, TN-OR00000062-TN-

OR00000067, TN-OR00000509-TN-OR00000514, TN-OR00000515-TN-OR00000520, TN-

OR00000088-TN-OR00000093, TN-OR00000521-TN-OR00000526, TN-OR00000527-TN-

OR00000532, TN-OR00000128-TN-OR00000133, TN-OR00000161-TN-OR00000166, TN-

OR00000591-TN-OR00000596, TN-OR00000601-TN-OR00000606, TN-OR00000235-TN-

OR00000239, TN-OR00000607-TN-OR00000612, TN-OR00000613-TN-OR00000618, TN-

OR00000285-TN-OR00000289, TN-OR00000307-TN-OR00000312, TN-OR00000695-TN-

OR00000700, TN-OR00000325-TN-OR00000330, TN-OR00000344-TN-OR00000349, TN-

OR00000383-TN-OR00000388, TN-OR00000823- TN-OR00000838, TN-OR00000399- TN-

OR00000404, TN-OR00000405- TN-OR00000410, TN-OR00000863- TN-OR00000868, TN-

OR00000869- TN-OR00000874, TN-OR00000432- TN-OR00000436, TN-OR00000453- TN-

OR00000458, TN-OR00000459- TN-OR00000463, TN-OR00006607- TN-OR00006610, TN-

OR00008607- TN-OR00008611, TN-OR00008640- TN-OR00008644, TN-OR00006634- TN-

OR00006637, TN-OR00006638- TN-OR00006641, TN-OR00007525- TN-OR00007540, TN-

OR00006032- TN-OR00006035, TN-OR00006123- TN-OR00006128, TN-OR00007670- TN-

OR00007673, TN-OR00006147- TN-OR00006151, TN-OR00006869- TN-OR00006873, TN-

OR00008948- TN-OR00008952, TN-OR00006164- TN-OR00006167, TN-OR00005326- TN-

OR00005330, TN-OR00007070- TN-OR00007073, TN-OR00006319- TN-OR00006322, TN-

OR00007117- TN-OR00007120, TN-OR00008995- TN-OR00008998, TN-OR00007207- TN-

OR00007210, TN-OR00005481- TN-OR00005484, TN-OR00007221- TN-OR00007225, TN-

OR00006421- TN-OR00006424, TN-OR00009325- TN-OR00009328, TN-OR00005689- TN-

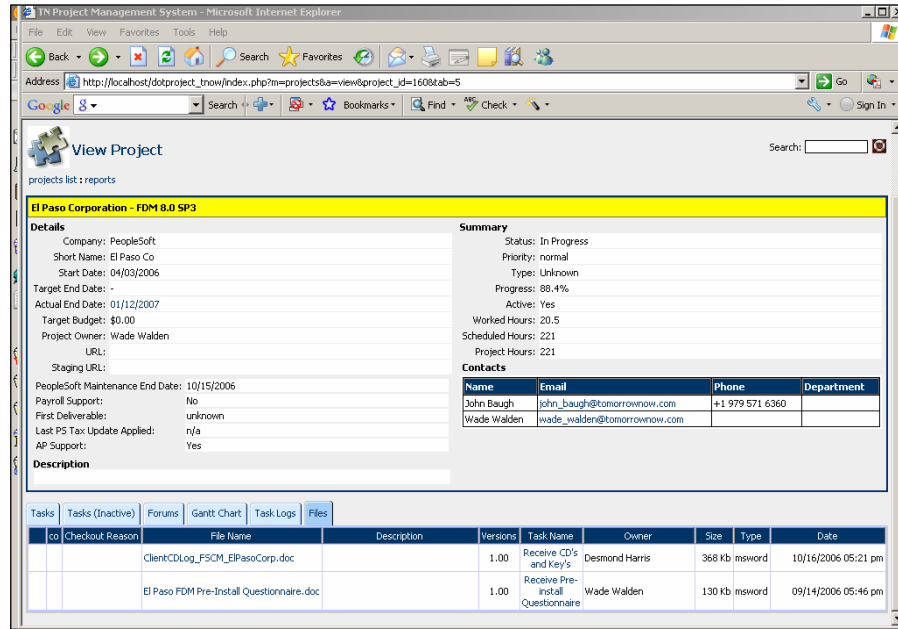OR00005692, TN-OR00006533- TN-OR00006538, TN-OR00006553- TN-OR00006557.

Further, Download Request Forms containing user ID and password information can be derived

or ascertained from TomorrowNow's onboarding documents received from and e-mail

1 communications with TomorrowNow's customers that are located within TomorrowNow's

2 document production, and the burden of deriving or ascertaining the answer to this interrogatory

3 is substantially the same for both parties. Thus, TomorrowNow relies on Rule 33(d) to further

4 respond to this interrogatory.

5   Many of the JDE World and OneWorld Download Request forms can also be located in a

6 folder titled "JDE Clients – TNOW" on DCITBU01. Also located in the "JDE Clients – TNOW"

7 folder is a spreadsheet called "Download Priorities.xls." *See* DCITBU01_G/JDE_1-3/JDE

8 Clients - TNOW/Download Request/Download_Priorities.xls. This spreadsheet contains many of

9 the Customer Connection user IDs and passwords for TomorrowNow JDE customers. Thus,

10 TomorrowNow relies on Rule 33(d) to further respond to this interrogatory.

11   TomorrowNow also stored PeopleSoft customer user IDs and passwords within its

12 onboarding database DotProject. *See* TN-OR 01361344, TN (Disc) 62. In order to locate the

13 user id and password information in DotProject, select any customer in the entry screen of

14 DotProject. From the customer's "Projects" page, select the blue "Files" tab, and open the Pre-

15 Install Questionnaire. Again, this questionnaire contains the customers' respective user IDs and

16 passwords. For example, within El Paso Corporation, select the Files tab, and a link to the FDM

17 Pre-Install Questionnaire is available. The screen shot below shows where to locate the Pre-

18 Install Questionnaire for El Paso Corporation. Thus, TomorrowNow relies on Rule 33(d) to

19 further respond to this interrogatory.

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23   TEXT REMOVED - NOT RELEVANT TO MOTION

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View Project

projects list : reports

El Paso Corporation - FDM 8.0 SP3

Details

Company:	PeopleSoft
Short Name:	El Paso Co
Start Date:	04/03/2006
Target End Date:	-
Actual End Date:	01/12/2007
Target Budget:	$0.00
Project Owner:	Wade Walden
URL:	
Staging URL:	

PeopleSoft Maintenance End Date:	10/15/2006
Payroll Support:	No
First Deliverable:	unknown
Last PS Tax Update Applied:	n/a
AP Support:	Yes

Summary

Status:	In Progress
Priority:	normal
Type:	Unknown
Progress:	88.4%
Active:	Yes
Worked Hours:	20.5
Scheduled Hours:	221
Project Hours:	221

Contacts

Name	Email	Phone	Department
John Baugh	john_baugh@tomorrownow.com	+1 979 571 6360	
Wade Walden	wade_walden@tomorrownow.com		

Description

Tasks | Tasks (Inactive) | Forums | Gantt Chart | Task Logs | Files

	co	Checkout Reason	File Name	Description	Versions	Task Name	Owner	Size	Type	Date
			ClientCDLog_FSCM_ElPasoCorp.doc		1.00	Receive CD's and Key's	Desmond Harris	368 Kb	msword	10/16/2006 05:21 pm
			El Paso FDM Pre-Install Questionnaire.doc		1.00	Receive Pre-install Questionnaire	Wade Walden	130 Kb	msword	09/14/2006 05:46 pm

Finally, TomorrowNow stored customer user IDs and passwords within the SAS database. For example, within the SAS Enterprise database, user id and password information can be found in the view 1. Support/ 1. All / By Customer. See TN-OR03775478, TN (Hard drive) 67. For customer Advance Auto Parts, double-click on the Engagement NAmerica tab under FDM. This will bring up a separate window containing the Engagement Master Form. Under Service Information, scroll to the right until Connectivity Info appears. Within Connectivity Info, the "PS Customer Connection – Login and Password Set Up by Client for TN" is available. See TN-OR00184527. Kathy Williams reminded the TomorrowNow PeopleSoft team to "update the SAS 'connection' tab" with the customer user ID and password information. *Id.* The screen shot below shows where the Customer Connection user ID and password can be found for Advance Auto Parts. Thus, TomorrowNow relies on Rule 33(d) to further respond to this interrogatory.
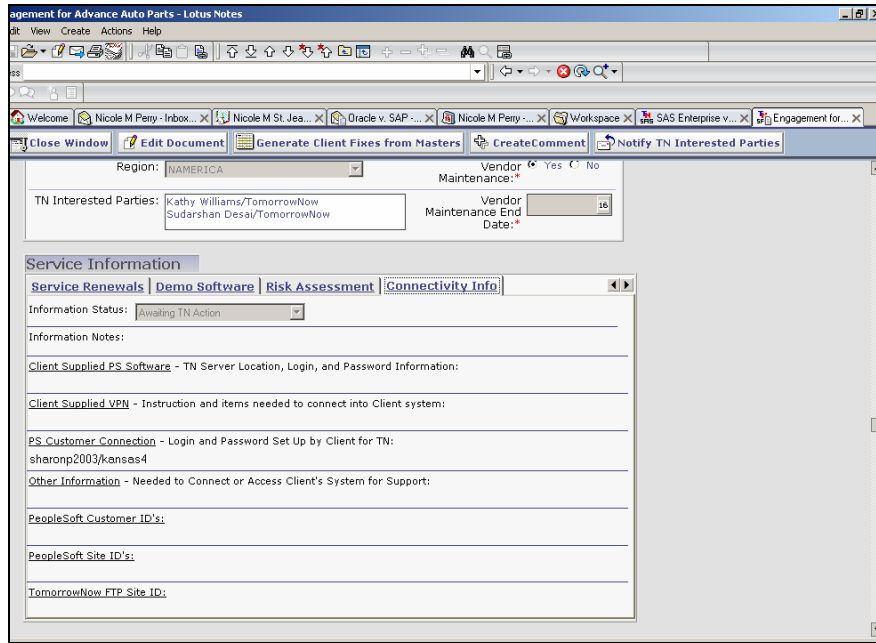
TomorrowNow stored customer user ids and passwords within the SAS Clients Database as well. See TN-OR03727374, TN (Disc) 157. For example, in the view 1. Support / 1. All By Customer / Koontz-Wagner / Customer, e-mail correspondence is posted under Comments / Email / Time. The Koontz-Wagner Customer Connection user ID and password can be found in Incoming Email – Shelley Nelson 01/21/2005 9:50:40 AM Onboarding update. Thus, TomorrowNow relies on Rule 33(d) to further respond to this interrogatory.

Each TomorrowNow customer's Support Services Agreement and the exhibits accompanying the Agreement authorized TomorrowNow to download software and support materials on the customer's behalf. The "Covered Products" portion of the Exhibit to the Agreement identifies product-specific information that TomorrowNow was to service for the customer. *See* Exhibit A to Second Supplemental Interrogatory Responses for a spreadsheet listing the Bates numbers for Support Services Agreements and relevant exhibits for each TomorrowNow customer. The TomorrowNow JDE World and OneWorld teams also requested that its customers complete a Product Verification Form, which included a listing of products for which the customers were licensed and for which they desired TomorrowNow support. *See, e.g.*, TN-OR00051406-TN-OR00051408, TN-OR00051858-TN-OR00051860, TN-OR00052001-TN-OR00052004, TN-OR00052707-TN-OR00052710, TN-OR00052711-TN-OR00052714, TN-

1 OR00053241-TN-OR00053244, TN-OR00053245-TN-OR00053248, TN-OR00052805-TN-

2 OR0052808, TN-OR00053154-TN-OR00053156, TN-OR00053438-TN-OR00053441, TN-

3 OR00053684-TN-OR00053586, TN-OR0053473-TN-OR00053475, TN-OR00053615-TN-

4 OR00053617, TN-OR00053430-TN-OR00053433, TN-OR00053434-TN-OR00053437, TN-

5 OR00054127-TN-OR00054129, TN-OR00053746-TN-OR00053749, TN-OR00054507-TN-

6 OR00054509, TN-OR00054347-TN-OR00054349, TN-OR000555724-TN-OR00055726.

7 Additional examples of Product Verification Forms can be located by running the search "Product

8 Verification Form" in the full text with "Word" as the document type. Further, Product

9 Verification Forms containing user ID and password information can be derived or ascertained

10 from TomorrowNow's Support Services Agreements as well as onboarding documents received

11 from and e-mail communications with TomorrowNow's customers that are located within

12 TomorrowNow's document production, and the burden of deriving or ascertaining the answer to

13 this interrogatory is substantially the same for both parties. Thus, TomorrowNow relies on Rule

14 33(d) to further respond to this interrogatory.

15 **ORACLE DATABASE AMENDED INTERROGATORY NO. 10:**

16   Describe in as much detail as possible all instances in which a Customer has provided you

17 with a password for use in Downloading Software and Support Materials, including but not

18 limited to Identifying all related Documents, Communications, or warranties provided by the

19 Customer, and indicating in each instance which Software and Support Materials the Customer

20 authorized You to Download with the password.

21 **ORACLE DATABASE SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 10:**

22   THIS ORACLE DATABASE SUPPLEMENTAL RESPONSE IS DESIGNATED AS

23 CONFIDENTIAL INFORMATION.

24   TomorrowNow is not currently aware of an instance where a customer provided a

25 password to TomorrowNow for TomorrowNow's use in obtaining Oracle database related

26 components and/or applications, including any updates or patches for those applications.

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19 **INTERROGATORY NO. 12:**

20   Describe in as much detail as possible any policies, practices or procedures, including

21 clean room procedures, that You have to ensure that Software and Support Materials are not

22 mixed between and among Customers or sent to SAP AG or SAP America.

23 **RESPONSE TO INTERROGATORY NO. 12:**

24   THIS RESPONSE IS DESIGNATED AS CONFIDENTIAL INFORMATION.

25   Subject to and without waiving the General Responses and Objections, TomorrowNow

26 responds by incorporating by reference its response to Interrogatory No. 6. TomorrowNow

27 further responds that its policy was to store a customer's downloaded material in a separate folder

28 structure for that particular customer and only to use such materials for that customer.

TomorrowNow's policies and procedures were promulgated in a variety of documents, which will be included in TomorrowNow's document production and on which TomorrowNow relies to further respond to this interrogatory pursuant to Rule 33(d).

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 12:

THIS SUPPLEMENTAL RESPONSE IS DESIGNATED AS CONFIDENTIAL INFORMATION.

TomorrowNow further responds by incorporating by reference its supplemental response to Interrogatory No. 6. TomorrowNow's policies and procedures documents include but are not limited to TN-OR00001278 – TN-OR00004196. TomorrowNow reserves the right to further supplement this response as necessary during the course of document production.

SECOND SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 12:

THIS SECOND SUPPLEMENTAL RESPONSE IS DESIGNATED AS CONFIDENTIAL INFORMATION.

TomorrowNow further responds that before the litigation, TomorrowNow's relevant policies and procedures included the following: (1) TomorrowNow was to download each customer's materials individually, by customer, never sharing materials between customer; (2) TomorrowNow was to use a specific customer's login ID only to download that customer's materials; (3) TomorrowNow was to only use a customer's current and valid login ID, assigned to the customer by the vendor; and (4) TomorrowNow was never to download materials on behalf of a customer past that customer's maintenance end date. *See, e.g.,* TN-OR00411402.

For other relevant TomorrowNow policies and procedures, *see* SAP-OR00631478 – SAP-OR00631496, TN-OR03775488 – TN-OR03775511, SAP-OR00251437, TN-OR02813156 – TN-OR02813157, TN-OR02813158 – TN-OR02813159, SAP-OR00129611-SAP-OR00129614, TN-OR00489529-TN-OR00489532. TomorrowNow further responds by incorporating by reference all of its current responses to Interrogatory No. 7. Pursuant to Rule 33(d), TomorrowNow relies upon each document cited in the Response and all Supplemental Responses to further respond to this interrogatory.

SIEBEL SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 12:

THIS SIEBEL SUPPLEMENTAL RESPONSE IS DESIGNATED AS CONFIDENTIAL INFORMATION.

TomorrowNow is not aware of any policies, practices, or procedures solely related to TomorrowNow's support services for its Siebel customers separate and apart from those discussed above. Therefore, TomorrowNow incorporates by reference its current responses above and TomorrowNow relies upon each document cited in the response and all supplemental responses to respond to this interrogatory. TomorrowNow further incorporates by reference and relies on its current responses to Interrogatories Nos. 6 and 7 of this set.

INTERROGATORY NO. 13:

Describe in as much detail as possible all Software and Support Materials that "have been downloaded beyond those that, according to TN's records, related to applications licensed to the particular customer on whose behalf the downloads were made," as alleged in ¶ 15 of Your Answer, including but not limited to Identifying the "records" You referenced in making Your determination.

RESPONSE TO INTERROGATORY NO. 13:

THIS RESPONSE IS DESIGNATED AS CONFIDENTIAL INFORMATION.

Subject to and without waiving the General Responses and Objections, TomorrowNow responds as follows: TomorrowNow's downloads on behalf of customers using JDE's OneWorld products were made based on instructions set forth on a Download Request Form. The Download Request Forms for Merck, OCE, SPX, Metro Machine and Yakazi instructed the download team to download all ESUs for all system codes on a particular release level. TomorrowNow's records did not show that those customers had represented that they were licensed to all system codes on a particular release level. Additionally, TomorrowNow has learned that the password and user id. for Honeywell were used to access the Customer Connection site to download materials apparently related to JDE products. Additional information responsive to this interrogatory can be derived or ascertained from the relevant customer contracts, onboarding documentation, Download Request Forms and the relevant customer files, which will be included in

1 TomorrowNow's document production and on which TomorrowNow relies to further respond to

2 this interrogatory pursuant to Rule 33(d).

3 **SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 13:**

4   THIS SUPPLEMENTAL RESPONSE IS DESIGNATED AS CONFIDENTIAL

5 INFORMATION.

6   TomorrowNow further responds that its customer contracts include but are not limited to:

7 TN-OR00000027 – TN-OR00001007 and TN-OR 00004204 – TN-OR00004276; and that its

8 onboarding documentation includes but is not limited to TN-OR00001008 – TN-OR00001277.

9 Download material (in native format) includes but is not limited to: TN-OR00004202,

10 TN-OR00005146 and TN-OR00005147. TomorrowNow reserves the right to further supplement

11 this response as necessary during the course of document production.

12 **SECOND SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 13:**

13   THIS SECOND SUPPLEMENTAL RESPONSE IS DESIGNATED AS

14 CONFIDENTIAL INFORMATION.

15   TomorrowNow further responds that because TomorrowNow did not have access to its

16 customers' respective license agreements with the software vendor, TomorrowNow relied on the

17 representations of its customers in each customer's Support Services Agreement and the

18 "Covered Products" portion of the Agreement's accompanying exhibits, as well as the product

19 information provided by the customer in the Product Verification Forms. As stated in the

20 response above, TomorrowNow believes that there were some downloads made for products

21 beyond those to which the customer informed TomorrowNow that the customer was licensed.

22 However, despite numerous discovery requests for information from Plaintiffs that will map

23 downloads to specific products, no such information has been produced which in turn means that

24 TomorrowNow does not have the ability to map each of the specific downloads to each of the

25 specific products. Plaintiffs have represented to the Court that they also do not have the ability

26 post-download to determine which downloads relate to which products. Thus, without such

27 mapping information (provided in a manner that permits an electronic "download to product"

28 comparison), it is not possible for TomorrowNow to evaluate the appropriateness of each

1 download it made on behalf of its customers. TomorrowNow further responds by incorporating

2 by reference all of its current responses to Interrogatory No. 14 and Interrogatory No. 16.

3 **SIEBEL SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 13:**

4 THIS SECOND SUPPLEMENTAL RESPONSE IS DESIGNATED AS

5 CONFIDENTIAL INFORMATION.

6 With regard to TomorrowNow's servicing of Siebel customers and the limited

7 downloading of informational documents from SupportWeb for a few clients, TomorrowNow is

8 not aware of any specific downloads from SupportWeb or elsewhere that were in excess of a

9 customer's license agreement with Oracle. Moreover, TomorrowNow has not conducted a

10 download by download analysis of any such downloads. Because TomorrowNow did not have

11 access to its customers' respective license agreements with the software vendor, TomorrowNow

12 relied on the representations of its customers in each customer's Support Services Agreement and

13 the "Covered Products" portion of the Agreement's accompanying exhibits for information

14 regarding the data licensed to a customer. Despite numerous discovery requests for information

15 from Plaintiffs that will map downloads to specific products, sufficient information has not been

16 produced which in turn means that TomorrowNow does not have the ability to map each of the

17 specific downloads to each of the specific products. Plaintiffs have represented to the Court that

18 they also do not have the ability post-download to determine which downloads relate to which

19 products. Thus, without such mapping information (provided in a manner that permits an

20 electronic "download to product" comparison), it is not possible for TomorrowNow to evaluate

21 the appropriateness of each download it made on behalf of its Siebel customers.

22 TomorrowNow further responds that its customer contracts for Siebel services include,

23 but are not limited to, TN-OR02985469 – TN-OR02985485; TN-OR02812692 – TN-

24 OR02812735; TN-OR03712204 - TN-OR03712214; TN-OR00006463 - TN-OR00006476; TN-

25 OR03712233 - TN-OR03712239; TN-OR00006771 - TN-OR00006781; TN-OR00006952 - TN-

26 OR00006970; TN-OR00007078 - TN-OR00007092; TN-OR06085843 - TN-OR06085854; TN-

27 OR06085827 - TN-OR06085828; TN-OR00000540 - TN-OR00000564; TN-OR00007868 – TN-

28 OR00007877; TN-OR00008179 - TN-OR00008192; TN-OR00008322 - TN-OR00008332; TN-

1 | OR00008389 - TN-OR00008405; TN-OR00008671 - TN-OR00008681; TN-OR03712369 - TN-

2 | OR03712371; TN-OR00000755 - TN-OR00000772; and TN-OR02985918 - TN-OR02985931.

3 | **FOURTH SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 13:**

4 | THIS FOURTH SUPPLEMENTAL RESPONSE IS DESIGNATED AS

5 | CONFIDENTIAL INFORMATION.

6 | Paragraphs 75 through 80 of Plaintiffs' March 22, 2007 Complaint lists several alleged

7 | TomorrowNow customers for whom Plaintiffs alleged they had "uncovered unlicensed

8 | downloads linked to" TomorrowNow. Plaintiffs' March 22, 2007 Complaint for Damages and

9 | Injunctive Relief ("Original Complaint") (Docket Entry No. 1), at ¶ 75 (24:21-22). After

10 | receiving the Complaint, TomorrowNow, with the assistance of its counsel[1] in this litigation,

11 | began an investigation in an attempt to determine what downloads TomorrowNow made on

12 | behalf of those customers and which, if any, any such downloads which were beyond those for

13 | which each customer had indicated to TomorrowNow it was licensed. At the same time,

14 | TomorrowNow, with the assistance of its counsel in this litigation, systematically engaged in an

15 | effort to preserve all electronic and hard copy data that was potentially relevant to Plaintiffs'

16 | allegations and began interviewing those TomorrowNow employees with knowledge of

17 | TomorrowNow's downloading activities.

18 | For certain of the entities named in paragraphs 75-80 of the Original Complaint,

19 | TomorrowNow preliminarily concluded by May 30, 2007 that TomorrowNow had the following

20 | minimum number of downloaded files for at least the following entities:

21 |

22 |

23 |

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26 | [1] Judge Laporte's August 31, 2009 Order (Dkt. 460), under which this Fourth
Supplemental Response is made, specifically states: "Defendants' supplemental response to
Interrogatory No. 13 shall not be construed as a waiver of either the attorney-client privilege or

27 | work product immunity." *Id.* at 1:26-28. Thus, this response is made subject to, and without
waiving, the attorney-client privilege, work product immunity or any other applicable privilege.

28 | This supplemental response does not, and is not intended to, contain any legal advice or opinions.

Customer Name	PeopleSoft Software	JDEdwards Software	Listed in Paragraphs 76-80 of Complaint	Listed in Paragraph 75 of Complaint	Minimum downloaded files located on TomorrowNow's server as of May 30, 2007
Honeywell	Y		Y	Y	18,210
Merck		Y	Y	Y	14,591
Metro Machine Corp		Y	Y	Y	15,499
Oce Technologies		Y	Y	Y	46,810
SPX Cooling		Y	Y	Y	11,243
SPX Flow		Y	Y	Y	7,664
SPX Flow Technology		Y	Y	Y	2,157
SPX Weil-McLain		Y	Y	Y	12,313
Abbott Labs		Y		Y	1,915
Abitibi Consolidated		Y		Y	36,405
Bear Stearns	Y			Y	0
Borders Foods		Y		Y	0
Caterpillar		Y		Y	6,258
Fuelserv		Y		Y	2,329
Helzberg Diamond Shop		Y		Y	0
Herbert Waldmann		Y		Y	5,126
Laird Plastic		Y		Y	2,261
National Manufacturing		Y		Y	0
Ronis		Y		Y	3,370
Stora Enso Corp		Y		Y	14,711
Texas Associates School Boards		Y		Y	3,236
VSM Group		Y		Y	2,775
Yazaki North America		Y		Y	45,751

These files were located on TomorrowNow's server known as DCITBU01_G, which has been produced to Plaintiffs as part of TomorrowNow's Data Warehouse native file production. *See* DCITBU01_G (TN-OR02989997, TN-OR02989995, TN-OR02989994, TN-OR02989993). And, as of May 30, 2007, TomorrowNow had preliminarily concluded that these files appeared to have been downloaded using each respective customer's username and password credentials, which were either listed on a spreadsheet the TomorrowNow JDE team maintained that was known as "Download Priorities.xls" and/or in various places in each customers' record entries in TomorrowNow's SAS database. *See* TN-OR08312517. *See also* DCITBU01_G/JDE_1-3/JDE Clients - TNOW/Download Request/Download_Priorities.xls; Second Supplemental Response to Interrogatory 10 above, for a description of how to access the "Connectivity Info" tab in SAS. For Honeywell and Bear Stearns, TomorrowNow had preliminarily concluded as of May 30, 2007

that: (a) Honeywell's apparent customer credentials that were used to download its files were username "hwe000999" and password "texas33," which is located in Honeywell's data contained in SAS under "Connectivity Info"; and (b) Bear Stearns' apparent customer credentials that were used to downloads its files was username "tomorrownow_bs" and password "texas3" which is located in Bear Stearns' data contained in SAS under "Connectivity Info". *See, e.g.,* TN-OR 04446717, TN (Disc).173. As far as TomorrowNow has been able to determine, the downloaded files neither contain any physical electronic tagging in the file itself, nor any file-based metadata associated with each file that provides both the exact username and password that was used to download each file.

Despite the fact that, as of May 30, 2007, TomorrowNow was able to ascertain that a certain number of files were downloaded by TomorrowNow on behalf of certain entities, TomorrowNow was unable to locate any specific product mapping information that would enable TomorrowNow to systematically tie any specific download to one or more of Plaintiffs' separately licensed products. Since that time, Defendants have repeatedly asked Plaintiffs for this product mapping information and to date, Plaintiffs have refused and/or been unable to produce any information that would permit Defendants in any systematic, reasonable way to tie each specific downloaded file to one or more of Plaintiffs' separately licensed products. Thus, as of May 30, 2007, TomorrowNow was still unable to determine specifically which of the downloaded files it was maintaining on behalf of the entities listed above were related solely to Plaintiffs' products beyond those to which each entity had informed TomorrowNow it was licensed.

Plaintiffs filed their First Amended Complaint for Damages and Injunctive Relief ("FAC") (Docket Entry No. 31) on June 1, 2007. For the first time, Plaintiffs specifically identified in ¶ 85 of the FAC four distinct files that Plaintiffs alleged TomorrowNow had downloaded and that were beyond that customers' license rights. The relevant portions of Plaintiffs' allegations in ¶ 85 of the FAC state:

> …On December 5, 2006, SAP TN used SPX's log-in ID to download a Payroll ESU, JJ13072, for EnterpriseOne software version 8.11 SP1. … SAP TN used the log-in ID of another customer, Merck, to download an EnterpriseOne 8.12 Blend Management ESU, JK10093, on December 13, 2006. … Further, SAP TN logged

in on December 18, 2006 using the log-in credentials of Yazaki and downloaded a Customer Relationship Management ESU, PH11676, for EnterpriseOne software version 8.11…. SAP TN also used the log-in ID of OCE to download a payroll update for World Software version A7.3, A738217431, on December 21, 2006. … None of these customers was licensed to copy these works. …

TomorrowNow was then able to use this information in ¶ 85 of the FAC to find the customer-specific download folder locations on DCITBU01_G in which these specific files were located. TomorrowNow then concluded that TomorrowNow had downloaded the ESUs with the file names JJ13072 (SPX), JK10093 (Merck) and PH11676 (Yazaki) and the SAR with the name of A738217431 (OCE), which correspond to the respective customers listed in ¶ 85 of the FAC (and as noted in parenthesis herein). *See* DCITBU01_G (TN-OR02989997, TN-OR02989995). By the time TomorrowNow filed its answer to the FAC on July 2, 2007 TomorrowNow had reached the preliminary conclusions that: (a) TomorrowNow apparently downloaded each of the files noted in ¶ 85 of the FAC using that specific customer's username and password credentials; and (b) by referring to each specific customer's Support Services Agreement with TomorrowNow, product verification forms and download request forms, it appeared that each of the four files noted in ¶ 85 of the FAC related to products other than those for which each respective customer had informed TomorrowNow they were licensed.[2] The documents and other information on which TomorrowNow's preliminary conclusions at that time were based are as follows:

SPX

File name: JJ13072
File location: BU01_G\JDEUPDATES&FIXES75-84\Single Files\SPX Weil-McLain\OneWorld\Electronic Software Updates\811SP1\JJ13072_exe\JJ13072.htm
System code(s) noted in file: 07 Payroll
TomorrowNow Support Services Agreement: TN-OR00601393-TN-OR00601404
Product Verification Form: TN-OR00056188-TN-OR00056190
Download Request Form: TN-OR00235417
Username apparently used: wmcnc1

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[2] In preparing this supplemental response and gathering the records associated with the preliminary factual conclusions TomorrowNow made before it filed its Answer to the FAC on July 2, 2007, TomorrowNow re-examined the ESU file labeled PH11676 (Yazaki), which notes system code 90 (CRM), and Appendix A to Yazaki's Support Services Agreement with TomorrowNow (TN-OR01711151- TN-OR01711152), which indicates that Yazaki informed TomorrowNow that it was in fact licensed to the JDE OneWorld CRM application, release 8.11. Thus, it appears that TomorrowNow's preliminary conclusion as of July 2, 2007 was incorrect with respect to the ESU file labeled PH11676 that is referred to in ¶ 85 of the FAC.

Login apparently used: wmxe_811
Sources for Username and ID: "Download_Priorities.xls," located at TN-OR08312517; TN-OR00235417

Merck

File name: JK10093
File location: BU01_G\JDEUPDATES&FIXES56-64\Merck\OneWorld\Software\Electronic Software Updates\812\JK10093_exe\JK10093.htm
System code(s) noted in file: 31 Shop Floor Control
TomorrowNow Support Services Agreement: TN-OR00000464-TN-OR00000478
Product Verification Form: N/A
Download Request Form: TN-OR00000479-TN-OR00000484
Username apparently used: jagjit_singh@merck.com
Login apparently used: kanyakumari2000
Sources for Username and ID: "Download_Priorities.xls," located at TN-OR08312517; TN-OR00000479

Yazaki

File name: PH11676
File location: BU01_G\JDEUPDATES&FIXES85-103\Single Files\Yazaki North America\One World\Electronic Software Update\811\PH11676_exe\PH11676.htm
System code(s) noted in file: 90 CRM
TomorrowNow Support Services Agreement: TN-OR01711142-TN-OR01711158
Product Verification Form: TN-OR01573472-TN-OR01573474
Download Request Form: TN-OR00001002-TN-00001007
Username apparently used: Joel_joyce
Login apparently used: jj48182
Sources for Username and ID: "Download_Priorities.xls," located at TN-OR08312517; TN-OR00001002

OCE

File name: A738217431
File location: BU01_G\JDEUPDATES&FIXES65-74\Oce Technologies\World\World A73\World Updates\A738217431_EXE\A738217431.EXE
System code(s) noted in file: 07 Payroll
TomorrowNow Support Services Agreement: TN-OR00602324-TN-OR00602335
Product Verification Form: TN-OR00001163-TN-OR00001165
Download Request Form: TN-OR05941642-TN-OR05941647
Username apparently used: john_knoops
Login apparently used: geheim1@2
Sources for Username and ID: "Download_Priorities.xls," located at TN-OR08312517; TN-OR05941642

Although it appeared to TomorrowNow as of July 2, 2007 that each of the four files noted above were solely related to system codes that are beyond those which each respective TomorrowNow customer indicated to TomorrowNow they were licensed, Plaintiffs' have not provided any information establishing that the system codes noted in each of the four files are the exclusive system codes for which that file is permitted to be used. Even as of September 23,

1 2009, Plaintiffs still have not provided adequate product mapping information that Defendants

2 could possibly use in an effort to attempt to definitely conclude that each of the four files do not

3 relate in any way to the products for which each of the specific customers are licensed.

4 As Plaintiffs know, many of its separately licensed products are subject to numerous

5 interdependencies and prerequisites associated with other licensed products in order for those

6 products to function properly. Thus, it is possible that a ESU or SAR that notes only one system

7 code in the file itself could in fact be intended and authorized by Plaintiffs to be used by

8 customers licensed for other system codes besides the one(s) noted in each ESU or SAR file.

9 This issue may be the subject of both fact and expert testimony at trial. Therefore,

10 TomorrowNow does not concede that the ESUs with the file names JJ13072, JK10093 and

11 PH11676 and the SAR with the name of A738217431 were unlicensed, illegal or unauthorized.

12 The statement in TomorrowNow's July 2, 2007 answer to ¶ 15 of the FAC that there were

13 downloads "beyond those that, according to TomorrowNow's records, related to applications

14 licensed to the particular customer on whose behalf the downloads were made," and Defendants'

15 representatives' subsequent statements in press releases/news conferences on July 2-3, 2007 that

16 "inappropriate downloads" took place, simply acknowledge the fact that TomorrowNow had

17 concluded as of July 2, 2007 that its records did not indicate that SPX, Merck, Yazaki and OCE

18 represented that they were licensed to the system codes noted in the ESUs with the file names

19 JJ13072 (SPX), JK10093 (Merck) and PH11676 (Yazaki) and the SAR with the name of

20 A738217431 (OCE). Thus, these particular downloads were considered by TomorrowNow to be

21 "inappropriate" because it was TomorrowNow's policy to only download materials for customers

22 related to those products for which the customer had informed TomorrowNow they were

23 licensed. That does not mean that TomorrowNow concedes either that these customers were not

24 in fact licensed to receive the subject files or that the licenses the customers had or have with

25 Plaintiffs do not permit these customers, or TomorrowNow acting on their behalf, to download

26 the files specifically referenced in ¶ 85 of the FAC.

27 Additionally, as part of TomorrowNow's preliminary investigation and related fact

28 finding efforts from March 22, 2007 through July 2, 2007 when TomorrowNow filed its answer

1 to ¶ 15 of the FAC indicating that there were downloads "beyond those that, according to

2 TomorrowNow's records, related to applications licensed to the particular customer on whose

3 behalf the downloads were made" and Defendants' representatives' subsequently made

4 statements in press releases/news conferences on July 2-3, 2007 that "inappropriate downloads"

5 took place, TomorrowNow made the following additional preliminary conclusions:

6   a.   Paragraph 76 of the FAC – This paragraph contains Plaintiffs' allegation regarding

7 Honeywell. TomorrowNow only serviced Honeywell's PeopleSoft applications. However,

8 TomorrowNow concluded that it had stored in Honeywell's download folders at TomorrowNow

9 certain downloads related to JDE, for which Honeywell had not indicated to TomorrowNow it

10 was licensed. Specifically, TomorrowNow concluded that Honeywell's download folder on

11 TomorrowNow's servers contained product roadmaps for certain JDE EnterpriseOne Products.

12 *See* six separate "EnterpriseOne" folders in Honeywell\Product Roadmaps\2005\2005-Q1 on the

13 DCITBU01_G server, which has been produced as part of TomorrowNow's Data Warehouse

14 native file production. *See* DCITBU01_G (TN-OR02989993). TomorrowNow also concluded

15 that Honeywell's download folder on TomorrowNow's servers contained red papers for certain

16 JDE EnterpriseOne Products. *See* three separate "EnterpriseOne" folders in Honeywell\Red

17 Papers on DCITBU01_G server (*id.*).

18   The statement in TomorrowNow's July 2, 2007 answer to ¶ 15 of the FAC that there were

19 downloads "beyond those that, according to TomorrowNow's records, related to applications

20 licensed to the particular customer on whose behalf the downloads were made" and Defendants'

21 representatives' subsequent statements in press releases/news conferences on July 2-3, 2007 that

22 "inappropriate downloads" took place simply acknowledge the fact that TomorrowNow's

23 downloads of JDE materials for Honeywell, a PS customer, were considered by TomorrowNow

24 to be "inappropriate" because it was TomorrowNow's policy to only download materials for

25 customers related to those products for which the customer had informed TomorrowNow they

26 were licensed. However, as noted above, that does not mean that TomorrowNow concedes either

27 that Honeywell was not in fact licensed to receive the subject files or that the licenses Honeywell

28 had or has with Plaintiffs do not permit Honeywell, or TomorrowNow acting on its behalf, to

1   download all of the files specifically referenced in ¶ 76 of the FAC.

2   b.   Paragraphs 77-81 of the FAC – Plaintiffs make several customer specific

3   allegations in ¶¶ 77-81 of the FAC. Although Plaintiffs did not provide (and as of September 23,

4   2009 still have not provided) the specific file names of each file it contends in ¶¶ 77-81 were

5   improperly downloaded, Plaintiffs did provide certain file counts. And, TomorrowNow

6   attempted to determine the accuracy of those counts. However, TomorrowNow was not and is

7   still not able to definitively conclude whether the file counts in ¶¶ 77-81 of the FAC are accurate.

8   But, as part of its investigation before it filed its answer to the FAC on July 2, 2007,

9   TomorrowNow confirmed that its records for Merck (¶ 77), SPX (¶ 78), OCE (¶ 79) and Yazaki

10   (¶ 81) showed that those customers had indicated to TomorrowNow that they were licensed to

11   some, but not all of Plaintiffs' JDE products. Before TomorrowNow filed its answer to the FAC

12   on July 2, 2007, TomorrowNow confirmed that its download request forms indicated that at the

13   time that TomorrowNow conducted downloads on behalf each of these customers,

14   TomorrowNow downloaded all available ESUs for certain releases instead of only those ESUs for

15   those releases that note the system codes that those customers told TomorrowNow they were

16   licensed to. Likewise, for each of those customers, TomorrowNow's records indicated that at the

17   time that TomorrowNow conducted downloads on behalf each of these customers,

18   TomorrowNow may have downloaded SARs for certain releases that note system codes other

19   than those the referenced customers told TomorrowNow they were licensed to. The records that

20   TomorrowNow used to make these preliminary conclusions include download request forms (TN-

21   OR00235417, TN-OR00000479-TN-OR00000478, TN-OR00000490- TN-OR00000495, TN-

22   OR00001002-TN-OR00001007, TN-OR00000990-TN-OR00000995, TN-OR05941642-TN-

23   OR05941647, TN-OR00081327), product verification forms (TN-OR00056188-TN-

24   OR00056190, TN-OR01573472-TN-OR01573474, TN-OR00001163-TN-OR00001165),

25   Appendix A forms to TomorrowNow's Support Services Agreements (TN-OR00601393-TN-

26   OR00601404, TN-OR00000464-TN-OR00000478, TN-OR01711142-TN-OR01711158, TN-

27   OR00602324-TN-OR00602335), and log files (TN-OR02193737, TN(Disc).82).

28   The following table compares Plaintiffs' allegations in ¶¶ 77-81 of the FAC to the

1   preliminary conclusions TomorrowNow reached regarding the combined number of total

2   downloads of ESUs and SARs that TomorrowNow had on its systems before it filed its answer to

3   the First Amended Complaint on July 2, 2007. The total number of downloads for each customer

4   noted in the far right column of the table below represents TomorrowNow's preliminary

5   conclusions as of July 2, 2007 regarding the combined total number of files for both: (a) those

6   groups of downloads that note system codes for which TomorrowNow's records reflected that its

7   customers indicated they were licensed; and (b) those groups of downloads that note system

8   codes for which TomorrowNow's records did not reflect its customers indicated they were

9   licensed. TomorrowNow has sought from Plaintiffs, but not received, information in Plaintiffs'

10 exclusive possession (to the extent it exists at all) that would potentially permit Defendants to

11 accurately segregate those two groups of downloads.

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Company	Para. of FAC	Plaintiffs' Number of Alleged Downloads	Plaintiffs' Number of Alleged Unauthorized Downloads	TomorrowNow's Preliminary Conclusion of Total Number of Downloaded ESUs and SARs on TomorrowNow's Servers
Merck	77	6,500	3,800	6,001
Oce	78	5,600	1,800	9,543
SPX	79	9,000	1,500	10,911
Metro Machine	80	600	50	6,052
Yazaki	81	11,000	1,500	18,047

TomorrowNow acknowledges that at least some of the downloaded ESUs and SARs on TomorrowNow's servers for these particular customers likely note a system code other than the system codes that those customers told TomorrowNow they were licensed to. However, that conclusion is reached by deductive reasoning based solely on the objective fact that, for certain releases, TomorrowNow downloaded all available ESUs. Thus, the conclusion is not based on any specific segregation or isolation of the downloads noted in the table above into subgroups of "appropriate" and "inappropriate" downloads. The statement in TomorrowNow's July 2, 2007 answer to ¶ 15 of the FAC that there were downloads "beyond those that, according to TomorrowNow's records, related to applications licensed to the particular customer on whose behalf the downloads were made" and Defendants' representatives' subsequent statements in press releases/news conferences on July 2-3, 2007 that "inappropriate downloads" took place simply acknowledge the fact that some unidentified subset of these particular downloads were considered by TomorrowNow to be "inappropriate" because it was TomorrowNow's policy to only download materials for customers related to those products for which the customer had informed TomorrowNow they were licensed. However, as noted above, that does not mean that TomorrowNow concedes either that these customers were not in fact licensed to receive the subject files or that the licenses the customers had or have with Plaintiffs do not permit these customers, or TomorrowNow acting on their behalf, to download all of the files specifically referenced in ¶¶ 77-81 of the FAC.

      c.   IMCD Group – Before TomorrowNow filed its July 2, 2007 answer to ¶ 15 of the FAC, TomorrowNow concluded that a white paper with the file name "ods-00-0136.txt" titled

"Landed Costs in Enterprise One" may have been downloaded after IMCD's maintenance end date. *See* TN-OR05657398, TN-OR05657459. *See also* JDWSVR01_G\JDE\JDE Delivered Updates & Fixes\Generic WhitePapers\White Papers\OneWorld\ODS\ods-00-0136\[ods-oo-136]Landed Costs in EnterpriseOne.txt (TN-OR06125331). Defendants' representatives' statements in press releases/news conferences on July 2-3, 2007 that "inappropriate downloads" took place simply acknowledged the fact that downloading after a customer's maintenance end date was considered by TomorrowNow to be "inappropriate" because it was TomorrowNow's policy to only download materials for customers before their maintenance end dates and related to those products for which the customer had informed TomorrowNow they were licensed. However, as noted above, that does not mean that TomorrowNow concedes that IMCD was not in fact licensed to receive a white paper with the file name "ods-00-0136.txt" titled "Landed Costs in Enterprise One" or that the license IMCD had or have with Plaintiffs do not permit IMCD, or TomorrowNow acting on its behalf, to download all of the files specifically referenced in ¶¶ 77-81 of the FAC.

Finally, because Plaintiffs have refused and/or are unable to provide adequate product mapping information that would enable the cross-referencing of every one of Plaintiffs downloadable files to each and every one of Plaintiffs' potentially applicable separately licensed products to which those downloads relate, TN has not been able to conduct a download-by-download analysis to conclude for each download on TN's servers which ones were for those products that TN's customers indicated they were licensed to and which ones were not. Moreover, TN does not concede that Plaintiffs are able to meet their burden of proof on any of their claims now that years have passed in discovery in this case without Plaintiffs producing the definitive product-to-download mapping information that Defendants have requested since the beginning of the case.

FIFTH SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 13:

THIS FIFTH SUPPLEMENTAL RESPONSE IS DESIGNATED AS CONFIDENTIAL INFORMATION.

1   TomorrowNow's Fourth Supplemental Response to Interrogatory No. 13 is further

2   supplemented to correct a clerical error as follows:

3   The sentence in the penultimate pararaph of TomorrowNow's Fourth Supplemental

4   Response to Interrogatory No. 13 that states:

5   "However, as noted above, that does not mean that TomorrowNow concedes that IMCD

6   was not in fact licensed to receive a white paper with the file name "ods-00-0136.txt" titled

7   "Landed Costs in Enterprise One" or that the license IMCD had or have with Plaintiffs do not

8   permit IMCD, or TomorrowNow acting on its behalf, to download all of the files specifically

9   referenced in ¶¶ 77-81 of the FAC."

10   Is hereby amended to state:

11   "However, as noted above, that does not mean that TomorrowNow concedes that IMCD

12   was not in fact licensed to receive a white paper with the file name "ods-00-0136.txt" titled

13   "Landed Costs in Enterprise One" or that the license IMCD had or have with Plaintiffs do not

14   permit IMCD, or TomorrowNow acting on its behalf, to download all of the files that were

15   downloaded by or on behalf of IMCD."

16   For ease of reference, the amended language affected by this Fourth Supplemental

17   Response to Interrogatory No. 13 is underlined above.

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                        TEXT REMOVED - NOT RELEVANT TO MOTION
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3 **INTERROGATORY NO. 16:**

4   Identify all Persons who were aware of, engaged in, conducted, supervised, authorized,

5 investigated, or stopped any "inappropriate" downloads, including but not limited to stating their

6 name, date of hire and termination, job title, job responsibilities, and a brief description of how

7 they related to the "inappropriate" Downloads.

8 **RESPONSE TO INTERROGATORY NO. 16:**

9   THIS RESPONSE IS DESIGNATED AS CONFIDENTIAL INFORMATION.

10   TomorrowNow objects that this interrogatory seeks information not in the possession of

11 TomorrowNow. TomorrowNow further objects that because the investigation of the issues

12 referenced in this interrogatory was and is conducted in response to the filing of Oracle's

13 complaint, this interrogatory seeks information that is protected from disclosure by the attorney-

14 client privilege and the work product doctrine. Subject to and without waiving the foregoing

15 objections and the General Responses and Objections, TomorrowNow responds as follows: Peter

16 Surette was the TomorrowNow employee generally responsible for completing the Download

17 Request Forms for JDE One World, as discussed in response to Interrogatory No. 13. Keith

18 Shankle was the TomorrowNow employee generally responsible for completing the Download

19 Request Forms for JDE World. Various TomorrowNow employees working on the PeopleSoft

20 side of TomorrowNow's business provided information to TomorrowNow employees Peggy

21 Lanford and Mark Meyer, who generally supervised other TomorrowNow employees who

22 actually conducted the downloads at relevant times. The job titles and dates of hire and

23 termination, if relevant, for the employees named in this response are contained on the

24 spreadsheet referenced in the response to Interrogatory No. 2, above. TomorrowNow executive

25 management gave direction to change certain business processes relating to downloading.

26 Documents relating to those process changes will be included in TomorrowNow's document

27 production, and TomorrowNow relies on such documents to further respond to this interrogatory

28 pursuant to Rule 33(d).

SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 16:

THIS RESPONSE IS DESIGNATED AS CONFIDENTIAL INFORMATION.

TomorrowNow further responds as follows: TomorrowNow typically downloaded software and support materials to which its customers represented that they were entitled while the customers were in the on-boarding process with TomorrowNow. As part of that process, TomorrowNow determined what materials to download by reviewing the information located in a customer's Support Services Agreement and the information in the "Covered Products" portion of the Agreement's accompanying exhibits. *See* Exhibit A to Second Supplemental Interrogatory Responses for a spreadsheet listing the Bates numbers for Support Services Agreements and relevant exhibits for each TomorrowNow customer. The TomorrowNow JDE World and OneWorld teams also received product information from the customer through the Product Verification Forms. *See* Second Supplemental Response to Interrogatory No. 10 for a listing of the Support Services Agreements and Product Verification Forms.

Generally, the following people assisted with or supervised the TomorrowNow JDE World and OneWorld downloads: Laura Sweetman, Mark Kreutz, Pete Surette, Keith Shankle, Melissa Garcia, Florence Leong, David Palmer, Mark Deling, and Harry Schoennagel. Other members of the TomorrowNow JDE team may have gone on to Customer Connection on certain occasions. *See, e.g.*, TN-OR00005150-TN-OR00005160, TN-OR00013829-TN-OR00013831, TN-OR00020044-TN-OR00020051, TN-OR00061681-TN-OR00061686, TN-OR00133328-TN-OR0013335, TN-OR00099747-TN-OR00099754 (TomorrowNow organizational charts). In addition to the TomorrowNow JDE team members listed above, the TomorrowNow information services team was also enlisted to help with the downloading process. *See, e.g.*, TN-OR00005150-TN-OR00005160, TN-OR00013829-TN-OR00013831, TN-OR00020044-TN-OR00020051, TN-OR00061681-TN-OR00061686, TN-OR00133328-TN-OR0013335, TN-OR00099747-TN-OR00099754 (TomorrowNow organizational charts).

Generally, the following people assisted with or supervised the TomorrowNow PeopleSoft downloads: Peggy Lanford, Desmond Harris, George Lester, Wade Walden, Robin Alex, Melissa Garcia, Mark Meyer, Shelley Nelson, Greg Nelson, Kathy Williams, Aaron Woods, Amanda

1 | Krenek, Linda Birdwell, Dimitri Garcia, Zachary Grafe, Cynthia Lampkin, Audrey Wessels,

2 | Sarah Rekieta, Briana Perkins, Yolanda Espiriqueta, Brenda Clark, Justin Johnson, and RoseAnna

3 | Ramirez. Other members of the TomorrowNow PeopleSoft team may have gone on to Customer

4 | Connection on certain occasions. *See, e.g.*, TN-OR00005150-TN-OR00005160, TN-

5 | OR00013829-TN-OR00013831, TN-OR00020044-TN-OR00020051, TN-OR00061681-TN-

6 | OR00061686, TN-OR00133328-TN-OR0013335, TN-OR00099747-TN-OR00099754

7 | (TomorrowNow organizational charts). There were also temporary employees used along the

8 | way to facilitate the downloads conducted on behalf of the TomorrowNow PeopleSoft customers.

9 | Initially, all downloading was done manually with the assistance of temporary employees.

10 | At a later date, George Lester created downloading scripts, and Melissa Garcia was later placed in

11 | charge of the use and maintenance of the downloading scripts that assisted with the downloading

12 | process. TomorrowNow subsequently created Titan to assist with the downloading process.

13 | Titan is an automated program created initially by Josh Testone and then further developed by

14 | John Ritchie. However, during the time periods that TomorrowNow used Titan, some manual

15 | downloading occurred.

16 | Because TomorrowNow did not have access to its customers' respective license

17 | agreements with the software vendor, TomorrowNow relied on the representations of its

18 | customers in the customer's Support Services Agreement and the "Covered Products" portion of

19 | the Agreement's accompanying exhibits, as well as the product information provided by the

20 | customer in the Product Verification Forms. TomorrowNow now believes that there were some

21 | downloads made for products beyond those to which the customer informed TomorrowNow that

22 | the customer was licensed. However, despite numerous discovery requests for this mapping

23 | information from Plaintiffs, TomorrowNow still does not have the ability to map each of the

24 | specific downloads to each of the specific products. Plaintiffs have represented to the Court that

25 | they also do not have the ability post-download to determine which downloads relate to which

26 | products. Thus, without such mapping information (provided in a manner that permits an

27 | electronic "download to product" comparison), it is not possible for TomorrowNow to evaluate

28 | the appropriateness of each of the downloads it made on behalf of its customers.

1   In order to determine if any specific download was appropriate, a review of millions of

2   downloaded files and the objects contained in those files would be required, along with Support

3   Services Agreements, Product Verification Forms, Download Request Forms, the customers'

4   license agreements with the vendor, and a mapping from the vendor of what software and support

5   materials correspond with what products. *See* Second Supplemental Response to Interrogatory

6   No. 11 for a listing of where the downloaded materials can be found; *see* Second Supplemental

7   Response to Interrogatory No. 10 for a listing of Download Request Forms. This complex

8   mapping process would be equally burdensome for all parties.

9   After the litigation, TomorrowNow management gave the directive to change certain

10   business processes related to downloading. These changes were memorialized in the

11   TomorrowNow Compliance Guidelines of Support Services, V1 and V2. *See* SAP-OR00631478-

12   SAP-OR00631496, TN-OR03775488-TN-OR03775511. The TomorrowNow executives and/or

13   employees involved with the changes to the download process were Mark White, Martin Breuer,

14   Harry Schoennagel, Mel Gadd, Mark Kreutz, John Tanner, Shelley Nelson, Rod Russell, John

15   Baugh, Tab Brown, Broderick Ellis, Larry Garcia, Paul Henville, Chris Jackson, Tom Leier,

16   Florence Leong, Gordon Robinson, and Kathy Williams. Both versions of the Compliance

17   Guidelines state that downloading must be performed by the client, and TomorrowNow

18   employees are prohibited from directly engaging in downloading activities. *Id.* Automated

19   downloading tools could no longer be used after the business process changes went into effect.

20   *Id.* TomorrowNow employees were permitted to provide "broad guidance" to customers with

21   respect to the types of information the customers should download, but TomorrowNow

22   employees were prohibited from making specific recommendations regarding the software and

23   support materials that should be downloaded. *Id.* For a list of the other changes to the download

24   process, *see* SAP-OR00631478-SAP-OR00631496 and TN-OR03775488-TN-OR03775511.

25   The following employees were disciplined for download-related reasons: Ed Harris and

26   Greg Nelson. *See* TN-OR02812000, TN-OR00009540-TN-OR00009541.

27   For a list of the dates of hire, dates of termination, and job titles of the employees listed

28   above, *see* TomorrowNow Employees spreadsheet. *See* TN-OR 00009568, TN (Disc) 12.

SECOND SUPPLEMENTAL RESPONSE TO INTERROGATORY NO. 16:

THIS SECOND SUPPLEMENTAL RESPONSE IS DESIGNATED AS

CONFIDENTIAL INFORMATION.

TomorrowNow further responds that after the litigation, the TomorrowNow executives

and/or employees involved with the changes to the download process also include Peggy Lanford,

Desmond Harris, Mark Meyer, and Robin Alex. For a list of the dates of hire, dates of

termination, and job titles of the employees listed above, see TomorrowNow's updated employee

spreadsheet. *See* TN-OR05942443, Exhibit B to TomorrowNow's Third Amended and

Supplemental Response to Plaintiff Oracle Corporation's First Set of Interrogatories (Set One).

TEXT REMOVED - NOT RELEVANT TO MOTION

PROOF OF SERVICE

I, Laurie Paige Burns, declare:

I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 555 California Street, 26th Floor, San Francisco, California 94104. On December 4, 2009, I served a copy of the attached document(s):

DEFENDANT TOMORROWNOW, INC.'S EIGHTH AMENDED AND SUPPLEMENTAL RESPONSE TO PLAINTIFF ORACLE CORPORATION'S FIRST SET OF INTERROGATORIES (SET ONE)

☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.

☐ by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

☐ by placing the document(s) listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.

☒ by placing the document(s) listed above in a sealed envelope and causing such envelope to be hand delivered to the office of the addressee on the date specified above.

☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Donn Pickett
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Executed on December 4, 2009, at San Francisco, California.

By: _LAURIE PAIGE BURNS_
LAURIE PAIGE BURNS