

1 BINGHAM McCUTCHEEN LLP
CHRISTOPHER B. HOCKETT (SBN
2 121539)
GEOFFREY M. HOWARD (SBN 157468)
3 HOLLY A. HOUSE (SBN 136045)
ZACHARY J. ALINDER (SBN 209009)
4 BREE HANN (SBN 215695)
Three Embarcadero Center
5 San Francisco, CA 94111-4067
Telephone: (415) 393-2000
6 Facsimile: (415) 393-2286
chris.hockett@bingham.com
7 geoff.howard@bingham.com
holly.house@bingham.com
8 zachary.alinder@bingham.com
bree.hann@bingham.com
9

11 DORIAN DALEY (SBN 129049)
JENNIFER GLOSS (SBN 154227)
12 500 Oracle Parkway
M/S 5op7
13 Redwood City, CA 94070
Telephone: (650) 506-4846
14 Facsimile: (650) 506-7114
dorian.daley@oracle.com
15 jennifer.gloss@oracle.com
16

Attorneys for Plaintiffs
17 Oracle Corporation, Oracle USA, Inc.,
and Oracle International Corporation

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

JONES DAY
ROBERT A. MITTELSTAEDT (SBN 060359)
JASON McDONELL (SBN 115084)
555 California Street, 26th 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

JONES DAY
SCOTT W. COWAN (Admitted *Pro Hac Vice*)
JOSHUA L. FUCHS (Admitted *Pro Hac Vice*)
717 Texas, Suite 3300
Houston, TX 77002
Telephone: (832) 239-3939
Facsimile: (832) 239-3600
swcowan@jonesday.com
jlfuchs@jonesday.com

Attorneys for Defendants
SAP AG, SAP America, Inc., and
TomorrowNow, Inc.

Case No. 07-CV-1658 (MJJ)

**SUPPLEMENTAL JOINT CASE
MANAGEMENT CONFERENCE
STATEMENT**

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

Date: February 12, 2008
Time: 2:00 p.m.
Place: Courtroom 11, Floor 19
Judge: Honorable Martin J. Jenkins

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 *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

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
6 an Amended Complaint**

7 Virtually all discovery sought and received thus far has centered on Oracle's
8 current allegations. However, in the process of conducting this discovery, Oracle has uncovered
9 a broader program of copyright infringement that is entirely different from the scheme alleged in
10 the current complaint.

11 Based on this evidence, Oracle is gathering additional facts and analyzing the
12 need to file an amended complaint that will encompass these new claims. It expects soon to
13 share a draft amended complaint with Defendants, and to seek their agreement to allow the
14 filing. If Defendants do not agree, Oracle will seek leave from the Court to file the amended
15 complaint.

16 **(b) Defendants Have Not Complied with Their Discovery
17 Obligations**

18 Defendants have failed thus far to respond adequately to Oracle's discovery
19 requests. After many rounds of meeting and conferring, extensive correspondence, and amended
20 and supplemental responses by Defendants, Oracle has begun filing the necessary motions to
21 compel before Judge Legge. Some of the key discovery issues are summarized below.

22 First, as of today, SAP AG and SAP America have not produced any documents
23 in response to Oracle's RFPs. This failure has impaired Oracle's ability to gather relevant facts
24 and prepare its case.

25 Second, despite the Court's instruction to treat interrogatories as serious
26 foundational discovery, Defendants' responses to Oracle's most important interrogatories have
27 simply referred under Rule 33(d) to TomorrowNow's SAS database. That database contains
28 nearly nine gigabytes of data (the equivalent of millions of pages) and is extremely difficult for
Oracle to search and analyze. Therefore, Defendants' interrogatory responses are essentially

1 useless to Oracle.

2 Third, Defendants were late in producing a complete and usable version of the
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
25 Oracle’s website, are estimated to contain 5 terabytes of complex, technical data. Reviewing this
26 vast amount of data once it is received will also take significant time, particularly if Defendants
27 also blanket-designate it as Highly Confidential.

28 (c) **Oracle’s Need for Additional Discovery**

1 TomorrowNow's production of download library files. Accordingly, at that time, Oracle expects
2 to be able to make specific proposals for extending the time and limits on discovery.

3 **(2) Oracle Has Diligently Produced Its Documents**

4 Oracle's production to date includes voluminous server log files that it believes
5 reflect Defendants' access to and downloading of Software and Support Materials from Oracle's
6 Customer Connection support system, as well as the customer contract files associated with the
7 customers Oracle has identified, to date, whose credentials Defendants used to download Oracle
8 Software and Support Materials. In addition, Oracle, like TomorrowNow, has begun to produce
9 individual custodian email and other files. It is in the process of producing contracts for a second
10 round of approximately 250 additional customers and is gathering and reviewing a significant
11 volume of materials for approximately 188 custodians.

12 **(3) ADR**

13 Oracle believes ADR is premature at this time. As described more fully above,
14 Oracle has not completed its analysis of Defendants' conduct; further, Oracle believes that it has
15 additional claims against Defendants. Accordingly, until these issues are more fully explored,
16 Oracle believes ADR would be premature and unlikely to be productive.

17 **c. SAP's Separate Statement of Developments**

18 At the September case management conference, the Court gave the parties over
19 ten months for fact discovery and increased the limits on the numbers of depositions and
20 interrogatories the parties could use. Now, Oracle asks the Court to delay the schedule and to
21 increase the burden and expense of this case by expanding discovery, but only after waiting
22 another sixty days to see just how long and how much. This request should be refused.

23 Oracle claims to need more time and tools for discovery, yet it has barely used
24 any of the depositions permitted by the Court (Oracle will have taken only five depositions, at
25 most, before the supplemental case management conference) and months remain before fact
26 discovery closes. Oracle claims to need more time to present a further amended complaint, yet it
27 has not provided even the barest description of its supposed new claims, either to the Court or to
28 Defendants. While there may be some discovery disputes (which Judge Legge will handle), and

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

1 Court considered at the initial case management conference and as is typical in litigation. The
2 involvement of a third party will provide a useful opportunity to Oracle to articulate and quantify
3 its claims.

4 DATED: January 29, 2008

5 BINGHAM McCUTCHEN LLP

6
7 By: Christopher Hockett / BDH

8 Christopher B. Hockett
9 Attorneys for Plaintiffs
Oracle Corporation, Oracle International
Corporation, and Oracle USA, Inc.

10 DATED: January 29, 2008

11 JONES DAY

12 By: Robert Mittelstaedt / BDH

13 Robert A. Mittelstaedt
14 Attorneys for Defendants
SAP AG, SAP America, Inc.,
15 and TomorrowNow, Inc.