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 TomorrowNow, Inc.

18 UNITED STATES DISTRICT COURT  
 19 NORTHERN DISTRICT OF CALIFORNIA  
 20 SAN FRANCISCO DIVISION

21 ORACLE CORPORATION, a Delaware  
 corporation, ORACLE USA, INC., a Colorado  
 22 corporation, and ORACLE INTERNATIONAL  
 CORPORATION, a California corporation,  
 23

Plaintiffs,

24 v.

25 SAP AG, a German corporation, SAP  
 AMERICA, INC., a Delaware corporation,  
 26 TOMORROWNOW, INC., a Texas corporation,  
 and DOES 1-50, inclusive,  
 27

Defendants.  
 28

Case No. 07-CV-1658 (MJJ)

**JOINT CASE MANAGEMENT  
 CONFERENCE STATEMENT**

F.R.C.P. 16 and Civil L.R. 16-10

Date: September 4, 2007  
 Time: 2:00 p.m.  
 Place: Courtroom 11, Floor 19  
 Judge: Honorable Martin J. Jenkins

Case No. 07-CV-1658 (MJJ)

1 Plaintiffs Oracle Corporation, Oracle USA, Inc. and Oracle International  
2 Corporation (collectively, “Oracle” or “Plaintiffs”) and Defendants SAP AG, SAP America, Inc.  
3 (“SAP America” ) and TomorrowNow, Inc. (“TomorrowNow,” and collectively with SAP AG  
4 and SAP America, “SAP” or “Defendants,” and together with Oracle, the “Parties”) jointly  
5 submit this Case Management Conference Statement in advance of the September 4, 2007 Case  
6 Management Conference.

7 **1. Jurisdiction And Service**

8 This action arises under the Federal Copyright Act, 17 U.S.C. §§ 101 *et seq.*, and  
9 the Computer Fraud and Abuse Act, 18 U.S.C. §§ 1030 *et seq.* Accordingly, this Court has  
10 subject-matter jurisdiction over this action pursuant to 18 U.S.C. § 1030(g), 28 U.S.C. § 1331,  
11 and 28 U.S.C. § 1338. This Court has supplemental subject-matter jurisdiction over the pendent  
12 state law claims under 28 U.S.C. § 1367. The parties are not aware of any issues with respect to  
13 personal jurisdiction or venue. All named Defendants have been served and have answered the  
14 First Amended Complaint. Oracle is not currently aware of the names or capacities of any Doe  
15 Defendants, but will add and serve any such Defendants promptly upon discovering their  
16 identities. Defendants reserve the right to challenge any such proposed amendment.

17 **2. Facts**

18 **a. Oracle’s Statement**

19 In late 2006, Oracle discovered a pattern of massive downloads from supposed  
20 customers on Oracle’s customer support website for its PeopleSoft and J.D. Edwards (“JDE”)   
21 product lines. That website, called Customer Connection, is the entry point for Oracle licensed  
22 customers with active support agreements to access and download a wide array of support  
23 materials related to the customer’s licensed software applications. These materials include  
24 program updates, software updates, bug fixes, patches, custom solutions, and instructional  
25 documents – all copyrighted by Oracle – across the entire PeopleSoft and JDE family of software  
26 products (the “Software and Support Materials”).

27 Oracle traced this unusual downloading activity directly to SAP, Oracle’s largest  
28 competitor in the enterprise software applications industry. Over the course of several months,

1 SAP had illegally downloaded over 10,000 copyrighted Software and Support Materials from  
2 Oracle to use with its customers and to recruit new ones. Some of these materials consist of  
3 proprietary software code made available only to Oracle’s paying customers. Other materials  
4 consist of copyrighted instructional “solution” documents. In one example detailed in the First  
5 Amended Complaint, SAP copied a document solution created by Oracle related to a software  
6 fix for the change in daylight savings time, affixed its own logo on the document, and distributed  
7 it to its own customers.

8 Oracle filed its original Complaint on March 22, 2007. After it obtained  
9 copyright registrations related to the underlying downloaded Software and Support Materials,  
10 Oracle filed the operative First Amended Complaint on June 1, 2007. The First Amended  
11 Complaint alleges ten causes of action against the Defendants:

- 12 (1) Copyright infringement (17 U.S.C. § 106);
- 13 (2) Violations of the Computer Fraud and Abuse Act (18 U.S.C. §§  
14 1030(a)(2)(C), (a)(4) & (a)(5));
- 15 (3) Violations of the Computer Data Access and Fraud Act (California  
16 Penal Code § 502);
- 17 (4) Breach of contract;
- 18 (5) Intentional interference with prospective economic advantage;
- 19 (6) Negligent interference with prospective economic advantage;
- 20 (7) Unfair competition;
- 21 (8) Trespass to chattels;
- 22 (9) Unjust enrichment; and
- 23 (10) For an Accounting.

24 Through these claims, Oracle seeks relief as stated in Section 11 below.

25 On July 2, 2007, the Defendants answered the First Amended Complaint and  
26 conducted a number of conference calls related to the Answer. The Answer admits some of  
27 Oracle’s allegations and denies others. For example, the Defendants concede that “certain  
28 downloads took place that...may have erroneously exceeded the customer’s right of access,” and  
that the Daylight Savings Time solution on their website is “substantially similar and in some

1 instances identical to Oracle’s DST Solution.” Answer at ¶¶ 2 & 87.

2 SAP has made other admissions through its post-litigation conduct.

3 TomorrowNow’s CEO Andrew Nelson responded to Oracle’s Complaint by defending the  
4 downloading business model as entirely “legal” and “appropriate”; indeed, the highest day of  
5 SAP downloading occurred a week after Oracle filed its Complaint. Subsequently, however,  
6 SAP stopped all downloads and has now revealed that it has revamped its policies to permit  
7 downloading only at its customer locations, with a TomorrowNow employee to “facilitate” the  
8 downloads. These course corrections have slowed the preservation negotiations and initial  
9 discovery process, but also speak to the merits of Oracle’s underlying allegations.

10 The evidence of unauthorized downloading detailed in Oracle’s First Amended  
11 Complaint is likely only the tip of the iceberg. Oracle’s best records cover only a period of a few  
12 months, but SAP’s own public statements suggest that SAP downloaded Oracle’s intellectual  
13 property over a period of years. If true, the actual scope of SAP’s unauthorized taking may  
14 exceed by many times the numbers reflected in the First Amended Complaint. Oracle expects  
15 difficulty in determining the actual scope of SAP’s misconduct, in part because SAP did not have  
16 a policy of preserving the records of its access to, and taking from, Oracle’s computer systems.

17 Faced with this undeniable evidence of unauthorized taking, much of which it has  
18 admitted as inappropriate, in its statement below SAP focuses on proposed discovery restrictions,  
19 and urges forced settlement talks and an early trial date. In doing so, SAP tries to change the  
20 subject in two ways with one obvious goal: to make this case go away without meaningful  
21 discovery into what it really did.

22 First, SAP states, without any supporting evidence, that SAP America and SAP  
23 AG never received any of the illegally downloaded Software and Support Materials. Based on  
24 this questionable assertion, SAP contends that discovery should focus only on TomorrowNow’s  
25 misconduct and it makes no allowance for the time-consuming international discovery that will  
26 uncover what SAP knew and when it knew it. However, the underlying assertion is both  
27 irrelevant and suspect. It is irrelevant because, as explained below, whether SAP America and  
28 SAP AG received the actual downloaded material or not, they directed, benefited from, and must

1 answer for the conduct of their subsidiary. It is suspect because it rests on the promise that SAP  
2 followed a policy not to share downloaded material – the same type of policy that SAP breached  
3 when it downloaded the materials in the first place.

4 This assertion is part of a strategy by corporate parents SAP AG and SAP  
5 America to distance themselves from TomorrowNow. For example, Defendants’ Answer states:  
6 “TN (not SAP America or SAP AG) employees, acting on behalf of TN’s customers,  
7 downloaded information from Oracle’s support website....” Further, during a July 2, 2007  
8 conference call, SAP AG’s CEO, Henning Kagermann, stated: “[W]e believe that SAP did not  
9 have access to Oracle materials downloaded by TomorrowNow,” and later, “[T]his is something  
10 which was done by employees of TomorrowNow and not by employees of SAP.”

11 Despite these attempts to dissociate SAP from TomorrowNow, SAP is  
12 responsible for the acts of TomorrowNow, a wholly-owned subsidiary, as to which SAP  
13 admittedly holds “all the rights and authorities that are commensurate with that 100%  
14 ownership.” Answer, ¶ 26. It now appears that SAP orchestrated a scheme – likely dating at  
15 least to SAP AG’s acquisition of TomorrowNow in January 2005 – to illegally copy and  
16 competitively misuse Oracle’s Software and Support Materials. These illegally downloaded  
17 materials allowed SAP to offer cut-rate support services to lure Oracle’s current and potential  
18 customers over to SAP as part of SAP’s well-publicized “Safe Passage” program. Indeed, as  
19 SAP AG’s pre-litigation statements make clear, TomorrowNow served as the lynchpin of SAP’s  
20 “Safe Passage” marketing campaign – designed by SAP AG for the express benefit of SAP AG’s  
21 business. For example, SAP America’s website promises that “SAP and TomorrowNow can cut  
22 your maintenance costs by as much as 50% through 2015,” and elsewhere says that “Safe  
23 Passage maintenance and support are delivered worldwide through TomorrowNow.”

24 SAP AG’s recent public statements also confirm that it knew TomorrowNow’s  
25 business model involved illegal downloading and that SAP AG failed to stop it. For example,  
26 upon SAP AG’s acquisition of TomorrowNow, and after its due diligence, SAP AG says it  
27 identified a need to implement “extensive” new downloading policies at TomorrowNow –  
28 supposedly to outlaw the type of software theft in which TomorrowNow continued to engage.

1 Answer, ¶ 1. At the same time, however, SAP AG made the conscious decision to set up a  
2 “firewall” (subsequently clarified to mean just another “policy” to ensure the deliberate absence  
3 of any direct network connection between SAP AG and TomorrowNow) so that “SAP  
4 employees [did not] come into contact with the support materials [downloaded] by  
5 TomorrowNow on behalf of their customers....” July 2, 2007 SAP Conference Call. Also at the  
6 same time, SAP AG chose not to install any SAP management on site at TomorrowNow. It now  
7 appears that SAP AG did all of these things in order preserve its own deniability, while all along  
8 accepting the economic benefits of TomorrowNow’s illegal conduct.

9           Given that, by its own admission, SAP violated its own supposed policies  
10 regarding downloading Oracle’s intellectual property, there is reason to suspect that SAP also  
11 violated its “firewall” policy and transmitted Oracle’s intellectual property throughout the SAP  
12 organization. Discovery will confirm this further policy breach and what SAP did with these  
13 downloaded materials.

14           The second way SAP tries to change the subject is by advocating for an overly  
15 restrictive, and short, discovery process, followed by immediate mandatory ADR and a quick  
16 trial date (proposed for the exact time frame that SAP knows Oracle’s lead trial counsel will be  
17 preparing for a two-month trial across the country). Oracle addresses these issues later, in  
18 Sections 8 and 17.

19           SAP’s attempts to minimize the issues in this case, and to draw attention away  
20 from them, does not change the seriousness of Oracle’s allegations. On the one hand, SAP  
21 admits it improperly downloaded Oracle’s intellectual property, and reveals that the Department  
22 of Justice has opened a criminal investigation into the matter. On the other hand, SAP wants to  
23 sweep the whole affair under the rug by limiting discovery for a few short months to just its  
24 TomorrowNow subsidiary, by forcing early settlement talks without adequate discovery, and by  
25 asking the Court and Oracle to take its word that SAP America and SAP AG knew nothing about  
26 this activity and did not benefit from it. Oracle is entitled to know what happened, what SAP  
27 knew, when SAP knew it, and how much SAP has benefited from its scheme. This case involves  
28 tens, and perhaps hundreds, of thousands of illegally downloaded software and support materials

1 by SAP, directly implicating dozens of SAP employees and hundreds of customers all over the  
2 world. Oracle's allegations deserve careful, serious scrutiny and fair investigation, not the  
3 minimalist approach that SAP suggests below.

4 **b. Defendants' Statement**

5 Oracle's statement of "facts" is dramatic but inaccurate. It ignores that  
6 TomorrowNow, on behalf of its customers, had a right to access Oracle's Customer Connection  
7 website and to download support materials for the customers. It ignores that the downloads were  
8 performed by TomorrowNow, not SAP America or SAP AG. It ignores that none of the support  
9 materials downloaded by TomorrowNow were provided to SAP America or SAP AG. This case,  
10 in short, is about whether TomorrowNow exceeded its customers' rights in downloading certain  
11 materials. That is not a matter of "corporate theft on a grand scale", as Oracle says in its  
12 complaint, but a matter of contract interpretation.

13 The core facts are less dramatic than presented by Oracle. Briefly, when  
14 customers licensed software applications from PeopleSoft or J.D. Edwards (since acquired by  
15 Oracle), the customers also usually purchased service contracts so those companies would  
16 support and maintain the applications for an annual fee. The customers also obtained the right to  
17 support materials that are now included on Oracle's Customer Connection website. "Third party  
18 support" companies like TomorrowNow compete with Oracle in providing support and  
19 maintenance for legacy PeopleSoft and JDE applications, at a lower price than Oracle charges.  
20 Oracle has provided training to employees of third party support companies, including  
21 TomorrowNow, even after this case was filed. And, as Oracle conceded in its Amended  
22 Complaint but does not mention above, the companies that provide third party support may  
23 access Oracle's website to download support materials on behalf of their customers.

24 It should, then, be a fairly straightforward exercise to resolve this case in the "just,  
25 speedy and inexpensive" fashion mandated by Rule 1. Oracle claims to have identified specific  
26 downloads in alleged excess of the customers' rights, even to the level of providing numbers of  
27 alleged improper downloads for particular TomorrowNow customers. Oracle should identify  
28 those downloads, provide the contracts and licenses it claims demonstrate that the materials

1 downloaded were not authorized so that the parties can focus on determining the legality of  
2 particular downloads and the harm, if any, to Oracle. Other issues, such as the copyrightability  
3 and registration of the works identified in Oracle's Amended Complaint, can be pursued in  
4 parallel, without distracting from this primary focus. Defendants believe that it is in the interests  
5 of all concerned, including customers, for this case to be resolved promptly so that the parties  
6 and their customers may focus on their ongoing businesses and continued innovation, without the  
7 distraction of unnecessarily burdensome or prolonged litigation.

8 **c. Facts In Dispute**

9 Oracle's Statement of Facts in Dispute - As described above, the Defendants'  
10 Answer, filed on July 2, 2007, partially admitted certain allegations by Oracle. Nevertheless, a  
11 substantial number of disputed factual issues remain related to the downloading, copying and  
12 competitive misuse of Oracle's copyrighted materials, including but not limited to:

- 13 • The extent to which the Software and Support Materials were accessed,  
14 taken and used "inappropriately" as described by SAP AG's CEO during  
15 Conference Calls on July 2-3, 2007 or beyond the scope of any applicable  
16 license;
- 17 • Whether SAP can avoid being bound by the terms of use and other  
18 agreements associated with Oracle's customer support website;
- 19 • The extent to which SAP involved customers in the downloading or  
20 further use of the Software and Support Materials;
- 21 • The extent to which SAP AG and SAP America were involved, directly or  
22 indirectly, in accessing, downloading or using any Software and Support  
23 Materials;
- 24 • The extent to which SAP AG or SAP America knew, before during or  
25 after the acquisition of TomorrowNow, that TomorrowNow engaged in  
26 illegal downloading of Oracle's Software and Support Materials as part of  
27 its "business model";
- 28 • The extent of any breach of any SAP or SAP AG policies allegedly put in  
place to assure that no confidential material of Oracle reached SAP AG or  
SAP America;
- The extent to which the Defendants' access, downloading and use of  
Oracle's Software and Support Materials allowed SAP to compete more  
effectively against Oracle and interfere with Oracle's customer  
relationships;
- Whether the Defendants had authorization, permission or other right to  
access Oracle's computer systems, or exceeded any such authorization,



- 1 permission or other access right;
- 2 • Whether the Defendants intended to defraud Oracle through their access to
- 3 Oracle's computer system;
- 4 • Whether the Defendants knowingly caused the transmission of a program,
- 5 information, code or command and as a result caused damage to Oracle's
- 6 computer system;
- 7 • Whether the Defendants knowingly and fraudulently accessed and used
- 8 Oracle's computer services without permission;
- 9 • Whether the Defendants knowingly and fraudulently accessed, took,
- 10 copied or made use of programs, data, or files from Oracle's computer
- 11 system without permission;
- 12 • Whether the Defendants accessed, provided a means of access or assisted
- 13 in providing a means of accessing Oracle's computer system causing
- 14 damage to Oracle;
- 15 • The extent to which SAP created and used derivative works from Oracle's
- 16 Software and Support Materials;
- 17 • Whether the Defendants had authorization, permission or other right to
- 18 copy, create derivative works from, distribute, reproduce or publicly
- 19 display Oracle's Software and Support Materials;
- 20 • The extent to which the Defendants controlled, directed, induced or
- 21 materially contributed to the copying, distribution, public display or
- 22 creation of derivative works from Oracle's Software and Support
- 23 Materials;
- 24 • Whether the Defendants used Oracle's Software and Support Materials
- 25 without being the authorized and designated Oracle technical support
- 26 contact, without a legitimate business purpose or in ways other than in the
- 27 furtherance of a relationship with Oracle;
- 28 • Whether the Defendants interfered in Oracle's expectancy in continuing
- and advantageous economic relationships with current and prospective
- purchasers and licensees of Oracle's support services and software;
- The extent to which the Defendants took commercial advantage of
- Oracle's investment in its Software and Support Materials;
- Whether the Defendants intentionally interfered with Oracle's use or
- possession of its computer systems, including Customer Connection,
- causing damage to Oracle's computer systems; and,
- The extent of damages, including punitive damage, owing to Oracle
- arising from the Defendants' conduct as alleged in the First Amended
- Complaint.

27 Defendants' Statement of Facts in Dispute – The factual disputes in this case are

28 fairly summed up as follows:

- 1 • What, if any, materials were downloaded that went beyond  
2 TomorrowNow's customers' rights of access?
- 3 • What, if any, harm did Oracle suffer as a result of any improper  
4 downloads?
- 5 • Did the 44 works as to which Oracle obtained copyright registrations meet  
6 the requirements of copyrightability? Were the registrations proper and  
7 timely?

8 Properly focused discovery will provide the parties the opportunity to clarify,  
9 narrow and efficiently address the actual factual disputes.

### 10 **3. Legal Issues In Dispute**

- 11 • Whether Defendants or any one of them have engaged in copyright  
12 infringement;
- 13 • Whether Defendants or any one of them have violated the Computer  
14 Fraud and Abuse Act (18 U.S.C. §§ 1030(a)(2)(C), (a)(4) & (a)(5));
- 15 • Whether Defendants or any one of them have violated the Computer Data  
16 Access and Fraud Act (California Penal Code § 502);
- 17 • Whether Defendants or any one of them have and if so breached  
18 contractual obligations to Oracle;
- 19 • Whether Defendants or any one of them intentionally or negligently  
20 interfered with Oracle's prospective economic relationships with its  
21 current and/or potential customers;
- 22 • Whether Defendants' alleged access to Oracle's computer systems through  
23 Customer Connection constitutes trespass to chattels;
- 24 • Whether Defendants or any one of them have been unjustly enriched, and  
25 in what amount, through the activities alleged in the First Amended  
26 Complaint;
- 27 • Whether Oracle has been damaged, and in what amount, by Defendants'  
28 activities alleged in the First Amended Complaint;
- Whether Defendants have any defense to the allegations in the First  
Amended Complaint, including through any argument that their activities  
are permitted by any agreement; and,
- Whether the materials as to which Oracle claims copyright protection were  
properly copyrightable, properly and timely registered, and properly  
asserted and/or owned by Oracle.

### 4. **Motions**

*Motion for Preservation Order:* On April 30, 2007, Oracle filed a Motion for an  
Interim Preservation Order and a Meet and Confer Schedule for Final Preservation Order. When

1 this case was reassigned, the Motion was taken off-calendar. The parties met and conferred in an  
2 attempt to come to an agreed form of Preservation Order over the following months. Through  
3 this process, the parties reached preliminary agreement on a number of topics in the Stipulated  
4 Preservation Order relating to pre-litigation evidence, but some outstanding issues remain to be  
5 resolved. The parties anticipate either submitting a stipulated order or a mostly stipulated order  
6 with a short list of issues they will ask to Court to resolve. The parties also are continuing to  
7 discuss preservation of post-litigation evidence.

8 *Discovery Motions:* The parties anticipate potentially significant discovery  
9 motion practice.

10 *Summary Judgment Motions:* Defendants anticipate filing summary judgment or  
11 other dispositive motions at the appropriate time. Oracle will evaluate whether to file a motion  
12 for summary judgment or partial summary judgment after the parties have substantially  
13 completed discovery.

#### 14 **5. Amendment Of Pleadings**

15 Oracle filed the operative First Amended Complaint on June 1, 2007. Defendants  
16 answered on July 2, 2007. The parties have not yet determined whether any further amendment  
17 to add parties or claims, including counterclaims, will be necessary or appropriate. The parties  
18 reserve their rights to object to any proposed amendment of parties or claims, including  
19 counterclaims.

#### 20 **6. Evidence Preservation**

21 The parties have exchanged assurances of evidence preservation, and further have  
22 engaged in detailed meet and confer discussions regarding evidence preservation efforts. The  
23 parties resolved a number of issues in dispute and, as explained above in Section 4, have reached  
24 preliminary agreement on a number of the topics with the hope of finalizing the Stipulated  
25 Preservation Order, but some outstanding issues remain to be resolved. Discussions also  
26 continue regarding the proper preservation of evidence related to any ongoing downloading  
27 activities.

1           **7. Disclosures**

2           The parties exchanged their Initial Disclosures pursuant to Rule 26 of the Federal  
3 Rules of Civil Procedure on August 16, 2007.

4           **8. Discovery**

5           **a. Discovery Limits**

6           The parties disagree on the limits of discovery.

7                   **(1) Oracle's Proposal On Discovery Limits**

8           This case is extremely complex, with multiple Plaintiffs and multiple Defendants  
9 (one of which is overseas, and is to date unwilling to agree to streamlined discovery procedures,  
10 including access to their international deponents without going through formal Hague  
11 Convention procedures). The case involves an intricate scheme of unlawful downloading and  
12 other copying of works that the Defendants then used to compete against Oracle for its own  
13 customers. To date, Oracle has uncovered over 10,000 unlawful downloads from Defendants.  
14 The real number is likely multiples of that. Further, Oracle has so far uncovered 69 customers of  
15 the Defendants, that were implicated in the downloading, and which are necessary targets of  
16 discovery related to each of Oracle's claims. (Discovery may well reveal that SAP has interfered  
17 with many more than this initial list of 69 customers; SAP has sought discovery on its entire list  
18 of over 300 current and former customers.) SAP has already served 118 requests for production  
19 and Oracle expects that number to expand significantly. Discovery is complicated by several  
20 factors, including the multinational list of party custodians and computer systems and implicated  
21 customers, SAP's policy to not keep any records of its access to and downloading from  
22 Customer Connection, the massive number of downloads, and the complex nature of the  
23 analysis.

24           To prove its claims, Oracle will need discovery from the Defendants and from the  
25 customers.

26           Discovery from the Defendants will involve numerous corporate departments  
27 within each Defendant, and will involve at least dozens of individuals. Oracle will require  
28 depositions from multiple individuals in various departments within the defendant companies,

1 including information technology (responsible for building and maintaining the servers and  
2 network used to access Oracle’s systems and store and distribute the resulting downloaded  
3 material); the sales and marketing departments (who used the downloaded materials or the  
4 availability of them to lure customers as part of the Safe Passage program); support engineers  
5 (who stored, viewed, used and provided the downloaded materials directly to customers); support  
6 developers (who may have used the downloaded materials to prepare derivative works, such as  
7 the Daylight Savings Time document); finance personnel (who may have monitored and  
8 commented on the success or failure of TomorrowNow and Safe Passage); and the executive and  
9 management team at each SAP entity. This discovery will relate, in part, to the complex  
10 computer systems used to access Oracle’s Software and Support Materials, the records of that  
11 activity, and the methods used to store the materials within the SAP computer systems, and then  
12 to use the stolen materials to lure customers to SAP and TomorrowNow. Many of these  
13 depositions will take place in many foreign locations due to the dispersed nature of the SAP  
14 workforce.

15           Discovery from the customers is no less complex. Many of them are large, multi-  
16 national corporations, headquartered in various U.S. and foreign jurisdictions. Even if the list  
17 remains at 69, it will take a significant amount of time and effort to appropriately focus and take  
18 the document and deposition discovery to which Oracle is entitled to gain evidence for its claims.  
19 Further, the list could expand as SAP signs new customers. SAP recently informed Oracle that it  
20 has moved all of its downloading activities directly to the customer site with TomorrowNow  
21 employees to facilitate the downloading. SAP has, therefore, both made information about  
22 downloading more difficult to obtain (because it is in the hands of third parties) and made their  
23 customers even more central to the case going forward.           

24           Consistent with the size and complexity of the case, Oracle requests that the Court  
25 expand the discovery limits in this case. In an attempt to balance the need against the rigors and  
26 burdens of discovery, Oracle proposes the following:

27           **Depositions:** Oracle proposes an initial total limit of 80 depositions per side,  
28 without prejudice to any party to seek leave of court to obtain further depositions if discovery

1 reveals a reasonable need for them. Oracle's proposal of 80 depositions includes its estimates,  
2 based on the information currently available to it, for necessary party and third party depositions,  
3 as follows.

4 *Party depositions:* Oracle currently estimates a need for approximately 30 party  
5 depositions from SAP, divided between the various sales and marketing, executive, customer  
6 support, software development, information technology, and other departments at each of the  
7 three Defendants.

8 *Third party depositions:* SAP has put at issue over 300 customers through its first  
9 round of discovery requests. Oracle does not currently intend to depose each of them, but is  
10 unable without some foundational discovery to know the extent to which any of them may be  
11 implicated in SAP's downloading scheme or are the subject of SAP's interference using Oracle's  
12 Software and Support Materials. Oracle, however, has so far identified 69 customers whose  
13 credentials SAP used to download Software and Support Materials. Oracle may need more than  
14 one deposition from many of these customers to prove its claims. For example, SAP may have  
15 communicated with executives or internal support personnel in the Safe Passage sales process,  
16 but communicated with a different set of people when actually providing Oracle's Software and  
17 Support Materials to the customer once it had signed on with SAP, or when it obtained the  
18 customer's credentials to access Oracle's systems. For now, Oracle estimates the need for 50  
19 depositions from these customers, in addition to the estimated 30 party depositions, but reserves  
20 its right to seek an expanded limit as the case progresses and the facts warrant.

21 Oracle's proposal is based on the understanding that all 30(b)(6) depositions  
22 count as one deposition under the limit.

23 **Interrogatories:** Given the size and scope of the case, Oracle believes that 100  
24 interrogatories per side, with the ability of either party to seek leave of court to obtain further  
25 interrogatories if necessary, is an appropriate number. To date, Oracle has served 35 and  
26 Defendants have served 15 (many of which have multiple subparts).

27 **Requests For Production And Requests For Admission:** The parties agreed  
28 during the 26(f) Conferences that there should be no limit on Requests for Production or

1 Requests for Admission.

2 **(2) Defendants' Proposal On Discovery Limits**

3 Oracle's proposal on discovery "limits" would unduly delay and complicate the  
4 resolution of this case. Oracle asserts that dozens of customer depositions are required because  
5 TomorrowNow identified approximately 300 current and former customers and asked Oracle to  
6 identify any allegedly improper downloads as to those customers. Oracle is wrong, for two  
7 reasons. First, Oracle claims to be able to identify specific improper downloads by customer;  
8 discovery of and related to customers should be limited to customers as to which Oracle is  
9 willing to make and can document such an allegation. Second, and as Oracle knows,  
10 TomorrowNow maintains extensive records of the work done for each customer;  
11 TomorrowNow's records contain the information Oracle claims to need, and depositions from  
12 the customers themselves would be of little, if any, additional benefit sufficient to justify the  
13 burden on third parties.

14 This case is properly focused on a few and relatively straightforward issues.  
15 Defendants respectfully submit that it would be appropriate to at most double the normal limits  
16 on discovery by permitting 20 depositions and 50 interrogatories per side, and that the Court  
17 should direct the parties to focus preparation of this case as set forth in section 15, below. With  
18 clear guidance from the Court and appropriate limits on discovery, the parties and their counsel  
19 should be able to exercise restraint and focus on the most significant depositions. Should a party  
20 thereafter seek additional depositions, the Court will then have the benefit of a concrete record to  
21 help it determine if there is good cause to impose that burden.

22 **b. Discovery Timing**

23 **(1) Oracle's Position**

24 This case will require enough time for discovery to account for the complexity of  
25 the underlying key documents and the dispersed nature of the key facts. SAP's argument that  
26 discovery in this case is "typical" raises concerns that SAP does not fully appreciate the gravity  
27 of the conduct alleged in Oracle's Complaint. The parties have both served a first round of  
28 written discovery. SAP has served 118 document requests and Oracle has served 95. Both sides





1 information (“ESI”). The Parties agree to produce ESI as .Tiff files with the following additional  
2 metadata fields: (1) Beginning and Ending Control Number, (2) Beginning and Ending  
3 Attachment Number, (3) Document Type, (4) Date Sent and Received, (5) Date Modified, (6)  
4 Date Created, (7) Custodian, (8) Author, (9) Recipient, (10) CC, (11) BCC, (12) Title, and (13)  
5 Filename. The Parties agree that Excel spreadsheets, and similar materials that require native  
6 format to be reasonably usable, will be produced in native format. In addition, if there are  
7 additional documents that either party believes needs to be produced in native format for any  
8 reason, the parties agree to meet and confer to resolve that issue, and if not resolved, then to brief  
9 it to the Court.

10 **9. Class Actions**

11 This case is not a class action.

12 **10. Related Cases**

13 There are no known related cases.

14 **11. Relief**

15 Oracle’s Statement – Oracle seeks preliminary and permanent injunctive relief,  
16 return of stolen property, impoundment and/or destruction of all infringing materials, damages to  
17 be proven at trial, restitution, disgorgement, punitive damages, prejudgment interest, an  
18 accounting, fees and costs. Oracle is currently unaware of the amount of damages. Despite  
19 SAP’s apparent belief that Oracle should know every way in which SAP has used illegally  
20 downloaded material for competitive gain, the rules permit Oracle to conduct discovery to  
21 determine these facts and calculate its damages accordingly.

22 Defendants’ Statement – Oracle claims to be able to identify specific improper  
23 downloads, by customer. Oracle has filed an original and amended complaint, accompanied by  
24 substantial publicity, alleging it has been harmed. Defendants believe that Oracle’s  
25 unwillingness to say anything in this statement or its Initial Disclosures about its alleged  
26 damages, not even identifying any methodologies for determining *if* it has been damaged, is  
27 revealing, and violates Oracle’s obligations under the rules governing this statement and its  
28 Initial Disclosures.

1           **12. Settlement And ADR**

2           The parties disagree about whether it is useful to pursue an early settlement and  
3 whether they should participate in the Court’s mandatory ADR program.

4           Oracle’s Position – Oracle believes that it is premature to discuss settlement until  
5 it can determine the extent of SAP’s illegal taking and misuse of Oracle’s intellectual property,  
6 and the resulting damage to Oracle. Oracle agrees to participate in mediation at the appropriate  
7 time, but Oracle believes that forcing ADR before meaningful discovery and before both parties  
8 are ready makes little sense.

9           Defendants’ Position – As with most cases, prompt resolution of this case is in the  
10 best interests of all concerned. At a minimum, the Court’s ADR process will be a useful forum  
11 for Oracle to identify and quantify its alleged harm so that discovery, motions and trial can be  
12 appropriately focused. Defendants thus respectfully submit that the parties should be ordered to  
13 participate in mediation with an active or retired Magistrate Judge within the next few months,  
14 without delaying initial discovery which could be useful to that process.

15           There have been no ADR efforts to date, and the parties have not yet determined a  
16 specific ADR plan for the case.

17           **13. Consent To A Magistrate Judge For All Purposes**

18           Oracle consented to the Magistrate Judge. Defendants objected to this case being  
19 tried before a Magistrate Judge.

20           **14. Other References**

21           Because the parties anticipate discovery motion practice on some complex issues,  
22 they agree that reference to a Magistrate Judge or Special Master for discovery disputes is  
23 appropriate. The parties do not believe that any other references are necessary.

24           **15. Narrowing Of Issues**

25           Oracle’s Position – Oracle respectfully submits that it is premature to narrow  
26 issues, since discovery has yet to begin in earnest. SAP’s suggestions as to focusing discovery  
27 are focused on limiting Oracle’s claims to the damage caused by SAP’s unlawful downloading,  
28 but that is only one piece of Oracle’s Complaint, and SAP’s suggestion would not even work for

1 that small part. SAP ignores all of the cross-use of these materials with other customers, and  
2 numerous other classes of information that is only within SAP's possession, custody or control  
3 or that of its customers. Further, numerous other issues remain that SAP ignores, for example  
4 SAP's use of those materials to lure additional customers through its Safe Passage program, and  
5 SAP's creation and use of derivative materials, similar to the DST solution that SAP admits is  
6 substantially similar to Oracle's solution.

7 Defendants' Position – Defendants respectfully submit that discovery and motions  
8 in this case should be focused as follows:

9 (a) Oracle should promptly identify the customers as to which it contends  
10 TomorrowNow conducted improper downloads, identify the alleged improper downloads, and  
11 produce all licenses, contracts and other agreements which relate to the identified customers'  
12 right to access the Software and Support Materials at issue in this case.

13 (b) TomorrowNow will provide its database(s) of information showing  
14 services provided to those customers and those materials it can identify as having been  
15 downloaded for those customers.

16 (c) The parties will meet and confer to agree on the specific list of  
17 allegedly improperly downloaded materials.

18 (d) Oracle will provide a computation of any category of damages it  
19 claims and those documents and materials set forth in Rule 26(a)(1)(C) of the Federal Rules of  
20 Civil Procedure.

21 (e) Remaining discovery, motion practice and trial preparation will be  
22 focused on the alleged improperly downloaded materials, including, for example, any use or  
23 transmission of these materials, and Oracle's alleged damages.

## 24 **16. Expedited Schedule**

25 Oracle's Position – Oracle respectfully submits that this is not the type of case  
26 that can be handled on an expedited basis with streamlined procedures.

27 Defendants' Position – Discovery focused on the issues truly in dispute, coupled  
28 with Court-ordered mediation, will help expedite the case.

1           **17. Scheduling**

2           The parties propose different schedules, separated primarily by a difference of  
3 opinion regarding the necessary period for discovery and time for trial.

4           **a. Oracle's Proposed Case Schedule**

5           Oracle respectfully submits that due to the complexity and scope of the issues, the  
6 need to analyze voluminous and complex computer records, the multiple parties, the numerous  
7 nonparty witnesses, including at least 69 customer witnesses, and the difficulty of obtaining  
8 dozens of depositions around the world, the discovery period should be approximately 18  
9 months. In addition, as SAP is aware, Oracle's trial counsel is unavailable during the early to  
10 middle part of 2009 due to a 2 month trial in Delaware scheduled to begin in April 2009.

11 Accordingly, Oracle proposes the following schedule:

- 12           Trial – September 25, 2009
- 13           Pretrial Conference – September 18, 2009
- 14           Settlement Conference – August 18, 2009
- 15           Motion Cut-Off – June 12, 2009
- 16           Expert Discovery Cut-Off – May 6, 2009
- 17           Rebuttal/Supplement Disclosure and Reports – April 16, 2009
- 18           Expert Reports Due – April 2, 2009
- 19           Expert Designation – March 19, 2009
- 20           Non-Expert Discovery Cut-Off – March 5, 2009

21           **b. Defendants' Proposed Case Schedule**

22           Defendants believe that with appropriate focusing of discovery this case can be  
23 ready for trial by February 2009, if not earlier (which should then make it possible to  
24 accommodate the schedule of Oracle's trial counsel). Defendants propose the following  
25 schedule leading up to their proposed trial date:

- 26           Non-Expert Discovery Cut-Off – May 30, 2008
- 27           Expert Reports by Party With Burden of Proof – June 27, 2008 (experts

28 will be made available for deposition within three weeks of burden of proof reports on request of

1 the opposing party)

2 Rebuttal Expert Reports – August 15, 2008

3 Expert Discovery Cut-Off – September 12, 2008

4 Dispositive Motion Cut-Off – September 30, 2008

5 Motion hearing and pretrial conference dates would be set at the  
6 convenience of the Court’s calendar.

7 **18. Trial**

8 All parties have requested a trial by jury on all issues so triable. It is premature to  
9 estimate the length of trial.

10 **19. Disclosure Of Non-Party Interested Entities Or Persons**

11 **a. Oracle’s Disclosure**

12 Pursuant to Civil L.R. 3-16, the undersigned certifies that the following listed  
13 persons, associations of persons, firms, partnerships, corporations (including parent corporations)  
14 or other entities (i) have a financial interest in the subject matter in controversy or in a party to  
15 the proceeding, or (ii) have a non-financial interest in that subject matter or in a party that could  
16 be substantially affected by the outcome of this proceeding:

17 All shareholders of publicly held Oracle Corporation.

18 The members of the Board of Directors of Oracle Corporation: Larry Ellison, Jeff  
19 Henley, Charles Phillips, Safra Catz, Dr. Michael J. Boskin, Jeffrey Berg, Donald L. Lucas, Jack  
20 F. Kemp, Hector Garcia-Molina, H. Raymond Bingham, Naomi O. Seligman.

21 Pursuant to Federal Rule of Civil Procedure 7.1(a), the undersigned certifies that  
22 Oracle Corporation is a publicly held corporation that wholly owns, through one or more of its  
23 non-publicly held wholly-owned subsidiaries, both other Plaintiffs Oracle USA, Inc. and Oracle  
24 International Corporation. No other publicly held corporation owns 10% or more of the stock in  
25 either of the Plaintiffs.

26 **b. Defendants’ Disclosure**

27 Defendants timely made their disclosures under Local Rule 3-16 and Rule 7.1(a)  
28 of the Federal Rules of Civil Procedure on July 2, 2007 (see Docket Nos. 37, 38).

