

1 Robert A. Mittelstaedt (SBN 060359)
 Jason McDonell (SBN 115084)
 2 Elaine Wallace (SBN 197882)
 JONES DAY
 3 555 California Street, 26th Floor
 San Francisco, CA 94104
 4 Telephone: (415) 626-3939
 Facsimile: (415) 875-5700
 5 ramittelstaedt@jonesday.com
 jmcdonell@jonesday.com
 6 ewallace@jonesday.com

7 Tharan Gregory Lanier (SBN 138784)
 Jane L. Froyd (SBN 220776)
 8 JONES DAY
 1755 Embarcadero Road
 9 Palo Alto, CA 94303
 Telephone: (650) 739-3939
 10 Facsimile: (650) 739-3900
 tglanier@jonesday.com
 11 jfroyd@jonesday.com

12 Scott W. Cowan (Admitted *Pro Hac Vice*)
 Joshua L. Fuchs (Admitted *Pro Hac Vice*)
 13 JONES DAY
 717 Texas, Suite 3300
 14 Houston, TX 77002
 Telephone: (832) 239-3939
 15 Facsimile: (832) 239-3600
 swcowan@jonesday.com
 16 jlfuchs@jonesday.com

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

19 UNITED STATES DISTRICT COURT

20 NORTHERN DISTRICT OF CALIFORNIA

21 OAKLAND DIVISION

22 ORACLE USA, INC., et al.,

23 Plaintiffs,

24 v.

25 SAP AG, et al.,

26 Defendants.

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

**DEFENDANTS' SUPPLEMENTAL
 OBJECTIONS TO PLAINTIFFS'
 DEPOSITION DESIGNATIONS
 RELATED TO CONTRIBUTORY
 COPYRIGHT INFRINGEMENT**

1 Attached as Exhibit "A" is a chart of Defendants' objections to Plaintiffs' deposition
2 designations, which includes the disputed testimony and a brief statement of the basis for each of
3 Defendants' objections. Defendants bring these objections in light of the Court's October 28,
4 2010 Minute Order (ECF No. 952), prohibiting all evidence on contributory copyright
5 infringement unless admissible on the issue of damages or for context. Plaintiffs recently
6 disclosed that they intend to play Shai Agassi deposition designations on Tuesday, November 2,
7 and did not withdraw testimony for him relating solely to contributory infringement. Defendants
8 notified Plaintiffs of their objections and Plaintiff did not withdraw the associated testimony.
9 Defendants believe that the following testimony and objections should provide guidance to the
10 parties relating to the contributory infringement issues and the future playing of deposition
11 designations.

12 The disputed designations for Shai Agassi relate solely to contributory copyright
13 infringement and thus should be excluded. Further, the disputed designations for John Ritchie
14 relate to designations Plaintiffs sent at 9:01 p.m. October 31, 2010. Defendants object to the new
15 John Ritchie designations based on Federal Rule of Evidence 403, as the probative value of these
16 designations is far outweighed by the prejudicial effect.

17
18
19 Dated: November 1, 2010

JONES DAY

20
21 By: /s/ Scott W. Cowan
22 Scott W. Cowan

23 Counsel for Defendants
24 SAP AG, SAP AMERICA, INC., and
25 TOMORROWNOW, INC.
26
27
28

EXHIBIT A

<i>Testimony</i>	<i>Defendants' Objection</i>	<i>Court's Ruling</i>
Agassi, Shai 01/05/09		
53:14 – 53:17 Q. Didn't you acquire TomorrowNow with the knowledge that there was a risk that Oracle would sue? A. Yes.	Mr. Agassi was on the SAP AG Executive Board at the time of the TomorrowNow acquisition. The testimony is not relevant under FRE 401-402 and is unfairly prejudicial under FRE 403, as it is only relevant to contributory infringement (not damages) and goes beyond what is necessary to provide appropriate context pursuant to the Court's October 28, 2010 Minute Order. ECF No. 952.	
55:13 – 55:15 Q. Do you know the board issued a directive to TomorrowNow to stop that practice? A. I might have. I don't know.	The testimony is not relevant under FRE 401-402 and is unfairly prejudicial under FRE 403, as it is only relevant to contributory infringement (not damages) and goes beyond what is necessary to provide appropriate context pursuant to the Court's October 28, 2010 Minute Order. ECF No. 952.	
93:25 – 94:03 & 94:09 – 94:11 Q. Did you have any concerns at any time with the legality of TomorrowNow's operations? A. Yes. Q. When did they first arise? ***** THE WITNESS: It was one of the questions that we've asked from the first minute is, was this legal or not?	The testimony is not relevant under FRE 401-402 and is unfairly prejudicial under FRE 403, as it is only relevant to contributory infringement (not damages) and goes beyond what is necessary to provide appropriate context pursuant to the Court's October 28, 2010 Minute Order. ECF No. 952.	
97:04 – 97:09 Q. And so you deny ever learning that TomorrowNow downloaded	The testimony is not relevant under FRE 401-402 and is unfairly prejudicial under FRE 403, as it is only relevant to	

<i>Testimony</i>	<i>Defendants' Objection</i>	<i>Court's Ruling</i>
<p>copies of software to its own servers? A. I don't know. I mean, you -- I don't recall today if you're -- you know, I'm -- I may or may not. I don't know.</p>	<p>contributory infringement (not damages) and goes beyond what is necessary to provide appropriate context pursuant to the Court's October 28, 2010 Minute Order. ECF No. 952.</p>	
<p>104:18 – 104:22 Q. Do you recall that the Executive Board of SAP in which you were a member issued a directive to TomorrowNow to remove PeopleSoft software from its systems? A. No.</p>	<p>The testimony is not relevant under FRE 401-402 and is unfairly prejudicial under FRE 403, as it is only relevant to contributory infringement (not damages) and goes beyond what is necessary to provide appropriate context pursuant to the Court's October 28, 2010 Minute Order. ECF No. 952.</p>	
<p>201:13 – 201:14 & 202:08 – 202:17 Q. Okay. Let me ask you to look at Exhibit 212, please. ***** Q. Did you tell Mr. Word what the role of Mr. Zepecki and Mr. Geers was supposed to be? A. Yeah. John is our bullshit detector. Q. Was that your phrase? A. No. But it's a good phrase. Q. What does it mean? A. It means that if these -- if TomorrowNow would tell things that are not credible, John has better experience than we do in understanding that material.</p>	<p>The testimony is not relevant under FRE 401-402 and is unfairly prejudicial under FRE 403, as it is only relevant to contributory infringement (not damages) and goes beyond what is necessary to provide appropriate context pursuant to the Court's October 28, 2010 Minute Order. ECF No. 952.</p>	
<p>218:09 – 218:19; 218:20 – 218:21; 218:25 – 219:04; 219:09 – 219:22 Q. The second page of Exhibit 707 includes an</p>	<p>The testimony is not relevant under FRE 401-402 and is unfairly prejudicial under FRE 403, as it is only relevant to contributory infringement (not</p>	

<i>Testimony</i>	<i>Defendants' Objection</i>	<i>Court's Ruling</i>
<p>analysis by Mr. Zepecki of the strengths, opportunities of TomorrowNow, and the weaknesses, threats.</p> <p>Do you see that?</p> <p>A. Yeah.</p> <p>Q. And under strengths, opportunities, the last bullet point states: Oracle's legal challenges to TomorrowNow's ability to provide derivative works/support will get customers, quote, "in the middle," close quote, no-win situation for Oracle.</p> <p>*****</p> <p>Is this the first time you'd heard that?</p> <p>A. No.</p> <p>*****</p> <p>Q. What did you understand Mr. Zepecki to mean?</p> <p>A. That Oracle -- if Oracle went after TomorrowNow, it would -- it would actually alienate customers.</p> <p>*****</p> <p>Q. Was it a factor in favor of supporting the acquisition?</p> <p>A. Yes.</p> <p>Q. Under Weaknesses/Threats, about halfway down there's a bullet point that states: The access rights to the PeopleSoft software is very likely to be challenged by Oracle. SAP has to determine how much of a liability a legal challenge would be and factor it into the deal. That's not the first time used heard that at this</p>	<p>damages) and goes beyond what is necessary to provide appropriate context pursuant to the Court's October 28, 2010 Minute Order. ECF No. 952.</p>	

<i>Testimony</i>	<i>Defendants' Objection</i>	<i>Court's Ruling</i>
<p>point. Correct? A. John has -- John has expressed that a few times.</p>		
<p>242:01 – 242:04; 242:10 – 242:20; 242:22 – 242:22 Q. Let me show you what's been marked as Exhibit 221. This is an email from you to Mr. Mackey dated Janary 6, 2005. ***** A. But in any event, what I want to ask you about is the next sentence: Should not be an issue to do the stock deal since there is no IP to transfer to Germany, and we want a separate identity to shield liability. You did know by now that there was no IP being acquired? A. Yes. Q. So you knew that TomorrowNow had no independent right to PeopleSoft intellectual property? ***** THE WITNESS: I assumed - I assumed that.</p>	<p>The testimony is not relevant under FRE 401-402 and is unfairly prejudicial under FRE 403, as it is only relevant to contributory infringement (not damages) and goes beyond what is necessary to provide appropriate context pursuant to the Court's October 28, 2010 Minute Order. ECF No. 952.</p>	
<p>255:06 – 255:09 Q. Did anyone point out concerns that hadn't been raised in the business case? A. No. The only concerning that was brought up was legal.</p>	<p>The testimony is not relevant under FRE 401-402 and is unfairly prejudicial under FRE 403, as it is only relevant to contributory infringement (not damages) and goes beyond what is necessary to provide appropriate context pursuant to the Court's October 28, 2010 Minute Order. ECF No. 952.</p>	
<p>358:21 – 358:22; 360:13 – 360:21 Q. Let me show you an exhibit that has been marked 720.</p>	<p>The testimony is not relevant under FRE 401-402 and is unfairly prejudicial under FRE 403, as it is only relevant to</p>	

<i>Testimony</i>	<i>Defendants' Objection</i>	<i>Court's Ruling</i>
<p>*****</p> <p>Q. In the top of the page, near the top of the page, you ask the participants to stop the thread and communicate over the phone. Why is that?</p> <p>A. It's a general rule that if you start these over-expanding emails, you're better off getting on the phone and hashing it out.</p> <p>Q. It doesn't have anything to do with the sensitivity of the topic?</p> <p>A. It could be.</p>	<p>contributory infringement (not damages) and goes beyond what is necessary to provide appropriate context pursuant to the Court's October 28, 2010 Minute Order. ECF No. 952.</p>	
<p>366:15 – 366:18</p> <p>MR. PICKETT: Q. Did Mr. Mackey tell you that TomorrowNow is a separate entity due to the threat of litigation?</p> <p>A. In this email, he says so.</p>	<p>The testimony is not relevant under FRE 401-402 and is unfairly prejudicial under FRE 403, as it is only relevant to contributory infringement (not damages) and goes beyond what is necessary to provide appropriate context pursuant to the Court's October 28, 2010 Minute Order. ECF No. 952.</p>	
Ritchie, John 12/02/10		
<p>180:20-23; 181:2-5</p> <p>Q. Do you know <u>what people did after things got down into the hard-coded download path</u>?</p> <p>A. No. I already said I didn't. I said they could rename it easily and copy it and move it.</p> <p>*****</p> <p>Q. Correct.</p> <p>A. I didn't mean – afterward they could do whatever they want with it. They could download it to a flash drive and take it to SAP if they wanted.</p>	<p>The bolded testimony is not relevant under FRE 401-402 and unfairly prejudicial under FRE 403. The witness was a hostile former TomorrowNow employee at the time of his deposition. The only relevance this could have is towards contributory infringement; therefore, under the Court's Minute Order (ECF No. 952), the testimony is not relevant. Additionally, the witness already testified that he did not know what "people did after things got down into the hard-coded download path" (see the underlined text). To</p>	

<i>Testimony</i>	<i>Defendants' Objection</i>	<i>Court's Ruling</i>
	allow the witness to gratuitously say, after clearly stating that he did not know, that "[t]hey could download it to a flash drive and take it to SAP if they wanted" is unfairly prejudicial and the prejudicial effect outweighs any probative value.	