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16 UNITED STATES DISTRICT COURT
17 NORTHERN DISTRICT OF CALIFORNIA
18 SAN FRANCISCO DIVISION

19 ORACLE USA, INC., *et al.*,
20 Plaintiffs,
21 v.
22 SAP AG, *et al.*,
23 Defendants.

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

**PLAINTIFFS' ADMINISTRATIVE
MOTION FOR CLARIFICATION OF
MAY 5, 2008 CASE MANAGEMENT
ORDER**

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

PLAINTIFFS' ADMINISTRATIVE MOTION FOR CLARIFICATION OF MAY 5, 2008 CASE
MANAGEMENT ORDER

1 **I. INTRODUCTION**

2 Pursuant to Section E of this Court’s May 5, 2008 Case Management and Pretrial
3 Order (“May 5 Case Management Order”) and Civil Local Rule 7-11, Plaintiffs Oracle USA,
4 Inc., Oracle International Corporation, and Oracle EMEA Ltd. (“Oracle” or “Plaintiffs”) ask the
5 Court to clarify the meaning of the May 5 Case Management Order’s reference to 350 deposition
6 hours. After meeting and conferring on the issue, as set forth in the accompanying Declaration
7 of Geoffrey M. Howard in Support of Plaintiffs’ Administrative Motion for Clarification of May
8 5, 2008 Case Management Order (“Howard Decl.”), Oracle informed Defendants SAP AG, SAP
9 America, Inc., and TomorrowNow, Inc. (“Defendants,” and together with Oracle, the “Parties”)
10 that it would seek the Court’s guidance on this dispute via administrative motion. Defendants
11 declined to stipulate.

12 The Parties disagree as to whether the Court’s reference to “350 deposition hours”
13 in its May 5 Case Management Order includes expert deposition time. Oracle believes it does
14 not, and has conducted its deposition strategy accordingly. As Defendants now contend that it
15 does, Oracle seeks the Court’s immediate guidance.

16 **II. BACKGROUND AND ARGUMENT**

17 On May 12, 2009, the Parties filed a joint administrative motion, accompanied by
18 a stipulation, to modify the case scheduling order. As part of that motion, the Parties requested
19 that the 350 deposition hours per side currently permitted by the Court’s May 5 Case
20 Management Order be expanded to 450 hours.

21 The Parties negotiated the language of the joint motion over a period of seven
22 weeks, exchanged over ten drafts, and had more than ten phone calls to meet and confer about it.
23 *See* Howard Decl., ¶ 6.

24 Half an hour after Oracle filed the joint motion and stipulation on behalf of the
25 Parties, Defendants took the position, for the first time, that the original 350-hour deposition
26 limit includes time for expert depositions, not just fact depositions. *See id.*, ¶ 7, Ex. A. Oracle
27 disagrees and seeks clarification from the Court regarding its order.

1 As the Court will recall, this case was originally assigned to Judge Jenkins. At
2 the initial Case Management Conference in September 2007, the Parties discussed with Judge
3 Jenkins their mutual belief that the standard 10 depositions of fact witnesses permitted by the
4 Federal Rules would be far too few for this case. Judge Jenkins then set the fact deposition limit
5 at 20 per side, indicating that the Parties could seek additional depositions if necessary. *See*
6 September 25, 2007 Case Management Order, Docket Item 50.

7 By the time the case was reassigned to this Court, the Parties again agreed that 20
8 fact witness depositions would be insufficient. In their joint Case Management Conference
9 Statement, each side provided a proposal for expanding the limit. Oracle suggested 80 *fact*
10 witness depositions, while Defendants suggested 250 *fact* deposition hours. Both sides explicitly
11 described their proposals in terms of fact depositions only. *See* Joint Case Management
12 Conference Statement at 14-15, 18, Docket Item 76.

13 At the April 24 Case Management Conference itself, the Parties discussed their
14 respective proposals with the Court. Although the hearing was not recorded or transcribed,
15 Oracle's recollection is that the discussion was in the context of fact discovery, and that no one
16 suggested that the deposition hours proposals should include expert depositions as well. *See*
17 Howard Decl., ¶ 3.

18 After the hearing, the Court issued its May 5 Case Management Order, which
19 states that each side may take 350 hours of depositions. *See* May 5 Case Management Order at
20 1, Docket Item 84. The Order does not describe the 350 hours as fact or expert depositions. In
21 keeping with the Parties' proposals, which had only discussed fact depositions, as well as the
22 context of Judge Jenkins's original order and the discussion with this Court at the April 24 Case
23 Management Conference, Oracle interpreted the 350 hours to refer to fact depositions. *See*
24 Howard Decl., ¶ 4.

25 The timing of expert witness disclosures, which take place on June 1, only 18
26 days before the close of fact discovery, also supports Oracle's interpretation. Until that date,
27 neither Party will know how many testifying experts the other Party will disclose. It would be
28 illogical for the Parties to hold in reserve some portion of their deposition time for an unknown

1 number of expert depositions, until June 1. If, on the other hand, the 350 hours are for fact
2 depositions only, then the timing of expert disclosures and depositions makes sense.

3 Based on this interpretation, Oracle has been using its 350 hours for fact witness
4 depositions, and is nearing its limit. *See id.*, ¶¶ 4-5. Several important fact witnesses, including
5 third parties, remain before the close of fact discovery on June 19. *See id.*, ¶ 5.

6 The Parties' joint motion also reflects this understanding that additional hours
7 were needed for more fact discovery. For example, the motion states,

8 Because the Parties now agree that the post-litigation activity through October
9 31, 2008 – which Judge Laporte has noted is highly relevant – should be included
10 in this case, they also agree that some additional deposition time is needed relative
11 to the Parties' claims and defenses for that time period. Further, regardless of
12 whether they ultimately agree on an extrapolation methodology or stipulation
13 regarding TomorrowNow's software fixes, as described above, the Parties agree
14 that certain additional depositions of TomorrowNow's personnel should be
15 allowed for several issues, including allowing Oracle to better understand the
16 process by which TomorrowNow supported – and continued to support through
17 October 31, 2008 – its PeopleSoft, JD Edwards, and Siebel customers, including
18 SAP's decisions relevant to TomorrowNow's activities.

14 Joint Administrative Motion, Docket Item 304, at 6. Further, the Parties' stipulation describes
15 several additional specific fact witness depositions, including SAP Executive Board members
16 and key TomorrowNow personnel. *See Parties' Stipulation to Modify Case Scheduling Order*,
17 Docket Item 305, at 4-5.

18 Defendants now claim that expert deposition time must be included within the
19 existing 350-hour limit. *See Howard Decl.*, ¶ 7, Ex. A. After meeting and conferring, Oracle
20 informed Defendants that it would raise this issue with the Court. *Id.*, ¶ 8, Ex. B.

21 Oracle understands that the Court has scheduled a CMC for May 28, but because
22 numerous fact depositions are already scheduled between now and June 19 (and more are being
23 scheduled still), Oracle saw no choice but to bring this dispute to the Court's attention before
24 then. Oracle simply does not have sufficient hours left to complete fact and expert depositions
25 within the 350-hour limit. *See id.*, ¶ 5. Indeed, enough fact issues remain that the Parties agreed
26 in their joint motion and stipulation that another 100 deposition hours were warranted – and,
27 from Oracle's perspective at least, those 100 hours were intended and needed for fact witnesses
28 alone. While Oracle does not know how many experts Defendants will disclose on June 1, it

1 does not have enough of the original 350 hours remaining to accommodate expert depositions.

2 *See id.*

3 Accordingly, Oracle asks the Court to confirm, as soon as possible, the meaning
4 of the current 350-hour deposition limit.

5 **III. CONCLUSION**

6 For the foregoing reasons, Oracle respectfully requests that the Court confirm that
7 the May 5 Case Management Order's 350-hour deposition limit does not include expert
8 deposition time.

9 DATED: May 19, 2009

10 BINGHAM McCUTCHEN LLP

11 By: _____ /s/

12 Geoffrey M. Howard
13 Attorneys for Plaintiffs
14 Oracle USA, Inc., Oracle International
15 Corporation, and Oracle EMEA, Ltd.