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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

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
TomorrowNow’s customers’ rights of access?
- 2 • What, if any, harm did Oracle suffer as a result of any improper
3 downloads?
- 4 • Did the 44 works as to which Oracle obtained copyright registrations meet
5 the requirements of copyrightability? Were the registrations proper and
timely?

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

8 **3. Legal Issues In Dispute**

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

26 **4. Motions**

27 *Motion for Preservation Order:* On April 30, 2007, Oracle filed a Motion for an
28 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.

28

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 have served an initial set of interrogatories. This discovery is largely foundational on both sides.
2 Many of the document requests on both sides necessarily involve voluminous computer logs and
3 other complicated records that show the access to Oracle's computer systems, the IP address of
4 the person accessing the information, the products requested and returned, and the licensed or
5 unlicensed nature of those products. Oracle, for example, has requested the data on the SAP
6 computers used to access Customer Connection, store the downloaded materials, and provide
7 them to its customers.

8 These records are not susceptible to quick or easy review. They involve terabytes
9 of complicated computer code and log entries that will require forensic experts on both sides to
10 spend time understanding them before additional discovery can efficiently proceed. As an
11 illustration, both sides required the assistance of technical experts just to meaningfully complete
12 the Rule 26(f) meet and confer process. This initial document collection, review, production and
13 analysis will take several months. The parties will then require depositions from each other and
14 from customers in disparate locations around the U.S. and in various foreign jurisdictions, many
15 of which will (unless SAP agrees otherwise) require time-consuming Hague Convention
16 discovery protocols. SAP's position understates these complex and time-consuming
17 international discovery issues.

18 For these reasons, even limiting discovery to a subset of specific and readily
19 identifiable targets, non-expert discovery could not reasonably conclude in less than 18 months.

20 (2) **SAP's Position**

21 Oracle overstates the complexity of this case. Even if not expressly focused as
22 proposed by Defendants in paragraph 15, properly limited discovery in this case can take place in
23 several months, not a year and one-half. The parties' fairly thorough, but typical, first rounds of
24 interrogatories and requests for production can be completed in the next three months or so. This
25 will lay the groundwork for depositions and any necessary follow-up written discovery, which
26 could surely be completed in a few months.

27 **c. Discovery Of Electronically Stored Information**

28 The Parties agree on the format of production for electronically stored

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).

20. **Other Matters Any Party Considers Conducive To The Just, Speedy And Inexpensive Determination Of This Action]**

The parties have expressly stipulated out of the privilege log requirements stated in *Burlington Northern v. District Court*, 408 F.3d 1142, 1149 (9th Cir. 2005), and therefore agree that the production of privilege logs within 45 days after the production of a party's documents is reasonable and will be sufficient to preserve the party's privilege objections. The parties dispute the scope of privilege log requirements with respect to communications with in-house counsel subsequent to filing of the litigation. The parties agree that communications with outside counsel need not be logged or disclosed. SAP proposes that communications involving in-house counsel but not outside counsel need not be logged or disclosed unless in-house counsel was acting in a business and not legal capacity. Oracle proposes that the parties log all communications involving in-house counsel but not outside counsel, and indicate on the privilege log the basis for the asserted privilege. The parties are not aware of any other such matters at this time.

DATED: August 28, 2007

BINGHAM McCUTCHEN LLP

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Oracle Corporation, Oracle International Corporation, and Oracle USA, Inc.

DATED: August 28, 2007

JONES DAY

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