

1 Robert A. Mittelstaedt (SBN 060359)
 Jason McDonell (SBN 115084)
 2 Elaine Wallace (SBN 197882)
 JONES DAY
 3 San Francisco Office
 555 California Street, 26th Floor
 4 San Francisco, CA 94104
 Telephone: (415) 626-3939
 5 Facsimile: (415) 875-5700
 ramittelstaedt@jonesday.com
 6 jmcdonell@jonesday.com
 ewallace@jonesday.com
 7

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

13 Scott W. Cowan (Admitted *Pro Hac Vice*)
 Joshua L. Fuchs (Admitted *Pro Hac Vice*)
 14 JONES DAY
 717 Texas, Suite 3300
 15 Houston, TX 77002
 Telephone: (832) 239-3939
 16 Facsimile: (832) 239-3600
 swcowan@jonesday.com
 17 jlfuchs@jonesday.com
 Attorneys for Defendants
 18 SAP AG, SAP AMERICA, INC., and
 TOMORROWNOW, INC.
 19

20 UNITED STATES DISTRICT COURT
 21 NORTHERN DISTRICT OF CALIFORNIA
 22 SAN FRANCISCO DIVISION

23 ORACLE CORPORATION, et al.,
 Plaintiffs,
 24 v.
 25 SAP AG, et al.,
 26 Defendants.

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

**DEFENDANTS' REPLY TO
 ORACLE'S OPPOSITION TO
 DEFENDANTS' OBJECTIONS TO
 SPECIAL MASTER'S REPORT
 AND RECOMMENDATIONS RE:
 DISCOVERY HEARINGS 1 AND 2**

Date/Time: July 1, 2008, 11:00 am
 Courtroom: E, 15th Floor
 Judge: Hon. Elizabeth D. Laporte

DEFS.' REPLY TO ORACLE'S OPP. TO DEFS.'
 OBJS. TO SPCL. MASTER'S RECS.
 Case No. 07-CV-1658 PJH (EDL)

1 **TABLE OF CONTENTS**

2 **Page**

3 INTRODUCTION 2

4 ARGUMENT 3

5 I. ORACLE’S BLANKET REQUEST FOR ALL DOCUMENTS PRODUCED TO
6 THE GRAND JURY IS IMPROPER 3

7 A. Oracle Must Demonstrate That It Is Seeking Documents For Their “Own
8 Sake” And That Such A Disclosure Will Not Compromise The Integrity Of
9 The Grand Jury..... 3

10 1. Oracle has not shown that it seeks the documents for their “own
11 sake.” 3

12 2. Oracle’s assertions of relevance are speculative..... 5

13 B. Granting Oracle’s Request Will Compromise The Integrity Of The Grand
14 Jury Process..... 6

15 II. ORACLE HAS NOT SHOWN THAT RFP NOS. 25 AND 26 ARE
16 BURDENSOME OR SEEK IRRELEVANT INFORMATION..... 8

17 A. Oracle’s Scope Concerns Are Unfounded And, In Addition, Addressed By
18 The Generally Applicable Discovery Limits Currently Being Negotiated..... 8

19 B. Oracle Mischaracterizes The Facts To Support Its Relevance Argument. 9

20 C. Oracle’s Claim That There Are No Employees Who Have A Business
21 Reason To Communicate with TN is wrong..... 11

22 D. The Special Master’s Recommendation Was Arbitrary And Prejudicial. 11

23 CONCLUSION 12

24

25

26

27

28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page

Cases

Board of Ed. Of Evanston Twp. High School Dist. No. 205 v. Admiral Heating & Ventilation, Inc.
513 F. Supp. 600 (N.D. Ill. 1981) 6, 7

In re Grand Jury Proceedings
851 F.2d 860 (6th Cir. 1988)..... 6

In re John Doe Grand Jury Proceedings
537 F. Supp. 1038 (D.R.I. 1982)..... 6

In re Sulphuric Acid Antitrust Litigation
2004 WL 769376 (N.D. Ill. April 9, 2004) 7

In re Sunrise Securities Litigation
130 F.R.D. 560 (E.D. Pa. 1989)..... 7

United States v. Dynavac
6 F.3d 1407 (9th Cir. 1993)..... passim

Statutes

Federal Rule of Criminal Procedure
6(e) 2, 3, 7, 8

1 **INTRODUCTION**

2 Oracle wastes much of its opposition on topics that are not an issue for the Court. As
3 Defendants made clear to Judge Legge and Oracle, besides the cover letters transmitting
4 Defendants' document productions, the only documents that have been provided to the
5 government under the grand jury subpoenas are electronic and paper records produced in
6 response to those subpoenas. And, it is only those records actually produced in response to the
7 subpoenas that are addressed by Judge Legge's recommendation. McDonnell Decl., Exh. 3 at 6;
8 Exh. 6, at 143:12-144:25.

9 As to those documents, the issue is straightforward. Oracle requests all documents
10 TomorrowNow ("TN") has produced to the grand jury. A general or blanket request for
11 documents produced to a grand jury is inappropriate under Rule 6(e) because it may disclose
12 matters occurring before the grand jury. Documents produced in response to a grand jury
13 subpoena may be disclosed in civil discovery only if the documents are sought for their own sake
14 and not simply to learn what the grand jury is investigating. *United States v. Dynavac*, 6 F.3d
15 1407, 1411 (9th Cir. 1993). Judge Legge erroneously adopted the view that documents produced
16 to a grand jury are never protected by grand jury secrecy under Rule 6(e). Oracle too ignores
17 *Dynavac* and has consistently failed to demonstrate that it is entitled to the documents it seeks
18 under Ninth Circuit law.

19 As to RFP Nos. 25 and 26, which seek communications between Oracle and TN, Oracle's
20 opposition is based on unfounded scope and relevance objections. Defendants do not contend
21 that Oracle is required to search the documents of "all 69,000 Oracle employees." Opp. at 11.
22 Defendants have been, and are, willing to limit those requests to those employees likely to have
23 had such communications. Oracle's statements to the contrary misrepresent the record.
24 Moreover, the parties' negotiations on generally applicable limits on discovery, subsequent to the
25 hearing with Judge Legge, and this Court's clear directive at the May 28, 2008 Discovery
26 Conference to agree on such limits or have them imposed by the Court should adequately address
27 Oracle's burden concerns. These RFPs will be subject to the same general limits on custodians,
28 search terms, and targeted searches the parties agree on or the Court imposes.

1 As to relevance, Oracle mischaracterizes the communications already produced in the case
2 in an effort to minimize their significance and prevent the production of other, similar
3 communications. Their significance is obvious however, as Defendants demonstrate below.

4 **ARGUMENT**

5 **I. ORACLE’S BLANKET REQUEST FOR ALL DOCUMENTS PRODUCED TO**
6 **THE GRAND JURY IS IMPROPER**

7 **A. Oracle Must Demonstrate That It Is Seeking Documents For Their “Own**
8 **Sake” And That Such A Disclosure Will Not Compromise The Integrity Of**
9 **The Grand Jury.**

10 The Ninth Circuit established a clear test to determine when a general request for
11 documents produced to a grand jury may be granted in civil discovery. “If a document is sought
12 for its own sake rather than to learn what took place before the grand jury, and if its disclosure
13 will not compromise the integrity of the grand jury process, Rule 6(e) does not prohibit its
14 release.” *Dynavac* at 1411-12 (emphasis added). While production of a document that was also
15 produced to the grand jury does not automatically reveal grand jury workings, it is equally true
16 that production of a document that was produced to the grand jury in a concurrent grand jury
17 investigation may reveal something about the nature of the grand jury proceedings. *Id.* at 1413.
18 Thus, the Ninth Circuit rejected the rule that documents produced to a grand jury are never
19 protected by Rule 6(e), which is the rule Judge Legge erroneously adopted.

20 Oracle ignores the import of *Dynavac* and urges the Court to follow Judge Legge’s ruling
21 that a document produced to the grand jury is never protected by Rule 6(e). *Dynavac* is
22 controlling precedent and Oracle must meet each element of the test set forth in *Dynavac* for its
23 request to be granted. It meets neither.

24 **1. Oracle has not shown that it seeks the documents for their “own sake.”**

25 Oracle has offered a series of unconvincing justifications in support of its blanket request
26 for documents, none of which demonstrate that Oracle seeks documents for their “own sake.”
27 Notably, neither in its original request for documents, nor in its briefs or at argument, has Oracle
28 ever provided any specific description of any document covered by its request. Rather than

1 describe specific documents that it believes are relevant to its claims, Oracle simply repeats its
2 tautology that it seeks the documents for their own sake because it “does not seek production of
3 what transpired before the grand jury.” Opp. at 4, 5. But such a bare tautology does not
4 demonstrate that the documents are sought for their “own sake,” as required by *Dynavac*.

5 Oracle does not now and has never explained why it needs a response to its blanket
6 request for the documents produced to the grand jury when it has received and will receive all
7 relevant documents through the normal course of civil discovery. When pressed by Judge Legge,
8 Oracle’s answer was telling. Oracle did not, and still does not, contend that normal discovery has
9 failed to provide Oracle with specific documents it has requested. Rather, Oracle baldly
10 conceded that it wanted to know information unrelated to the specific documents that may be
11 covered by its request:

12 JUDGE LEGGE: You are missing my point. Let’s assume that it is; that there
13 has been a subpoena, and let’s assume they have a truckload of material they are about to
14 deliver to the U.S. Attorney for ultimate production—let’s assume that.

15 Why go through all that [obtaining the documents produced to the grand jury], if
16 you are going to get the answers to the questions that you want answered by methods we
17 have been talking about this morning [e.g., through appropriate civil discovery requests]?

18 [ORACLE]: As Your Honor knows, and your colleague, Judge Breyer, has
19 found, there’s a whole lot of information that isn’t even—*not the documents themselves*,
20 but let’s say that [sic] have been presentations making these kinds of clear delineations
21 between what they say happened, and who did it, and the scope.

22 McDonell Reply Decl., Exh. 1, 93:5-18.¹

23 Indeed, Oracle has consistently admitted that it wants the documents produced to the
24 grand jury for something other than anything intrinsic to the documents themselves:

- 25 • “If there’s a nice presentation to the government that talks about the facts and the
26 history, and lays it all out in a nice, easy way, that is an admission that obviously
27 is very helpful.” See Opp. at 9 (citations omitted).
- 28 • The grand jury documents could reveal “the manner in which the Defendants
produced those documents to the government” (McDonell Reply Decl., ¶ 3);
- The grand jury documents could show “whether TN’s production to date includes
documents also provided to the government” (*id.*);

27 ¹ All references to “McDonell Reply Decl.” are to the Reply Declaration of Jason
28 McDonell in Support of Defendants’ Objections to Special Master’s Report and
Recommendations Re: Discovery Hearings 1 and 2, filed herewith.

- 1 • The grand jury documents could show how Defendants “cataloged their
2 production to the government” (*id*).

3 Oracle’s admissions should be dispositive. The documents produced to the grand jury are
4 not being sought for their “own sake” but to glean information about the nature and scope of any
5 grand jury investigation.² Oracle’s broad justifications would apply to all grand jury
6 investigations and thus would entirely eviscerate the rule espoused in *Dynavac*. In such a
7 situation, a motion to compel should not be granted. *Dynavac*, 6 F.3d at 1412.

8 **2. Oracle’s assertions of relevance are speculative.**

9 Oracle asserts that its request seeks “highly relevant” documents with a “direct
10 relationship” to this case, (Opp. at 8), but Oracle has never even described any particular
11 document encompassed by its request much less explained how such a document may be relevant
12 to its claims. As Oracle freely concedes, it has no direct knowledge of any grand jury
13 investigation or what documents may have been produced to a grand jury. Opp. at 4 (“Oracle has
14 no specific knowledge about the existence or progress of any grand jury proceedings”). Thus, its
15 assertions of “direct relevance” are nothing but speculation, or, at best, an educated guess.

16 If the documents sought by Oracle are “highly relevant,” then they have been, or will be,
17 produced in response to proper civil discovery requests. To date, Defendants have produced over
18 2.3 million Bates-numbered pages of documents and over 6 terabytes of native data (not Bates-
19 numbered), and production is ongoing. McDonell Reply Decl., ¶ 4. Oracle has no reason to
20 believe it will not receive all relevant documents in due course whether or not they were also
21 produced to a grand jury, and it has offered none.

22 Oracle has the resources to conduct civil discovery – it does not need to piggy-back on the
23 work done by the government. It has received and will receive all relevant documents in the
24 ordinary course of civil discovery, and there is no need to circumvent the normal discovery
25 process and potentially compromise grand jury proceedings by a granting Oracle’s blanket
26 request for any documents produced to a grand jury.

27 ² Moreover, how TN cataloged their production or whether TN’s production to the
28 government is coextensive with its production in response to civil discovery requests is wholly
irrelevant to any of Oracle’s claims.

1 **B. Granting Oracle's Request Will Compromise The Integrity Of The Grand**
2 **Jury Process.**

3 Oracle asserts that the requested “documents can provide no information about the grand
4 jury’s inner workings.” Opp. at 7. This is a bold statement considering Oracle can only guess at
5 what the grand jury requested and what Defendants produced to it. It is also wrong. Oracle’s
6 request is not a request for particular documents that happened to have been previously produced
7 to the grand jury. It is instead a general request for any document produced to the grand jury
8 regardless of the nature of the document. As such, it is an attempt to learn which documents were
9 asked for and produced to the grand jury rather than any information contained in the documents
10 themselves. This is a critical distinction. Blanket requests for documents produced to a grand
11 jury can reveal much about a grand jury investigation. *Dynavac*, 6 F.3d at 1412 n.2 (disclosure of
12 “which documents were subpoenaed by the grand jury may disclose the grand jury’s deliberative
13 process.”) (emphasis in original); *In re John Doe Grand Jury Proceedings*, 537 F. Supp. 1038,
14 1044-45 (D.R.I. 1982) (“an examination of all documents provided to a grand jury pursuant to a
15 subpoena can reveal a great deal about the nature, scope and purpose of a secret grand jury
16 investigation”). Further, “even when documents are sought ‘for their own sake,’ disclosure may,
17 when the documents are “considered in the aggregate and in their relationship to one another,
18 make possible inferences about the nature and direction of the grand jury inquiry.” *Id.* (quoting
19 *In re Grand Jury Proceedings*, 851 F.2d 860, 865 (6th Cir. 1988)).

20 The blanket request made by Oracle for any document produced to the grand jury
21 regardless of the nature of the document would, if fulfilled, reveal which documents the grand
22 jury requested and thus the focus of its investigation. It may also reveal the names of individuals
23 who are of interest to the grand jury or who may be or have been witnesses. Revelation of the
24 names of individuals to Oracle and potentially the public would be especially pernicious,
25 smearing or intimidating them unnecessarily. Granting Oracle’s request would also establish a
26 precedent that would completely undermine the rule of grand jury secrecy by allowing any civil
27 litigant to pry open the door to the grand jury room whenever there is a parallel grand jury
28 proceeding. *Admiral Heating*, 513 F. Supp. at 604 (“Grand jury confidentiality would be

1 emasculated if a party seeking discovery of its proceedings could do so routinely by obtaining
2 that information [in civil discovery]”). Oracle utterly fails to acknowledge or even address this
3 consequence, dismissing it without any analysis and rather perplexingly as “unsubstantiated and
4 irrelevant to the questions at hand.” Opp. at 10 n. 6. But the result of upholding Judge Legge’s
5 ruling cannot be escaped: any civil litigant will be able to demand from any grand jury witness
6 production of any document produced by that witness to the grand jury, thereby creating a road
7 map for the litigant and potentially the public of every step taken by the grand jury in its
8 investigation. Such a result is flatly inconsistent with the tradition of grand jury secrecy that Rule
9 6(e) is designed to protect.

10 Moreover, Oracle’s insistence that because grand jury witnesses cannot be compelled to
11 silence, they can therefore be compelled to reveal what they said or produced to a grand jury is
12 both wrong and illogical. That a witness has the legal right to voluntarily reveal information does
13 not mean that the witness can be compelled to reveal what would otherwise be protected by the
14 rule of grand jury secrecy.

15 Finally, Oracle’s reliance on *In re Sunrise Securities Litigation*, 130 F.R.D. 560, 575
16 (E.D. Pa. 1989), the only case that even arguably supports its position,³ is misplaced. Opp. at 6.
17 While it is not clear from the opinion, it appears that the *Sunrise* case did not involve a blanket
18 discovery request for all documents produced to the grand jury, like Oracle’s here, and instead the
19 requested party was refusing to produce documents in response to otherwise proper civil
20 discovery requests. *See* 130 F.R.D. at 574 (the requested party had “invoked what it terms ‘the
21 Grand Jury Privilege’ to withhold various documents relating to” a grand jury investigation).
22 That is much different from the case here, where the defendants are not refusing to produce
23 documents responsive to legitimate discovery requests solely on the ground that they may have
24 been produced to a grand jury. Moreover, insofar as the court in *Sunrise* held that documents

25 ³ Oracle’s efforts to distinguish the cases cited by SAP are unsuccessful. The cases relied
26 on by SAP are factually and legally on point and illustrate Oracle’s failure to demonstrate that its
27 blanket request for anything produced to government seeks documents for their own intrinsic
28 value rather than information about the nature and scope of the grand jury investigation. *See*
Board of Ed. Of Evanston Twp. High School Dist. No. 205 v. Admiral Heating & Ventilation,
Inc., 513 F. Supp. 600 (N.D. Ill. 1981); *In re Sulphuric Acid Antitrust Litigation*, 2004 WL
769376 (N.D. Ill. April 9, 2004).

1 produced to a grand jury can never be protected by Rule 6(e), it is inconsistent with *Dynavac*,
2 which controls here.

3 The Special Master’s recommendations should be rejected. Oracle has not shown that it
4 seeks any of the requested documents for their own intrinsic value, production of the documents
5 would compromise the integrity of ongoing grand jury proceedings, and Oracle has the resources
6 and ability to obtain all relevant documents it needs through the normal course of civil discovery.

7 **II. ORACLE HAS NOT SHOWN THAT RFP NOS. 25 AND 26 ARE BURDENSOME**
8 **OR SEEK IRRELEVANT INFORMATION.**

9 **A. Oracle’s Scope Concerns Are Unfounded And, In Addition, Addressed By**
10 **The Generally Applicable Discovery Limits Currently Being Negotiated.**

11 Defendants do not maintain that RFP Nos. 25 and 26 require Oracle to search the
12 documents of “*all 69,000 Oracle employees*” for communications with TN. *See Opp.* at 11
13 (emphasis in original); *see also id.* at 13 (stating, incorrectly, that Defendants seek “all-employee-
14 communication” discovery). Oracle misrepresents the record on this point. Although Oracle
15 quotes extensively from the transcript of the March 4 hearing, including Judge Legge’s inquiry
16 “[H]ow can they answer this question without going to everybody in the office?” (*Opp.* at 17), it
17 omits the responses of Defendants’ counsel. Those responses make clear that Defendants have
18 been, and are, willing to limit the search to those employees likely to have had such
19 communications. *See McDonell Decl., Exh. 6, 92:25-93:15* (search should be of those Oracle
20 employees “likely to have had communications with TomorrowNow”); *87:12-18* (search should
21 be limited to employees with reason to have contact with TomorrowNow). Oracle has steadfastly
22 refused to agree to that compromise, insisting that there are no such Oracle employees. *Id.* at
23 91:17-22; *see also Opp.* at 13 (claiming, incorrectly, that “there is no specific custodian or group
24 within Oracle that would have a regular business purpose for such communications”). But
25 documents already produced in the case show otherwise. As discussed further below, employees
26 in Oracle’s sales, marketing, competitive intelligence, legal, and customer support departments
27 have had reason to – and do – communicate with both TN and SAP in the regular course of
28 business.

1 Nor is there any inconsistency between Defendants' arguments at the May 28, 2008
2 Discovery Conference and its position with respect to these RFPs. *See* Opp. at 11. Defendants'
3 position was then, and is now, that there needs to be reasonable limits on the scope of discovery
4 and that those limits should apply equally to both sides. Defendants have never contended that
5 these RFPs will be exempt from whatever limits on custodians, search terms, and targeted
6 searches are ultimately agreed on by the parties or set by the Court. To the extent that these
7 RFPs, as limited by Defendants during the meet and confer process, would have imposed an
8 undue burden on Oracle at all, the fact that the Court has said that such discovery limits will be
9 set, whether by agreement or by order, is sufficient to address Oracle's burden concerns.⁴

10 **B. Oracle Mischaracterizes The Facts To Support Its Relevance Argument.**

11 Oracle disputes the relevance of communications regarding instances in which Oracle, or
12 its predecessor PeopleSoft, consented to a customer providing software to TN. *See* Objs. at 13;
13 Opp. at 15. In support of its position, Oracle argues that the case is not about the receipt by TN of
14 "software that a customer *was licensed to use.*" Opp. at 15 (emphasis in original). But that is
15 precisely what the case is about, as Oracle's counsel acknowledged at the March 4 hearing:

16 But the bigger point, your Honor, is that Oracle has never said and it never would
17 say that TomorrowNow or a third party support provider like TomorrowNow can
18 never have its fingers on some form of software. There are circumstances in
19 which the third-party support providers are legitimately providing support, and
20 Oracle welcomes that competition. *The question is whether they're doing it
21 within the scope of the customer's license or not.*"

22 McDonnell Decl., Exh. 6, 90:18-91:1 (emphasis added). Communications between Oracle and TN
23 that reflect Oracle's position on whether a particular activity is within the scope of a customer's
24 license clearly are relevant to, for example, issues of consent and how Oracle's license
25 agreements are to be construed.

26 Oracle also accuses Defendants of misleading the Court regarding the relevance of
27 PeopleSoft's 2002 cease and desist letter to TN. Opp. at 15-16. Oracle incorrectly describes the
28 letter as limited to marketing materials that allegedly create the false impression that
TomorrowNow is affiliated with PeopleSoft or disparage PeopleSoft products, along with alleged

⁴ The dispute over these RFPs arose and was heard by Judge Legge well before the parties even started negotiating the discovery limits that were the subject of the May 28 hearing.

1 misappropriation of a customer list. *Id.* Oracle omits from its description PeopleSoft’s allegation
2 that “[TN’s] characterization of PeopleSoft’s products and of [TN’s] *abilities to service them* are
3 misleading ...,” (McDonell Decl., Exh. 8, at 1) (emphasis added), and that “because
4 TomorrowNow is not a certified member of PeopleSoft’s alliance network, it is misleading for the
5 TomorrowNow website to claim that TomorrowNow has the ability to perform upgrades to
6 PeopleSoft 8.” *Id.* at 2. These allegations parallel Oracle’s allegations in this litigation that TN’s
7 support activities are unlawful.

8 If there can be any doubt that the 2002 cease and desist letter is relevant, that doubt is
9 resolved by TN’s letter in response. Almost an entire page of that response is devoted to
10 contesting PeopleSoft’s claim that TN is not legally entitled to service PeopleSoft software.
11 McDonell Reply Decl., Exh. 2.⁵ The letter states, in part:

12 We are very concerned and disturbed by these claims. As Assistant General
13 Counsel for PeopleSoft, you are undoubtedly aware, or certainly should be aware,
14 that (a) there is no requirement that a service provider join or be affiliated with
15 any PeopleSoft-controlled alliance before servicing a customer’s PeopleSoft
16 software, (b) the tools for physically upgrading releases are built into the
17 PeopleSoft software release itself and licensed with the software product to
18 customers, (c) customers who pay PeopleSoft for annual support services have
19 rights to access and use PeopleSoft upgrade documentation and instructions made
20 generally available to PeopleSoft’s annual support services customers regardless
21 of whether a customer chooses to hire PeopleSoft, a third-party, or internally and
22 independently performs the upgrade process, (d) many software upgrades are
23 performed by customers without fee-based consulting assistance from either
24 PeopleSoft or its certified alliance network members, and (e) many software
25 upgrades are performed by customers without their internal project staff of
26 employees and/or contractors receiving any full education or training equivalent
27 to PeopleSoft’s “Consultant Certification” curriculum used by PeopleSoft
28 internally for its fee-based consultants or the curriculum used for the fee-based
consultants of its certified alliance network members.

Despite the fact that this well-known information was available to you prior to
your letter of July 10, 2002, we understand that PeopleSoft is telling customers
that there are legal and other reasons that TomorrowNow cannot provide these
services. We can only conclude that PeopleSoft is attempting to (a) knowingly
mislead its customers about their rights under their software license and support
agreements to select and use any service provider willing and able to perform
services relating to PeopleSoft software, (b) pressure and intimidate
TomorrowNow out of competition with PeopleSoft and its certified alliance
partner network, (c) create competitive barriers for TomorrowNow and perhaps

⁵ TN’s response to the 2002 cease and desist letter was produced to Oracle by Blank Rome, the law firm that represented TN in the acquisition by SAP, in response to a subpoena. McDonell Reply Decl., ¶ 2.

1 other independent service providers, and (d) control the vendor market from
2 which customers using PeopleSoft software can choose a service provider.

3 McDonell Decl., Exh.2 at 2. To our knowledge, PeopleSoft never replied to this letter.

4 The relevance of this document to the issues in this litigation, and specifically to
5 PeopleSoft's knowledge of, and at least implied consent to, TN's support activities, is obvious.
6 As early as 2002, PeopleSoft was aware of TN's support activities, challenged their lawfulness in
7 a cease and desist letter, and received a response that expressed TN's disagreement with
8 PeopleSoft's position and intent to continue to provide support for PeopleSoft products.

9 **C. Oracle's Claim That There Are No Employees Who Have A Business Reason**
10 **To Communicate With TN Is Wrong.**

11 In addition to the communications with TN by legal and technical support employees
12 discussed above, other categories of Oracle employees communicate with TN and SAP, in one
13 form or another, particularly employees from Oracle's sales, marketing, and competitive
14 intelligence groups. For example, document ORCL00029347 produced by Oracle is an email
15 from a TN employee to an Oracle employee regarding a conference for users of PeopleSoft
16 products which the Oracle employee attended and at which TN advertised its services, and
17 document ORCL00131592 produced by Oracle is an electronic meeting notice listing the names
18 of several SAP and TN employees.⁶

19 **D. The Special Master's Recommendation Was Arbitrary And Prejudicial.**

20 As Oracle conceded at the March 4 hearing, the only documents it has produced that are
21 potentially responsive to RFP Nos. 25 and 26 are documents it collected in response to other
22 requests. Objs. at 3. It has never searched for documents responsive to these specific requests,
23 even among the files of employees likely to have had communications with TN. *Id.* The Special
24 Master's adoption of that approach, even in light of Defendants' efforts to narrow the scope of the
25 requests, was an arbitrary "solution" to a dispute that should have been resolved through the
26 logical and reasonable limits proposed by Defendants. It was prejudicial because the discovery

27 _____
28 ⁶ Defendants have not attached the documents cited here because Oracle has designated them Confidential.

1 denied Defendants is relevant to key issues and defenses in the litigation. This is particularly true
2 in the context of the parties' subsequent negotiations on generally applicable discovery limits and
3 the Court's intent to impose such limits should the parties fail to reach agreement. Under these
4 circumstances, the limited burden on Oracle is far outweighed by the relevance of the discovery
5 sought. This Court should reject the Special Master's recommendation on RFP Nos. 25 and 26.

6 **CONCLUSION**

7 For the reasons set forth above, the Special Master's recommendations should be rejected.

8
9 Dated: June 6, 2008

JONES DAY

10
11 By: /s/ Jason McDonell

Jason McDonell

12 Counsel for Defendants
13 SAP AG, SAP AMERICA, INC., and
14 TOMORROWNOW, INC.

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