Defendant Oracle Corporation's Statement re Disputed Issues

To aid the Court in its evaluation of the parties' competing proposals regarding the Case Management Order, Oracle submits the following statement.

Early Identification of Companies Likely to Testify: From Oracle's perspective, the most important disputed issue is whether, as Oracle proposes, plaintiffs should be required to identify by March 22, 2004, those organizations (e.g., corporations and government entities) that plaintiffs believe are likely to provide witnesses who would testify at trial on plaintiffs' behalf, live or by deposition. See Defendant's Proposed Paragraph 4.a.2. Plaintiffs resist this, and propose a combination of Rule 26(a) disclosures and identification of trial witnesses in late May.

Oracle's proposal is intended to give it a fair chance to catch up with the plaintiffs' eight month investigation of the proposed transaction, during which plaintiffs had both subpoena power and the cooperation of PeopleSoft, and to permit meaningful discovery on the core issue of market definition. In the Complaint, plaintiffs allege that customers of the alleged relevant products, "high-function" Human Resources Management and Financial Management Service software, "typically find that the set of vendors that can meet their requirements is limited to Oracle, PeopleSoft and … SAP." Complaint ¶ 9. We presume from this that plaintiffs will offer customer testimony to that effect. It is critical that Oracle have a fair chance to take discovery of such customers. It is also necessary for Oracle to know who the customers are so it can make arrangements to obtain testimony from similarly situated customers that have considered or selected vendors other than Oracle, PeopleSoft and SAP.

Given the ambiguous criteria offered in the Complaint to "identify" the affected customers, Oracle has no idea how many customers make up the buy-side of the putative relevant markets. That potential pool of customers is very large, however, perhaps thousands of customers. Oracle therefore cannot conduct discovery of all of them; it needs to limit the field. Furthermore, we are advised that plaintiffs had communications of one sort or another with over 100 third parties, obtained statements, testimony or declarations from many of them, and issued

dozens of Civil Investigative Demands. That also is too large a field to permit meaningful, let alone efficient, third party discovery. Oracle has therefore asked plaintiffs to identify the companies from which its witnesses are likely to come. This, we submit, is the first step in a meaningful third party discovery program.

As a practical matter Oracle must have the potential companies identified very soon. Oracle will not get eight months to obtain documents from those companies, as plaintiffs have had. Under the proposed schedule, Oracle will have from March 22, the date we propose for this disclosure, until the June 4 discovery cut-off. That means issuing subpoenas, negotiating and resolving disputes, obtaining the documents, reviewing the documents, and taking depositions must all be accomplished – for perhaps dozens of customers – in 11 weeks. That is ambitious by any standard. Plaintiffs' counterproposal, that Oracle gets Rule 26(a)-type disclosures of organizations "likely to have discoverable information that Plaintiffs may use," does not suffice. That presumably would be every customer plaintiffs have heard from, and perhaps others as well. The demands of this case require more structure than that. We are not asking plaintiffs to identify their actual trial witnesses now, but identifying the organizations from which they are likely to come is a reasonable first step in a program of expedited discovery.

Protective Order Issues: The parties' only disagreement regarding the terms of a protective order relates to whether two Oracle in-house attorneys who are counsel of record in this action, Ms. Dorian Daley and Mr. Jeff Ross, may have access to documents produced in the case, regardless of whether the documents are designated "Highly Confidential" by their owners. Oracle submits that all counsel of record should have access to all materials produced, both on an interim basis and for the duration of the case.

Ms. Daley and Mr. Ross are litigators who will take an active role in the defense of the action. They will be unable, as a practical matter, to participate in the defense of the action if they are not permitted to see documents designated "Highly Confidential." It is a reality of practice that virtually all important documents are so designated, rightly or wrongly. Therefore, a "two-tier" order under which they can see only some, but not "Highly Confidential"

documents, is no better than an order under which they can see nothing. We note that under the terms of the proposed protective order, Ms. Daley and Mr. Ross will be obligated to use information revealed to them only in connection with this litigation and not to disclose such information to any but designated individuals, and then only as necessary to defend the action. Oracle submits those obligations, which as officers of the Court Ms. Daley and Mr. Ross can be presumed to meet, adequately protect the interests of third parties.

Interrogatories: Oracle proposes that it be permitted to propound an initial set of interrogatories, a draft of which has been provided to plaintiffs' counsel, plus 15 additional interrogatories. Plaintiffs oppose this request and would limit Oracle to a total of 25 interrogatories, including sub-parts.

The Complaint in this action contains very ambiguous market definition and market structure allegations. It defines the alleged relevant market primarily with adjectives like "high-function," "multifaceted," and "most demanding." It omits allegations that are standard in merger cases, such as market shares. It includes wholly conclusory allegations, like the claim that "a significant number of customers … do not view SAP to be a viable substitute" for Oracle and PeopleSoft (Complaint ¶ 31), that are accompanied by no allegations of supporting facts. While this may suffice for notice pleading, clarification through discovery is essential.

In any ordinary action between private parties, the defendant could try to obtain detail regarding these allegations in various ways, perhaps most expeditiously by a Rule 30(b)(6) deposition of the plaintiff's corporate designee. That option is unavailable when the plaintiffs are a collection of governmental agencies. The only way Oracle can get plaintiffs to detail their allegations is by propounding interrogatories. Oracle therefore drafted a comprehensive set of contention interrogatories addressing what we regard as unanswered questions raised by the Complaint. (Plaintiffs' counsel was given a draft of those interrogatories on Monday, March 8, but did not have sufficient time to review them before the CMC statement needed to be finalized.)

Plaintiffs originally proposed an interrogatory limit of 15 per side, which they later amended to 15 for plaintiffs and 25 for defendant (including sub-parts). Oracle contends that is an inadequate number of interrogatories given the many ambiguities of the Complaint and Oracle's dependence on interrogatories as the only practical means to force plaintiffs to explain their contentions and gather evidence they deem supportive of them. We request the Court to permit Oracle to propound the set recently previewed with plaintiffs' counsel, plus 15 more.

Discount Request Forms and Related Materials: Plaintiffs propose a Paragraph 4.b.4 that would require Oracle to produce within 15 business days "all discount request forms, Executive Approval Forms, or other approval documents dated January 1, 2002 through the present relating to the sale of E Business Suite, Financial Management, or Human Resources software applications." This is tantamount to an order granting a motion to compel that has not been made, and with respect to a document request that has not been made in this litigation.

This relates to a dispute over Oracle's response to the "Second Request" the Department of Justice issued in the Hart-Scott-Rodino process. As Latham & Watkins was not involved in that process, we have only second-hand information about it. However, we are informed that Oracle declined to produce a group of documents that are a sub-set of those demanded by plaintiffs' proposed language on various grounds including burden, relevancy and inconsistency with prior Department of Justice positions. This issue evidently came to a head after Oracle had certified substantial compliance with the Second Request, and was never resolved.

Plaintiffs have now substantially expanded their request for these materials and are declining to use ordinary Rule 34 requests to obtain them. They want to bypass Rule 34, the ordinary processes for resolving disputes, and the necessity of a motion to compel. Oracle believes that is inappropriate. While some of the requested documents are properly discoverable, not all are, and in all events Oracle believes a Case Management Conference Order is not a vehicle for skirting the normal discovery processes.