1 2 3 4 5 6 7 8 9	BINGHAM McCUTCHEN LLP CHRISTOPHER B. HOCKETT (SBN 121539) GEOFFREY M. HOWARD (SBN 157468) HOLLY A. HOUSE (SBN 136045) ZACHARY J. ALINDER (SBN 209009) BREE HANN (SBN 215695) Three Embarcadero Center San Francisco, CA 94111-4067 Telephone: (415) 393-2000 Facsimile: (415) 393-2286 chris.hockett@bingham.com geoff.howard@bingham.com holly.house@bingham.com zachary.alinder@bingham.com bree.hann@bingham.com	JONES DAY ROBERT A. MITTELSTAEDT (SBN 060359) JASON McDONELL (SBN 115084) 555 California Street, 26 <sup>th</sup> Floor San Francisco, CA 94104 Telephone: (415) 626-3939 Facsimile: (415) 875-5700 ramittelstaedt@jonesday.com jmcdonell@jonesday.com  JONES DAY THARAN GREGORY LANIER (SBN 138784) JANE L. FROYD (SBN 220776) 1755 Embarcadero Road Palo Alto, CA 94303 Telephone: (650) 739-3939 Facsimile: (650) 739-3900 tglanier@jonesday.com jfroyd@jonesday.com
11	DORIAN DALEY (SBN 129049)	JONES DAY
	JENNIFER GLOSS (SBN 154227)	SCOTT W. COWAN (Admitted <i>Pro Hac Vice</i> ) JOSHUA L. FUCHS (Admitted <i>Pro Hac Vice</i> )
12	500 Oracle Parkway M/S 5op7	717 Texas, Suite 3300
13	Redwood City, CA 94070	Houston, TX 77002 Telephone: (832) 239-3939
14	Telephone: (650) 506-4846 Facsimile: (650) 506-7114	Facsimile: (832) 239-3600 swcowan@jonesday.com
15	dorian.daley@oracle.com jennifer.gloss@oracle.com	jlfuchs@jonesday.com
16		Attorneys for Defendants SAP AG, SAP America, Inc., and
17	Attorneys for Plaintiffs Oracle Corporation, Oracle USA, Inc.,	TomorrowNow, Inc.
18	and Oracle International Corporation UNITED STATES	DISTRICT COURT
19	NORTHERN DISTR	ICT OF CALIFORNIA ISCO DIVISION
20	DIN THE NO.	BCC BIVISION
21	ORACLE CORPORATION, a Delaware corporation, ORACLE USA, INC., a Colorado	Case No. 07-CV-1658 (MJJ)
22	corporation, and ORACLE INTERNATIONAL CORPORATION, a California corporation,	MANAGEMENT CONFERENCE
23	Plaintiffs,	STATEMENT
24	v.	F.R.C.P. 16 and Civil L.R. 16-10
25	SAP AG, a German corporation, SAP AMERICA, INC., a Delaware corporation,	Date: February 12, 2008
25 26	TOMORROWNOW, INC., a Texas corporation and DOES 1-50, inclusive,	Time: 2:00 p.m. Place: Courtroom 11, Floor 19 Judge: Honorable Martin J. Jenkins
27	Defendants.	
28		

Case No. 07-CV-1658 (MJJ)

1	Pursuant to Civil Local Rule 16-10(d), plaintiffs Oracle Corporation, Oracle USA,	
2	Inc., and Oracle International Corporation (collectively, "Oracle" or "Plaintiffs") and Defendants	
3	SAP AG, SAP America, Inc. ("SAP America"), and TomorrowNow, Inc. ("TomorrowNow")	
4	jointly submit this Supplemental Case Management Conference Statement in advance of the	
5	February 12, 2008 Supplemental Case Management Conference. (SAP AG and SAP America	
6	are collectively referred to as "SAP" and, with TomorrowNow, as "Defendants." Plaintiffs and	
7	Defendants are collectively referred to as the "Parties.")	
8	1. Developments	
9	The following developments have occurred since the last case management	
10	conference statement filed by the Parties.	
11	a. Joint Statement of Developments	
12	(1) Appointment of Discovery Master	
13	On January 10, 2008, the Court appointed the Hon. Charles A. Legge (Ret.) as	
14	Special Discovery Master for this case. On January 14, 2008, the Parties conferred with Judge	
15	Legge and set a first round of discovery motions for hearing on February 13, 2008. Additional	
16	discovery hearings have been set for approximately every three weeks for the remainder of fact	
17	discovery, if necessary. The Parties have agreed that Bingham McCutchen will file Judge	
18	Legge's Reports and Recommendations with the Court.	
19	(2) Document Production and Written Discovery	
20	Documents: To date, Oracle has served 95 Requests for Production ("RFPs") on	
21	TomorrowNow and 64 RFPs each on SAP AG and SAP America. Defendants, following meet	
22	and confer efforts, served their supplemental responses to these RFPs on January 18, 2008. To	
23	date, TomorrowNow has served 118 RFPs on Oracle. Oracle, following meet and confer	
24	discussions, served its supplemental responses to these RFPs on October 26, 2007.	
25	The Parties have commenced the production of documents and electronic records.	
26	They have engaged in extensive meet and confer discussions on RFP responses and document	
27	production and continue to make progress towards resolution of certain issues, though others will	
28	require resolution by discovery motion before Judge Legge.  1 Case No. 07-CV-1658 (MJJ)	

1	Written Discovery: Oracle has served 44 interrogatories on TomorrowNow, 8 on
2	SAP AG, and 6 on SAP America. TomorrowNow served its responses and supplemental
3	responses to Oracle's interrogatories on October 26, 2007 and January 15 and 17, 2008. SAP
4	AG and SAP America served their amended responses on January 15, 2008. TomorrowNow has
5	served 15 interrogatories on Oracle, which served its amended responses on October 26, 2007.
6	The Parties have engaged in extensive meet and confer discussions on interrogatory responses
7	and continue to make progress towards resolution of certain issues, though others will require
8	resolution by discovery motion before Judge Legge.
9	Oracle has served 154 requests for admission on TomorrowNow, which served its
10	responses on October 29, 2007. The Parties have completed their meet and confer discussions as
11	to these requests for admission.
12	(3) Depositions
13	Oracle has served two notices of deposition on TomorrowNow under Rule
14	30(b)(6), and several days of deposition testimony of TomorrowNow designees have taken place.
15	Additional days are scheduled for February. Oracle expects soon to notice additional Rule
16	30(b)(6) and individual depositions. Defendants have not yet noticed any depositions.
17	(4) Third Party Discovery
18	Oracle has served subpoenas on 45 third parties. To date, eight third parties have
19	produced documents for a total of approximately 4,000 pages. Defendants expect to serve some
20	third party subpoenas shortly. No third party depositions have occurred yet.
21	(5) Alternative Dispute Resolution
22	The Parties disagree on whether Alternative Dispute Resolution ("ADR") is
23	appropriate at this time. The Parties discuss their respective positions below.
24	b. Oracle's Separate Statement of Developments
25	After setting provisional discovery limits and a cut-off date at the September 2007
26	case management conference, the Court asked the Parties to report back on the progress of
27	discovery, and whether it appeared that additional discovery or more time would be required.
28	Oracle is not seeking expanded discovery limits or additional time now, but advises the Court $2 \hspace{1cm} \text{Case No. 07-CV-1658 (MJJ)}$

1	that is likely to do so in approximately 60 days. In accordance with the Court's request, Oracle	
2	reports below on several developments in the case, including some which bear on Oracle's likely	
3	need for additional discovery and time:	
4	(1) Report on Progress of Discovery	
5	(a) Discovery Has Revealed the Basis for New Claims and an Amended Complaint	
6	Virtually all discovery sought and received thus far has centered on Oracle's	
7	current allegations. However, in the process of conducting this discovery, Oracle has uncovered	
8	a broader program of copyright infringement that is entirely different from the scheme alleged in	
9	the current complaint.	
10	Based on this evidence, Oracle is gathering additional facts and analyzing the	
11	need to file an amended complaint that will encompass these new claims. It expects soon to	
12	share a draft amended complaint with Defendants, and to seek their agreement to allow the	
13	filing. If Defendants do not agree, Oracle will seek leave from the Court to file the amended	
14	complaint.	
	Complaint.	
15	(b) <b>Defendants Have Not Complied with Their Discovery</b>	
15 16	(b) <b>Defendants Have Not Complied with Their Discovery Obligations</b>	
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useless to	Oracle.
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3	SAS database, described by their counsel at the September 2007 CMC as easily producible and	
4	as the best source of information with "all the answers" about TomorrowNow's downloading	
5	and business practices. As stated above, this database contains an enormous amount of data in a	
6	customized format that requires expert assistance and special programming to use or review.	
7	Further, because Defendants have blanket-designated the entire SAS database as Highly	
8	Confidential under the Protective Order, Oracle's counsel cannot consult with knowledgeable	
9	Oracle personnel about any of the data and documents in the database. This blanket designation,	
10	combined with the size of the database and its late production, has significantly complicated and	
11	slowed Oracle's case preparation.	
12	Fourth, Defendants have refused to produce to Oracle any documents relating to	
13	the United States Department of Justice investigation of Defendants' conduct toward Oracle,	
14	including refusing to produce any documents provided by Defendants to the government in	
15	connection with that investigation. This refusal is legally unjustified, and Oracle believes	
16	Defendants have withheld relevant documents from Oracle that they have already supplied to the	
17	government.	
18	Finally, Oracle requested in July 2007 that TomorrowNow produce images of its	
19	servers used to download and store materials from Oracle. Oracle has only recently learned that,	
20	in May 2007, TomorrowNow took an image of the server used to store its libraries of materials	
21	downloaded from Oracle, but was subsequently unable to restore that image for production.	
22	Having now solved that restoration problem, TomorrowNow recently notified Oracle that its	
23	production of the underlying download library files will take approximately two additional	
24	months to complete. These files, which Oracle expects to reveal TomorrowNow's activity on	

Third, Defendants were late in producing a complete and usable version of the

(c) Oracle's Need for Additional Discovery

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Oracle's website, are estimated to contain 5 terabytes of complex, technical data. Reviewing this

vast amount of data once it is received will also take significant time, particularly if Defendants

also blanket-designate it as Highly Confidential.

1	The discovery Oracle has been able to take indicates that it will need more	
2	extensive discovery to prepare its case for trial.	
3	For example, Oracle took the deposition of TomorrowNow on several key	
4	allegations, including how TomorrowNow's personnel accessed Oracle's Customer Connection	
5	website, how Oracle's materials were downloaded, and how TomorrowNow used the	
6	downloaded material in its business. On this important last question, the TomorrowNow-	
7	designated witnesses explained that Oracle would have to take depositions of at least 27	
8	developers at TomorrowNow, as well as their managers and other personnel, to learn the	
9	specifics of what TomorrowNow did with Oracle's intellectual property. Oracle believes that it	
10	should be able to obtain much of this information through written discovery or Rule 30(b)(6)	
11	depositions, assuming Defendants comply with their discovery obligations. However, because it	
12	appears that TomorrowNow developers infringed Oracle's intellectual property on a daily basis	
13	over a course of many years, in ways that Oracle is only beginning to discover (and because	
14	Defendants have thus far refused to provide detailed and comprehensive written discovery	
15	responses on this topic), it appears likely that the current limit of 20 depositions per side will be	
16	insufficient for Oracle to gather the relevant facts it needs.	
17	Further, the discovery received to date shows that SAP AG and SAP America	
18	were substantially involved in TomorrowNow's downloading and other activities, and	
19	particularly in sales and marketing of services based on materials improperly taken from Oracle.	
20	As a result of this discovery, Oracle has identified more than five heavily-involved SAP AG and	
21	SAP America personnel whose depositions it will need to take.	
22	(d) Discovery Limits and Timeline	
23	For the foregoing reasons, Oracle believes it is likely that the current discovery	
24	limits and deadlines will need to be extended. Oracle proposes that the Court set a further Case	
25	Management Conference in approximately 60 days. By then, Oracle believes it will either have	
26	filed its motion to amend or the stipulated amended complaint. The Parties and the Court will	
27	also have the benefit of Judge Legge's ruling on a number of important discovery disputes.	
28	Further, Oracle will have had additional time to analyze the SAS database and should have  Case No. 07-CV-1658 (MJJ)	

TomorrowNow's production of download library files. Accordingly, at that time, Oracle expects 1 to be able to make specific proposals for extending the time and limits on discovery. 2 **Oracle Has Diligently Produced Its Documents** 3 **(2)** Oracle's production to date includes voluminous server log files that it believes 4 reflect Defendants' access to and downloading of Software and Support Materials from Oracle's 5 Customer Connection support system, as well as the customer contract files associated with the 6 customers Oracle has identified, to date, whose credentials Defendants used to download Oracle 7 Software and Support Materials. In addition, Oracle, like TomorrowNow, has begun to produce 8 individual custodian email and other files. It is in the process of producing contracts for a second 9 round of approximately 250 additional customers and is gathering and reviewing a significant 10 volume of materials for approximately 188 custodians. 11 **(3) ADR** 12 Oracle believes ADR is premature at this time. As described more fully above, 13 Oracle has not completed its analysis of Defendants' conduct; further, Oracle believes that it has 14 additional claims against Defendants. Accordingly, until these issues are more fully explored, 15 Oracle believes ADR would be premature and unlikely to be productive. 16 **SAP's Separate Statement of Developments** 17 c. At the September case management conference, the Court gave the parties over 18 ten months for fact discovery and increased the limits on the numbers of depositions and 19 interrogatories the parties could use. Now, Oracle asks the Court to delay the schedule and to 20 increase the burden and expense of this case by expanding discovery, but only after waiting 21 another sixty days to see just how long and how much. This request should be refused. 22 Oracle claims to need more time and tools for discovery, yet it has barely used 23 any of the depositions permitted by the Court (Oracle will have taken only five depositions, at 24 most, before the supplemental case management conference) and months remain before fact 25 discovery closes. Oracle claims to need more time to present a further amended complaint, yet it 26 has not provided even the barest description of its supposed new claims, either to the Court or to 27 Defendants. While there may be some discovery disputes (which Judge Legge will handle), and 28 Case No. 07-CV-1658 (MJJ)

1	Oracle may want to take some follow-up depositions, no developments have occurred which	
2	justify changing the case schedule or discovery limits.	
3	In fact, Oracle's complaints about Defendants' discovery responses lack merit.	
4	Defendants have already produced hundreds of thousands of pages of numbered documents (and	
5	will have produced over 700,000 pages by the supplement case management conference) and	
6	email files of most of the "priority" custodians identified by Oracle. Apart from the numbered	
7	documents, Defendants have produced terabytes of electronic data, in "native format", including	
8	its customer service databases (done by early November 2007) and materials downloaded for	
9	TomorrowNow customers.	
10	As discussed at the initial case management conference, this case is properly	
11	about the nature and extent of TomorrowNow's downloads, whether they were improper or	
12	unlicensed, and the harm, if any, Oracle suffered as a result. Defendants have produced what	
13	Oracle needs to assess and pursue its claims. Yet, Oracle to this day has failed even to identify	
14	the alleged improper downloads, produce all the licenses that may (or may not) support its claim	
15	that downloads were improper, or substantiate its alleged damages. As a result, Defendants have	
16	been forced to move to compel Oracle to provide such basic information as the alleged	
17	copyrighted works at issue, financial information (such as Oracle's profit margins on service)	
18	underlying its unspecified damage claim, and about Oracle's dealings with similarly situated	
19	third party service providers other than TomorrowNow. (Defendants address discovery disputes	
20	here only because Oracle asserts that they justify delaying this case and further expanding	
21	discovery limits. The Court has appointed Judge Legge to deal with such disputes, and the first	
22	hearing is scheduled for February 13, the day after the supplemental case management	
23	conference. Defendants will leave the full response to Oracle's complaints about discovery (and	
24	the pursuit of discovery relief against Oracle) to the process directed by the Court.)	
25	Defendants have taken the Court's schedule and discovery limits seriously, and	
26	are committed to completing fact discovery and this case on the schedule set by the Court.	
27	Oracle does not appear to share that commitment. Defendants respectfully suggest that the	
28	Court refer this matter to a settlement conference or mediation within the next 45 days, as the  Case No. 07-CV-1658 (MJJ)	

1	Court considered at the initial case ma	magement conference and as is typical in higation. The
2	involvement of a third party will provi	ide a useful opportunity to Oracle to articulate and quantify
3	its claims.	·
<b>4 5</b>	DATED: January 29, 2008	BINGHAM McCUTCHEN LLP
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7		By: Christopher B. Hockett
9	DATED: January 29, 2008	Attorneys for Plaintiffs Oracle Corporation, Oracle International Corporation, and Oracle USA, Inc.
10	5711ED. January 25, 2000	JONES DAY
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12		By: Robert Mithelstaelt /801
13 14		Robert A. Mittelstaedt Attorneys for Defendants SAP AG, SAP America, Inc.,
15		and TomorrowNow, Inc.
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