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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.,

23 Plaintiffs,

24 v.

25 SAP AG, et al.,

26 Defendants.

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

**OFFER OF PROOF REGARDING
 THE AT-RISK REPORT AND
 IMPACT ON DAMAGES ANALYSIS**

SUBMITTED UNDER SEAL

1 Defendants submit this Offer of Proof to identify the testimony, documentary and
2 demonstrative evidence related to Plaintiffs' At-Risk Reports and other customer-related
3 documents that Defendants would present, if permitted, to prove among other things: (1) the
4 proper fact of and amount of damages; (2) causation; (3) causation of damages (*e.g.*, customers'
5 reasons for not renewing support contracts with Plaintiffs and/or selecting Defendants' products
6 and services); (4) flaws in the opinions and testimony of Plaintiffs' damages related witnesses,
7 including its damages expert (Mr. Meyer) and its executives; (5) the superiority of Defendants'
8 lost profits and infringers' profits (disgorgement) analyses over damages evidence and
9 approaches offered by Plaintiffs; (5) the nature and breadth of the third party support market and
10 competitors to Oracle other than Defendants; and (6) the credibility of and/or the weight to be
11 properly given to Plaintiffs' arguments, documentary evidence and witnesses' testimony on these
12 subjects. If Defendants were permitted to present this evidence, its witnesses including but not
13 limited to its damages expert, Stephen Clarke, would be able to present extensive detailed
14 additional analysis and concrete examples that supports and corroborates his expert opinions
15 related to these subjects. Defendants would also be able to more effectively cross-examine
16 Plaintiffs' witnesses on these subjects.

17 If permitted, Defendants would present to the jury Defendants' Trial Exhibit A-0059
18 (attached as Exhibit A), and Defendants' Trial Exhibit A-9338 (attached as Exhibit B)
19 (collectively, the "At-Risk Reports"). The At-Risk Reports were prepared under the direction of
20 Plaintiffs' employee, Richard Cummins. Exhibit C (09/16/08 Cummins Depo. Tr.) at 204:24-
21 205:1, 205:5-7; Exhibit D (09/23/08 Cummins Depo. Tr.) at 312:3-12. The At-Risk Reports were
22 intended to capture information from customers who were at risk of leaving Oracle support for
23 any reason. Exhibit D (09/23/08 Cummins Depo. Tr.) at 320:23-321:2, 321:5-9, 321:11-17.

24 Defendants' witnesses, including Mr. Clarke would testify about the contents of these
25 reports and the ways in which they support his opinions on damages. Further, if permitted, Mr.
26 Clarke would present and testify to the information contained in his trial slides relating to
27 customers and damages issues (relevant slides are attached as Exhibit E) as well as various
28 customer-related exhibits including Trial Exhibits A-6110, A-5181 and A-6891 attached as

1 Exhibits F, G, and H, respectively). All of these have been improperly excluded on hearsay
2 grounds during the November 18, 2010 proceedings.¹

3 On August 5, 2010, Plaintiffs moved *in limine* to exclude customer statements referred to
4 in its At-Risk reports on the ground that they are out of court statements from third parties and
5 thus inadmissible hearsay. See ECF No. 916 (Pls.' MIL No. 3) at 13:27-17:5. Plaintiffs concede
6 that the At-Risk Reports are admissible as a business records. Plaintiffs only objection is to the
7 admissibility of transcribed customer comments contained in the report. See Exhibit I (09/30/10
8 MIL Hearing Tr.) at 10:15-12:14 ("We're not contending that the reports themselves are not . . .
9 business records. We're focused on just this one part of the report which are transcribed
10 comments from customers."). The Court excluded transcribed customer statements in the report,
11 except to the extent that Plaintiffs' expert relied on them, on the ground that Defendants had not
12 "articulated any applicable exception to the hearsay rule." See ECF No. 914 (09/30/10 Order) at
13 1-2.

14 On November 15, 2010, Defendants filed their Motion Regarding Admissibility of
15 Plaintiffs' At-Risk Report, requesting that the Court reconsider its Motion in Limine ruling and
16 admit the At-Risk Reports in their entirety, including transcribed customer statements. ECF No.
17 986 (Defs.' At-Risk Report Mot.). Defendants presented the Court with a complete copy of
18 Exhibit A-9338 as an exemplar of the notes field of an At Risk report so the Court could conduct
19 an *in camera* review of the report and consider whether it or any portion of it would be admitted
20 into evidence. Exhibit J (11/15/2010 Tr. of Proceedings) at 1431:24-1433:16. On November 16,
21 2010, the Court denied Defendants' request in its entirety and excluded the entire contents of the
22 so-called notes field of the At-Risk Reports, which thereby excluded, for example, virtually the
23 entirety of Exhibit A-9338 and the comparable portions of Exhibit A-0059. Exhibit K
24 (11/16/2010 Tr. of Proceedings) at 1528:4-1529:2. Defendants respectfully submit that the
25 Court's November 16, 2010 ruling is erroneous as a matter of law, for the reasons stated in
26 Defendants' written submission. See ECF No. 986 (Defs.' At-Risk Report Mot.).

27 Mr. Clarke reviewed and analyzed millions of pages of documents produced by the parties

28 ¹ Certified transcript currently unavailable; no citation available.

1 in this action and identified the reasons why individual customers terminated Plaintiffs' software
2 support. Mr. Clarke's damages calculations regarding infringers' profits and lost profits relied, in
3 part, upon information contained in the At-Risk Reports. See 05/07/2010 Stephen K. Clarke
4 Expert Report (the "Clarke Report") (relevant excerpts of which are attached as Exhibit L) at 209-
5 235. The Clarke Report explains that there were numerous reasons why various customers chose
6 to terminate Plaintiffs' support.

7 Plaintiffs' At-Risk Reports were part of a formal reporting process for all sales personnel
8 to report support renewal customers they felt were "at risk" of not renewing support. The At-Risk
9 Reports thus reveal the factors that Plaintiffs looked for, and customers identified, as precursors
10 to customers terminating Plaintiffs' software support. Mr. Clarke relies upon the same factors
11 and information identified in the At-Risk Reports to establish a similar methodology to determine
12 why customers left Plaintiffs' support. Based in part upon this information, Mr. Clarke grouped
13 customers into the appropriate "exclusion pools" to demonstrate why customers should be
14 excluded from the lost profits and/or infringers' profits analyses. Thus, the At-Risks Reports
15 legitimize, substantiate and provide great persuasive weight to Mr. Clarke's methodology and
16 analysis because they show that Plaintiffs and customers also identified the same factors as a
17 precursor to customers cancelling support.

18 For example, the At-Risk Reports quote Olin Corporation stating that Olin had decided it
19 would [REDACTED]

20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

28 If permitted, Mr. Clarke would testify regarding his methodology as it relates to the

1 information in the At-Risk Reports, and to customers' intentions, individually, in leaving
2 Plaintiffs' support to more fully support and corroborate his lost profits and infringers' profits
3 analyses. Mr. Clarke would demonstrate how factors identified by Plaintiffs' and their customers
4 served as the basis of his methodology and helped him categorize the customers appropriately
5 according to their behavior. This explanation would substantiate the legitimacy of Mr. Clarke's
6 approach towards the analysis, generally, and towards the individual customers.

7 If permitted to use the excluded evidence, the documents would prove and Mr. Clarke
8 would testify in greater depth with greater detailed support about the nature and existence of the
9 third party support market in general and alternatives to vendor provided support from Oracle in
10 addition to Defendant TomorrowNow.

11 If permitted to use the excluded evidence, Defendants would have cross examined
12 Plaintiffs' witnesses, including its executives and its damages expert, about the extensive
13 evidence showing reasons customers left Oracle support and purchased software and/or support
14 from Defendants and how that evidence shows that Oracle would have lost these customers even
15 absent the copyright infringement.

16 The At Risk Reports also contain detailed information related to the third-parties for
17 which the customers are at-risk of leaving. Such third-parties include TomorrowNow amongst
18 other third-party support providers, business process outsourcers, consulting companies, and other
19 software vendors. Alternatives to Oracle identified by Oracle's sales representatives in the At-
20 Risk Reports include:

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REDACTED

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Oracle disputes that these options are alternatives to Oracle. For example, Oracle challenges that self-support is a viable alternative, yet Oracle states in its own At-Risk Reports that customers left Oracle to go on self support. Mr. Clarke performed a detailed analysis of the third-party support market and one of his sources is Oracle’s At-Risk Reports. In trial, Mr. Clarke presented a slide that shows the company names of the alternatives to Oracle. He also discussed in some detail several third-party support options and other Oracle alternatives. Mr. Clarke would testify, if permitted, to the analyses and underlying detail exemplified in this slide that support, explain, and highlight his analysis regarding alternatives to Oracle support as contained in the Clarke Report.

In light of the Court’s rulings on September 30, 2010 and November 16, 2010, Mr. Clarke was obliged to exclude relevant customer information from his trial testimony and presentation and Defendants were unable to cross-examine Plaintiffs’ witnesses concerning the information. At trial, Mr. Clarke was forced to truncate his trial testimony and presentation by excluding the slides attached hereto as Exhibit E and his associated testimony and analysis. These slides presented individual examples of customers Mr. Clarke placed into particular exclusion pools to help explain and demonstrate his methodology. However, Mr. Clarke could not present these slides because they contained information from the At-Risk Reports.

These slides provide examples of customers that Mr. Clarke excluded from his lost profits and infringers’ profits analyses. They include information regarding B.B.S. Electronics and Textile Management Associates, which were excluded from the lost profits calculation because there was a service gap of over six months after the customers left Plaintiffs’ support (Service Gap); Capital Group, which was excluded from the infringers’ profits analysis because its purchases from SAP were product extension of other SAP software it already used (Product Extensions exclusion pool); Baxter, which was excluded from the infringers’ profits analysis because its software purchases were through a reseller/business process outsourcing

1 (Reseller/BPO exclusion pool); Hitachi, which was excluded from the infringers' profits analysis
2 because its purchases from SAP were products not related to its PeopleSoft software (Non-
3 Replacement Products exclusion pool); and Cowlitz County and Standard Register who were
4 each excluded for multiple reasons (Joint Exclude exclusion pool). These slides each
5 demonstrate different exclusion pools and examples of customers that qualify for the respective
6 pools.

7 Mr. Clarke would testify, if permitted, to the analyses exemplified in these slides that
8 support, explain, and highlight his causation analysis regarding his infringers' profits and lost
9 profits calculations contained in the Clarke Report.

10 Similarly, Defendants' witnesses, including Mr. Clarke, would have relied upon Trial
11 Exhibits A-6110, A-5181 and A-6891 to prove customer motivation, state of mind and causation
12 of damages. All of these have been improperly excluded on hearsay grounds. Exhibits A-5181
13 and A-6110 are admissions of a party opponent, adoptive admissions and fit within the state of
14 mind exception to the hearsay rule. Exhibit A-6891 was admissible to show the basis of Mr.
15 Clarke's testimony after Plaintiffs' counsel opened the door by inquiring about changes to Mr.
16 Clarke's report and opinions that were based on the information in the declaration that is Exhibit
17 A-6891.

18 For the reasons stated above, Defendants submit this Offer of Proof and identify the
19 testimony and documentary evidence from the At-Risk Reports and other excluded documents
20 and related testimony that Defendants would present, if permitted, to support and corroborate
21 Defendants' lost profits and infringers' profits analyses.

22
23 Dated: November 19, 2010

JONES DAY

24
25 By: /s/ Jason McDonell

Jason McDonell

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