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22 UNITED STATES DISTRICT COURT
 23 NORTHERN DISTRICT OF CALIFORNIA
 24 OAKLAND DIVISION

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

25 Plaintiffs,

26 v.

26 SAP AG, *et al.*,

27 Defendants.

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

**JOINT PRELIMINARY JURY
 INSTRUCTIONS**

Date: November 1, 2010
 Time: 8:30 a.m.
 Place: 3rd Floor, Courtroom 3
 Judge: Hon. Phyllis J. Hamilton

1 **JOINT PRELIMINARY JURY INSTRUCTIONS**

2 Pursuant to the Court’s direction at the September 30, 2010 Pretrial Conference
3 and the Court’s Final Pretrial Order (Dkt. No. 914), Plaintiffs Oracle USA, Inc., Oracle
4 International Corporation, and Siebel Systems, Inc. (collectively, “Oracle”) and Defendants SAP
5 AG, SAP America, Inc., and TomorrowNow, Inc. (collectively, “Defendants,” and with Oracle,
6 the “Parties”) submit the following joint preliminary jury instructions.

7 The Parties agree to jointly submit all but one of the preliminary instructions. The
8 Parties continue to disagree regarding the proper language of Instruction No. 3, “Parties and
9 Claims,” and thus submit competing versions of that instruction. The Parties have submitted
10 short statements supporting their proposed Instruction No. 3 directly following each proposed
11 instruction.

12
13 DATED: October 29, 2010

Bingham McCutchen LLP

14
15
16 By: /s/ Zachary J. Alinder
17 Zachary J. Alinder
18 Attorneys for Plaintiffs
19 Oracle USA, Inc., Oracle International
20 Corporation, and Siebel Systems, Inc.

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

23 DATED: October 29, 2010

JONES DAY

24 By: /s/ Tharan Gregory Lanier
25 Tharan Gregory Lanier
26 Attorneys for Defendants
27 SAP AG, SAP America, Inc.,
28 and TomorrowNow, Inc.

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Proposed Instruction No. 1 (Joint)

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

ORACLE USA, INC., ORACLE
INTERNATIONAL CORP., and SIEBEL
SYSTEMS, INC.

Plaintiffs,

v.

TOMORROWNOW, INC., SAP AMERICA,
INC., AND SAP AG

Defendants.

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

JURY INSTRUCTIONS

DATED: _____

Hon. Phyllis J. Hamilton
United States District Court Judge

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.0 (Civil).

DUTY OF JURY

Ladies and gentlemen: You are now the jury in this case. It is my duty to instruct you on the law.

You must not infer from these instructions or from anything I may say or do as indicating that I have an opinion regarding the evidence or what your verdict should be.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. And you must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath to do so.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all important.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.1A (Civil).

Proposed Instruction No. 3 (Plaintiffs)

PARTIES AND CLAIMS

To help you follow the evidence, I will give you a brief summary of who the parties are and what their positions are:

There are three plaintiffs: Oracle USA, Inc. (which I will refer to as “Oracle USA”), Oracle International Corporation (which I will refer to as “Oracle International”), and Siebel Systems, Inc. (which I will refer to as “Siebel Systems”). I will refer to these three entities collectively as “Plaintiffs” or “Oracle.”

There are three defendants: SAP AG, SAP America, Inc. (which I will refer to as “SAP America”) and TomorrowNow, Inc. (which I will refer to as “TomorrowNow”). I will refer to these three entities collectively as “Defendants.” SAP America is a wholly-owned subsidiary of SAP AG. TomorrowNow is a wholly-owned subsidiary of SAP America.

Oracle brought ten claims against Defendants on which you will be instructed. Those claims are:

- 1) Copyright infringement;
- 2) Violations of the Federal Computer Fraud and Abuse Act;
- 3) Violations of the California Computer Data Access and Fraud Act;
- 4) Breach of contract;
- 5) Intentional interference with prospective economic advantage;
- 6) Negligent interference with prospective economic advantage;
- 7) Violations of California Business & Professions Code § 17200;
- 8) Trespass to chattels;
- 9) Unjust enrichment; and,
- 10) An accounting.

The Parties agree that TomorrowNow is liable to Oracle for all ten claims. The Parties also agree that SAP AG and SAP America are vicariously and contributorily liable for all of the copyright infringement directly committed by TomorrowNow.

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

1 Plaintiffs’ Statement Regarding Instruction No. 3

2 Plaintiffs’ proposed instruction is consistent with the Ninth Circuit Model Civil
3 Jury Instructions. Defendants’ is not, and it should not be adopted for four reasons.

4 First, Defendants fail to list all ten claims for which TomorrowNow has admitted
5 to liability. Those ten claims are listed in the stipulation that will be provided to the jury, and
6 Defendants’ failure to list all of those claims makes their proposed instruction both inaccurate
7 and potentially confusing for the jury.

8 Second, Defendants’ omit the phrase “all of” from the sentence describing the
9 infringing conduct for which SAP AG and SAP America have admitted to liability. That
10 omission may lead to confusion as to whether SAP AG and SAP America are admitting to some
11 but not all of TomorrowNow’s infringement.

12 Third, Defendants improperly include a truncated (and inaccurate) damages
13 instruction. The Ninth Circuit Model Civil Jury Instructions do not provide for any such
14 instruction (notably, the relevant model instruction, number 1.2, is titled “Claims and Defenses”
15 and not “Claims, Defenses and Damages”), and there is no reason to include one here.

16 Fourth, if the Court is nonetheless inclined to include a damages instruction as
17 part of the preliminary jury instructions, Defendants’ proposed instruction should not be adopted
18 because it is inaccurate. It states that the jury needs to decide “whether” damages should be
19 awarded, but some of Oracle’s claims for which Defendants have admitted liability contain
20 damages as an element of the claim, and Defendants’ concession therefore includes an admission
21 of at least the statutorily required minimum damages. *See, e.g.*, 18 U.S.C. § 1030(g) &
22 (a)(5)(B)(i) (loss of more than \$5000 required). In addition, SAP has publicly admitted that the
23 damages in this case are at least in “the tens of millions of dollars,” (*see* Ex. A to Oracle’s Trial
24 Brief, Dkt. 748, at 3), an admission that was recently re-confirmed by SAP’s co-CEO Bill
25 McDermott. *See* [http://blogs.forbes.com/victoriabarret/2010/10/27/saps-mcdermott-on-ellisons-](http://blogs.forbes.com/victoriabarret/2010/10/27/saps-mcdermott-on-ellisons-latest-attack)
26 *latest-attack* (“[W]e believe the damages are in the tens of millions.”). As a result, any such
27 instruction, if included, should reflect that the jury’s role is to determine the amount of damages,
28 not “whether” or not damages exist – a fact which SAP has already conceded.

Proposed Instruction No. 3 (Defendants)

PARTIES AND CLAIMS

To help you follow the evidence, I will give you a brief summary of who the parties are and what their positions are:

There are three plaintiffs: Oracle USA, Inc. (which I will refer to as “Oracle USA”), Oracle International Corporation (which I will refer to as “Oracle International”), and Siebel Systems, Inc. (which I will refer to as “Siebel Systems”). I will refer to these three entities collectively as “Plaintiffs” or “Oracle.”

There are three defendants: SAP AG (which I will refer to by that name), SAP America, Inc. (which I will refer to as “SAP America”) and TomorrowNow, Inc. (which I will refer to as “TomorrowNow”). I will refer to these three entities collectively as “Defendants.” SAP America is a wholly-owned subsidiary of SAP AG. TomorrowNow is a wholly-owned subsidiary of SAP America.

You will be instructed on seven of Oracle’s claims against Defendants. Those claims are:

- 1) Copyright infringement;
- 2) Violations of the Federal Computer Fraud and Abuse Act;
- 3) Violations of the California Computer Data Access and Fraud Act;
- 4) Breach of contract;
- 5) Intentional interference with prospective economic advantage;
- 6) Negligent interference with prospective economic advantage; and
- 7) Trespass to chattels.

The Parties agree that TomorrowNow is liable to Oracle for all seven claims. The Parties also agree that SAP AG and SAP America are vicariously and contributorily liable for the copyright infringement committed by TomorrowNow.

Thus, the only issue for you to decide is that of damages. You must decide whether compensatory damages should be awarded based on any of the claims listed above and, if so, how much. Additionally, Oracle USA and Oracle International seek punitive damages

1 against TomorrowNow based on certain of these claims. You must decide whether to award
2 punitive damages based on those claims and, if so, how much.

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

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Defendant’s Statement Regarding Instruction No. 3

The chief dispute between the Parties with regard to Instruction No. 3 relates to Plaintiffs’ insistence on including a recitation of equitable claims on which the jury will not be instructed. Resolution of equitable claims is within the sole purview of the Court and therefore should not be addressed by the jury. *See, e.g., Trovan, Ltd. v. Pfizer, Inc.*, No. CV-98-00094 LGB MCX, 2000 WL 709149, at *17 (C.D. Cal. 2000) (recognizing that an award that is equitable in nature is “outside the province of the jury” and finding that an equitable claim, such as unjust enrichment, “tends to take the matter away from the jury and into the hands of the Court”). For this reason, there is no need to instruct the jury on equitable claims, and Defendants’ instruction omits the reference to these claims. *See Floor Seal Tech., Inc. v. Sinak Corp.*, 156 F. App’x 903, 905 (9th Cir. 2005) (finding “no reason to submit a jury instruction or interrogatory concerning a claim for equitable relief”).

Furthermore, this Court informed the Parties that it will not “give a jury instruction on issues for which the Court makes the determination.” *See* 9/30/10 Hearing Tr. (Pretrial Conference) at 100:3-5. Pursuant to this guidance, Plaintiffs agreed to remove their instructions on equitable claims from the final jury instructions. Nevertheless, Plaintiffs persist in referencing equitable claims in an instruction whose purpose is solely to roadmap the case as it will be presented at trial. Retaining the reference to equitable claims will serve only to confuse the jury as to which matters it must decide in this already complex case.

For these reasons, Defendants respectfully request that the Court adopt Defendants’ Proposed Instruction No. 3.

Proposed Instruction No. 4 (Joint)

BURDEN OF PROOF—PREPONDERANCE OF THE EVIDENCE

When a party has the burden of proof on any claim by a preponderance of the evidence, it means you must be persuaded by the evidence that the claim is more probably true than not true.

You should base your decision on all of the evidence, regardless of which party presented it.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.3 (Civil).

BURDEN OF PROOF—CLEAR AND CONVINCING EVIDENCE

When a party has the burden of proving any claim or defense by clear and convincing evidence, it means you must be persuaded by the evidence that the claim or defense is highly probable. This is a higher standard of proof than proof by a preponderance of the evidence.

You should base your decision on all of the evidence, regardless of which party presented it.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.4 (Civil).

Proposed Instruction No. 6 (Joint)

PARTY HAVING POWER TO PRODUCE BETTER EVIDENCE

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

Authority: CACI No. 203

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2 **WILLFUL SUPPRESSION OF EVIDENCE**

3 You may consider whether one party intentionally concealed or destroyed
4 evidence. If you decide that a party did so, you may decide that the evidence would have been
5 unfavorable to that party. You may also consider that fact in determining what inferences to
6 draw from the evidence, including as an indication of the party's consciousness that his case is
7 weak or unfounded.

8
9 Authority: CACI No. 204 (modified); BAJI 2.03 (modified); *Glover v. BIC Corporation*, 6 F.3d
10 1318, 1329 (9th Cir. 1993); *Thor v. Boska*, 38 Cal. App.3d 558, 565-68 (1974).

Proposed Instruction No. 8 (Joint)

TWO OR MORE PARTIES—DIFFERENT LEGAL RIGHTS

You should decide this case as to each plaintiff separately and as to each defendant separately. Unless otherwise stated, the instructions apply to all parties.

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

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WHAT IS EVIDENCE

The evidence you are to consider in deciding what the facts are consists of:

1. the sworn testimony of any witness;
2. the exhibits which are received into evidence; and
3. any facts to which the lawyers have agreed.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.6 (Civil).

2 **WHAT IS NOT EVIDENCE**

3 In reaching your verdict, you may consider only the testimony and exhibits
4 received into evidence. Certain things are not evidence, and you may not consider them in
5 deciding what the facts are. I will list them for you:

6 (1) Arguments and statements by lawyers are not evidence. The lawyers
7 are not witnesses. What they will say in their closing arguments and at other times
8 is intended to help you interpret the evidence, but it is not evidence. If the facts as
9 you remember them differ from the way the lawyers have stated them, your
10 memory of them controls.

11 (2) Questions and objections by lawyers are not evidence. Attorneys have
12 a duty to their clients to object when they believe a question is improper under the
13 rules of evidence. You should not be influenced by the objection or by the court's
14 ruling on it.

15 (3) Testimony that has been excluded or stricken, or that you have been
16 instructed to disregard, is not evidence and must not be considered. In addition
17 sometimes testimony and exhibits are received only for a limited purpose; when I
18 give a limiting instruction, you must follow it.

19 (4) Anything you may have seen or heard when the court was not in
20 session is not evidence. You are to decide the case solely on the evidence
21 received at the trial.

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23 Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.7 (Civil).
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Proposed Instruction No. 11 (Joint)

EVIDENCE FOR LIMITED PURPOSE

Some evidence may be admitted for a limited purpose only. When I instruct you that an item of evidence has been admitted for a limited purpose, you must consider it only for that limited purpose and for no other.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.8 (Civil).

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Proposed Instruction No. 12 (Joint)

DIRECT AND CIRCUMSTANTIAL EVIDENCE

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as testimony by a witness about what that witness personally saw or heard or did.

Circumstantial evidence is proof of one or more facts from which you could find another fact.

You should consider both kinds of evidence. The law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.9 (Civil).

RULING ON OBJECTIONS

There are rules of evidence that control what can be received into evidence.

When a lawyer asks a question or offers an exhibit into evidence and a lawyer on the other side thinks that it is not permitted by the rules of evidence, that lawyer may object. If I overrule the objection, the question may be answered or the exhibit received. If I sustain the objection, the question cannot be answered, and the exhibit cannot be received. Whenever I sustain an objection to a question, you must ignore the question and must not guess what the answer might have been.

Sometimes I may order that evidence be stricken from the record and that you disregard or ignore the evidence. That means that when you are deciding the case, you must not consider the evidence that I told you to disregard.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.10 (Civil).

2 **CREDIBILITY OF WITNESSES**

3 In deciding the facts in this case, you may have to decide which testimony to
4 believe and which testimony not to believe. You may believe everything a witness says, or part
5 of it, or none of it. Proof of a fact does not necessarily depend on the number of witnesses who
6 testify about it.

7 In considering the testimony of any witness, you may take into account:

8 (1) the opportunity and ability of the witness to see or hear or know the things
9 testified to;

10 (2) the witness's memory;

11 (3) the witness's manner while testifying;

12 (4) the witness's interest in the outcome of the case and any bias or prejudice;

13 (5) whether other evidence contradicted the witness's testimony;

14 (6) the reasonableness of the witness's testimony in light of all the evidence; and

15 (7) any other factors that bear on believability.

16 The weight of the evidence as to a fact does not necessarily depend on the number
17 of witnesses who testify about it.

18
19 Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.11 (Civil).

Proposed Instruction No. 15 (Joint)

WITNESS WILLFULLY FALSE

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

Authority: BAJI § 2.22.

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INFERENCES DEFINED

You are to consider only the evidence in the case. However, you are not limited to the statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You may draw from the facts that you find have been proved such reasonable inferences as seem justified in light of your experience.

“Inferences” are deductions or conclusions which reason and common sense lead you to draw from facts established by the evidence in the case.

Authority: Instruction 104.20, Federal Jury Practice and Instructions (5th ed. 2000).

2 **CONDUCT OF THE JURY**

3 I will now say a few words about your conduct as jurors.

4 First, keep an open mind throughout the trial, and do not decide what the verdict
5 should be until you and your fellow jurors have completed your deliberations at the end of the
6 case.

7 Second, because you must decide this case based only on the evidence received in
8 the case and on my instructions as to the law that applies, you must not be exposed to any other
9 information about the case or to the issues it involves during the course of your jury duty. Thus,
10 until the end of the case or unless I tell you otherwise:

11 Do not communicate with anyone in any way and do not let anyone else
12 communicate with you in any way about the merits of the case or anything to do
13 with it. This includes discussing the case in person, in writing, by phone or
14 electronic means, via e-mail, text messaging, or any Internet chat room, blog,
15 Web site or using any other electronic tools to obtain information about this case
16 or to help you decide the case. Please do not try to find out information from any
17 source outside the confines of this courtroom.

18 Until you retire to deliberate, you may not discuss this case with anyone,
19 even your fellow jurors. After you retire to deliberate, you may begin discussing
20 the case with your fellow jurors, but you cannot discuss the case with anyone else
21 until you have returned a verdict and the case is at an end. I hope that for all of
22 you this case is interesting and noteworthy. I know that many of you use cell
23 phones, Blackberries, the internet and other tools of technology. You also must
24 not talk to anyone about this case or use these tools to communicate electronically
25 with anyone about the case. This includes your family and friends. You may not
26 communicate with anyone about the case on your cell phone, through e-mail,
27 Blackberry, iPhone, text messaging, or on Twitter, through any blog or website,
28 through any internet chat room, or by way of any other social networking

1 websites, including Facebook, Twitter, My Space, LinkedIn, and YouTube. But,
2 if you are asked or approached in any way about your jury service or anything
3 about this case, you must respond that you have been ordered not to discuss the
4 matter and to report the contact to the court.

5 Because you will receive all the evidence and legal instruction you
6 properly may consider to return a verdict: do not read, watch, or listen to any
7 news or media accounts or commentary about the case or anything to do with it;
8 do not do any research, such as consulting dictionaries, searching the Internet or
9 using other reference materials; and do not make any investigation or in any other
10 way try to learn about the case or the parties on your own.

11 The law requires these restrictions to ensure the parties have a fair trial based on
12 the same evidence that each party has had an opportunity to address. A juror who violates these
13 restrictions jeopardizes the fairness of these proceedings, and a mistrial could result that would
14 require the entire trial process to start over. If any juror is exposed to any outside information,
15 please notify the Court immediately.

16
17 Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.12 (Civil) (modified).
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Proposed Instruction No. 18 (Joint)

NO TRANSCRIPT AVAILABLE TO JURY

During deliberations, you will have to make your decision based on what you recall of the evidence. You will not have a transcript of the trial. I urge you to pay close attention to the testimony as it is given.

If at any time you cannot hear or see the testimony, evidence, questions or arguments, let me know so that I can correct the problem.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.13 (Civil).

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TAKING NOTES

If you wish, you may take notes to help you remember the evidence. If you do take notes, please keep them to yourself until you and your fellow jurors go to the jury room to decide the case. Do not let note-taking distract you. When you leave, your notes should be left in the jury room. No one will read your notes. They will be destroyed at the conclusion of the case.

Whether or not you take notes, you should rely on your own memory of the evidence. Notes are only to assist your memory. You should not be overly influenced by your notes or those of your fellow jurors.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.14 (Civil).

2 **USE OF INTERPRETERS—OTHER LANGUAGES; COUNTRIES OF ORIGIN**

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

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

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

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

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

BENCH CONFERENCES AND RECESSES

From time to time during the trial, it may become necessary for me to talk with the attorneys out of the hearing of the jury, either by having a conference at the bench when the jury is present in the courtroom, or by calling a recess. Please understand that while you are waiting, we are working. The purpose of these conferences is not to keep relevant information from you, but to decide how certain evidence is to be treated under the rules of evidence and to avoid confusion and error.

Of course, we will do what we can to keep the number and length of these conferences to a minimum. I may not always grant an attorney's request for a conference. Do not consider my granting or denying a request for a conference as any indication of my opinion of the case or of what your verdict should be.

Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.18 (Civil).

2 **OUTLINE OF TRIAL**

3 Trials proceed in the following way: First, each side may make an opening
4 statement. An opening statement is not evidence. It is simply an outline to help you understand
5 what that party expects the evidence will show. A party is not required to make an opening
6 statement.

7 The plaintiff will then present evidence, and counsel for the defendant may cross-
8 examine. Then the defendant may present evidence, and counsel for the plaintiff may cross-
9 examine.

10 After the evidence has been presented, I will instruct you on the law that applies
11 to the case and the attorneys will make closing arguments.

12 After that, you will go to the jury room to deliberate on your verdict.

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14 Authority: Ninth Circuit Manual of Model Jury Instructions, Instruction 1.19 (Civil).
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2 **STIPULATIONS OF FACT**

3 The parties have agreed to certain facts, and their written stipulations of fact will
4 be placed in evidence as Exhibit 1. You should therefore treat these facts as having been proved.
5 I will read those agreed facts to you now. [*Read Stipulations of Fact Into The Record, including*
6 *Trial Stipulation and Order No. 2 Regarding Certain Facts (Dkt. No. 910); Trial Stipulation and*
7 *Order No. 3 Regarding Certain Facts (Dkt. No. 911); Stipulation and Order Regarding Data*
8 *Produced by Defendants on March 15, 2010 (Dkt. No. 912)].*

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10 Authority: Instruction 2.2, Ninth Circuit Manual of Model Jury Instructions (Civil).
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2 **STIPULATIONS OF LIABILITY**

3 The parties have reached stipulations that TomorrowNow is directly liable to
4 Plaintiffs for all of the claims that Plaintiffs have asserted, and that SAP AG and SAP America
5 are contributorily and vicariously liable. Those stipulations of liability will be placed in
6 evidence as Exhibit 2. You should therefore treat these claims as having been proved. I will
7 read these agreements on liability to you now.

8 On September 9, 2010, the Parties entered into Trial Stipulation and Order No. 1
9 Re Liability, Dismissal of Claims, Preservation of Defenses & Objections to Evidence at Trial.
10 That stipulation provides: *[Read Trial Stipulation and Order No. 1 Re Liability, Dismissal of*
11 *Claims, Preservation of Defenses & Objections to Evidence at Trial (Dkt. No. 866).]*

12 On October 28, 2010, SAP AG and SAP America further stipulated to liability for
13 contributory copyright infringement. You should therefore treat this claim as having been
14 proved.

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16 Authority: Instruction 2.2, Ninth Circuit Manual of Model Jury Instructions (Civil) (Modified);
17 *see* Dkt. No. 952.

DEPOSITION IN LIEU OF LIVE TESTIMONY

A deposition is the sworn testimony of a witness taken before trial. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. When a person is unavailable to testify at trial, the deposition of that person may be used at the trial.

You should consider deposition testimony, presented to you in court in lieu of live testimony, insofar as possible, in the same way as if the witness had been present to testify.

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

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USE OF INTERROGATORIES OF A PARTY

Evidence may be presented to you in the form of answers of one of the parties to written interrogatories submitted by the other side. These answers were given in writing and under oath, before the actual trial, in response to questions that were submitted in writing under established court procedures. You should consider the answers, insofar as possible, in the same way as if they were made from the witness stand.

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

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Proposed Instruction No. 27 (Joint)

USE OF REQUESTS FOR ADMISSION

Before trial, each party has the right to ask another party to admit in writing that certain matters are true. If the other party admits those matters, you must accept them as true. No further evidence is required to prove them. You must also accept as true any stipulated facts I read to you, and those set forth in the stipulation(s) I will provide to you.

Authority: CACI No. 210.

Proposed Instruction No. 28 (Joint)

EXPERT OPINION

Some witnesses, because of education or experience, are permitted to state opinions and the reasons for those opinions. Opinion testimony should be judged just like any other testimony. You may accept it or reject it, and give it as much weight as you think it deserves, considering the witness’s education and experience, the reasons given for the opinion, and all the other evidence in the case.

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

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CHARTS AND SUMMARIES NOT RECEIVED IN EVIDENCE

Certain charts and summaries not received in evidence may be shown to you in order to help explain the contents of books, records, documents, or other evidence in the case. They are not themselves evidence or proof of any facts. If they do not correctly reflect the facts or figures shown by the evidence in the case, you should disregard these charts and summaries and determine the facts from the underlying evidence.

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

Proposed Instruction No. 30 (Joint)

CHARTS AND SUMMARIES RECEIVED IN EVIDENCE

Certain charts and summaries may be received into evidence to illustrate information brought out in the trial. Charts and summaries are only as good as the underlying evidence that supports them. You should, therefore, give them only such weight as you think the underlying evidence deserves.

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

Proposed Instruction No. 31 (Joint)

CORPORATIONS—FAIR TREATMENT

All parties are equal before the law and a corporation is entitled to the same fair and conscientious consideration by you as any party.

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

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2 **LIABILITY OF CORPORATIONS**

3 Under the law, a corporation is considered to be a person. It can only act through
4 its employees, agents, directors, or officers. Therefore, a corporation is responsible for the acts
5 of its employees, agents, directors, and officers, performed within the scope of authority.

6 An act is within the scope of a person’s authority if it is within the range of
7 reasonable and foreseeable activities that an employee, agent, director or officer engages in while
8 carrying out that person’s business.

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10 Authority: Instruction 4.2, Ninth Circuit Manual of Model Jury Instructions (Civil) (modified);
11 *See Delfino v. Agilent Techs., Inc.*, 52 Cal. Rptr. 3d 376, 395 (Cal. Ct. App. 2006) (“The plaintiff
12 bears the burden of establishing that the employee’s action for which vicarious liability is sought
13 to be imposed was committed within the scope of the employment.”); *Lowery v. Reinhardt*, No.
14 Civ. S-07-0880 RRB DAD, 2008 WL 550083, at *5 (E.D. Cal. Feb. 27, 2008) (same).

INTERPRETATION OF INSTANT MESSAGES

Defendants did not produce in a timely fashion certain relevant instant messages (IMs) involving TN employees. As a result, Plaintiffs were unable to fully investigate and use the late-produced IMs during preparations for this trial. Therefore, if any of these IMs are introduced into evidence during trial, and if there is any dispute about their meaning, you should interpret them consistent with what you find to be any reasonable interpretation presented by Plaintiffs.

Authority: The Court’s September 29, 2010 Order Regarding Data Produced by Defendants on March 15, 2010 (Dkt. 912).