

1 Robert A. Mittelstaedt (SBN 060359)  
Jason McDonell (SBN 115084)  
2 Elaine Wallace (SBN 197882)  
JONES DAY  
3 555 California Street, 26<sup>th</sup> Floor  
San Francisco, CA 94104  
4 Telephone: (415) 626-3939  
Facsimile: (415) 875-5700  
5 ramittelstaedt@jonesday.com  
jmcdonell@jonesday.com  
6 ewallace@jonesday.com

7 Tharan Gregory Lanier (SBN 138784)  
Jane L. Froyd (SBN 220776)  
8 JONES DAY  
1755 Embarcadero Road  
9 Palo Alto, CA 94303  
Telephone: (650) 739-3939  
10 Facsimile: (650) 739-3900  
tglanier@jonesday.com  
11 jfroyd@jonesday.com

12 Scott W. Cowan (Admitted *Pro Hac Vice*)  
Joshua L. Fuchs (Admitted *Pro Hac Vice*)  
13 JONES DAY  
717 Texas, Suite 3300  
14 Houston, TX 77002  
Telephone: (832) 239-3939  
15 Facsimile: (832) 239-3600  
swcowan@jonesday.com  
16 jlfuchs@jonesday.com

17 Attorneys for Defendants  
SAP AG, SAP AMERICA, INC., and  
18 TOMORROWNOW, INC.

BINGHAM McCUTCHEM LLP  
DONN P. PICKETT (SBN 72257)  
GEOFFREY M. HOWARD (SBN 157468)  
ZACHARY J. ALINDER (SBN 209009)  
BREE HANN (SBN 215695)  
Three Embarcadero Center  
San Francisco, CA 94111-4067  
Telephone: (415) 393-2000  
Facsimile: (415) 393-2286  
donn.pickett@bingham.com  
geoff.howard@bingham.com  
zachary.alinder@bingham.com  
bree.hann@bingham.com

BOIES, SCHILLER & FLEXNER LLP  
DAVID BOIES (Admitted *Pro Hac Vice*)  
333 Main Street  
Armonk, NY 10504  
Telephone: (914) 749-8200  
Facsimile: (914) 749-8300  
dboies@bsflp.com

STEVEN C. HOLTZMAN (SBN 144177)  
FRED NORTON (SBN 224725)  
1999 Harrison St., Suite 900  
Oakland, CA 94612  
Telephone: (510) 874-1000  
Facsimile: (510) 874-1460  
sholtzman@bsflp.com  
fnorton@bsflp.com

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

Attorneys for Plaintiffs  
Oracle USA, Inc., *et al.*

20 UNITED STATES DISTRICT COURT  
21 NORTHERN DISTRICT OF CALIFORNIA  
22 OAKLAND DIVISION

23 ORACLE USA, INC., et al.,

24 Plaintiffs,

25 v.

26 SAP AG, et al.,

27 Defendants.

Case No. 07-CV-1658 PJH (EDL)

**JOINT STATEMENT REGARDING  
TRIAL DATE**

1 Pursuant to the Court's February 16, 2012 Scheduling Order (D.I. 1108), plaintiffs  
2 Oracle USA, Inc., Oracle International Corporation and Siebel Systems, Inc. (collectively  
3 "Oracle") and defendants SAP AG, SAP America and TomorrowNow, Inc. (collectively  
4 "Defendants") met and conferred regarding the trial date and alternatives set forth in the  
5 Scheduling Order. The parties did not reach agreement on the trial date or alternatives. Oracle's  
6 position is that, due to a substantial number of scheduling conflicts, it has no choice but to object  
7 to the June 18, 2012 date or trailing in 2012. Defendants' position is that they prefer June 18,  
8 2012 or to trail. The parties submit this Joint Statement Regarding Trial Date setting forth their  
9 respective positions.

#### 10 **I. ORACLE'S STATEMENT**

11 Oracle appreciates the Court's effort to fit the re-trial of this case into its 2012 calendar.  
12 Unfortunately, preexisting trial obligations in multiple other cases make it impossible for Oracle  
13 to consent to a June 18, 2012 trial date. These obligations prevent key Oracle management  
14 witnesses, Oracle in-house counsel, Oracle's outside trial counsel, and Oracle's damages expert  
15 from being available either to participate in a two-week trial in the second half of June or  
16 adequately prepare for such a trial.<sup>1</sup> The schedule conflicts include the following:

17 In *Oracle Corporation v. Google Inc.*, CV 10-03561 WHA (N.D. Cal.), Judge Alsup  
18 issued an order this week stating that "Counsel are reminded that they and witnesses must keep  
19 the period from April 16 until late June available for the trial." (Dkt. 724 (February 23, 2012).)  
20 Oracle is represented in the *Google* case by its trial counsel in this case (both David Boies  
21 individually and the larger Boies, Schiller & Flexner team), and there is significant witness  
22 overlap, including the top executives of the company. Prior to this week's order, Judge Alsup had  
23 preserved the option of trial in April and May as a fallback, also asking counsel "to keep free  
24 September, October, November and December." (*Oracle America, Inc. v. Google, Inc.*,  
25 Transcript of proceedings, December 21, 2011, at 164:12-19.) In a letter submitted to Judge

26 \_\_\_\_\_  
27 <sup>1</sup> Oracle also believes that a two-week time slot is likely to be insufficient to present this  
28 case, given the multiple issues and damages theories that remain unresolved and require retrial  
under the Court's post-trial orders, and requests an opportunity to be heard on that issue before  
the date and duration of trial is set.

1 Alsup today, counsel for Google confirms that the Court has asked the parties' counsel to set  
2 aside these time periods, and that Google (like Oracle) is complying with that request. (Dkt. 748  
3 (February 24, 2012).) As was the case with regard to this litigation, and as Oracle has repeatedly  
4 expressed to Judge Alsup, getting to trial in the Google case as soon as possible is of critical  
5 importance to Oracle. Consenting to re-trial in this case would ignore Judge Alsup's request and  
6 jeopardize Oracle's interests in the Google litigation.

7 Prior to and notwithstanding Judge Alsup's order this week in the *Google* case, Oracle's  
8 lead trial counsel, Mr. Boies, has a previously scheduled trial starting on June 4, 2012 and  
9 continuing into July for another client (*Invista B.V., et al. v. E.I du Pont de Nemours and*  
10 *Company*, 08 Civ. 3063 (SHS) (S.D. N.Y.). Mr. Boies does not have the ability to reschedule that  
11 trial at this juncture.

12 In *Hewlett-Packard Co. v. Oracle Corporation*, 1-11-CV-203163 (Cal. Superior Court,  
13 Santa Clara County), trial is set for May 29, 2012, and is likely to continue through late June.  
14 Both key management witnesses and in-house counsel overlap between the *Hewlett-Packard* case  
15 and this case. The overlapping witnesses' testimony includes, without limitation, testimony  
16 relating to lost profits, causation, and the expectations of the parties.

17 Finally, Oracle's damages expert witness, Mr. Meyer, and his team of consulting experts  
18 are scheduled to appear at two separate multi-week trials beginning in June: *Voom HD Holdings,*  
19 *LLC v. Echostar Satellite LLC*, Index No. 600292/08 (Supreme Court of the State of New York)  
20 (4-6 weeks), and *Lyons v. Nike*, 3:09-cv-01183-AC (D. Oregon) (2-3 weeks).

21 As a result of these multiple conflicts, Oracle unfortunately cannot consent to the  
22 proposed June 18, 2012 trial date.

23 With respect to the prospect of trailing other cases, Oracle notes only that the conflicts  
24 described above are likely to extend into July; that Judge Alsup has asked counsel to keep  
25 September, October, November and December open for trial in the *Google* case; that co-lead trial  
26 counsel (Geoff Howard and other members of the Bingham McCutchen team assigned to this  
27 case) have a trial scheduled for October 2012 in *Yardi Systems, Inc. v. RealPage, Inc. and DC*  
28 *Consulting, Inc.*, CV11-690 ODW (JEMx) (C. D. Cal.); and that Mr. Meyer is scheduled to testify

1 at trial in August 2012 in *PMC v. Echostar*, 2:08-cv-00070-RSP (E.D. Tex.) and in November  
2 2012 in *Summit Entertainment v. Bath & Body Works*, 1:11-cv-01594-GBD (S.D. NY).

3 Deferring trial in this case all the way to August 2013 is not optimal. But given the Court's own  
4 schedule and the conflicts noted above, Oracle feels it has relatively little choice.

## 5 **II. DEFENDANTS' STATEMENT**

6 Defendants are ready, willing and able to retry this case on the *June 18, 2012* date set  
7 forth in the Scheduling Order. This case has already been litigated for nearly five years, and  
8 Oracle's statement rejecting the Court's remittitur makes it clear that Oracle intends for this case  
9 to be litigated for many years to come.

10 Oracle's statement above emphasizes the point. The first trial took three weeks. The  
11 Court and the parties invested years of effort in focusing the case for the first trial, through  
12 numerous rulings on motions and detailed factual and legal stipulations. The Court's ruling on  
13 the parties' post-trial motions gives very clear guidance on the issues to be retried. Yet, Oracle  
14 now claims that two weeks is not enough for the retrial and that numerous (but unidentified)  
15 damages issues are unresolved. Both statements should leave the reader incredulous. Given the  
16 limited scope of the new trial, *i.e.*, focused solely on calculating lost profits and infringer's profits  
17 for copyright infringement, the retrial should be short, focused and efficient. Where an  
18 alternative is available on the Court's calendar, there is no need, and no reason, to wait until  
19 August 2013. Nothing good will come of waiting; delay will only engender more delay.

20 Sorting through the statement above, Oracle really rejects the June 18 date based on four  
21 purported conflicts. The first is the potential May trial in Santa Clara County Superior Court of  
22 the *HP v. Oracle* matter. This poses no real conflict. Oracle's management can surely consider  
23 more than one litigation at a time (having filed most of those that are so busy this year), this case  
24 does not share the same trial team as the HP matter, and there is no reason that Oracle witnesses  
25 in common to the two cases (if there actually are any) could not appear to testify in San Jose in  
26 May and in Oakland in June. Notably, Oracle neither identifies the witnesses allegedly in  
27 common, nor explains how its executives, who testified in November 2010 that they had no  
28 knowledge on the lost maintenance profits and infringer's profits at issue in the upcoming trial,

1 would have anything to add to the more focused retrial.

2 The second potential conflict involves the busy testifying schedule of Oracle's damages  
3 expert Paul Meyer. The limited information available in the meet and confer does not confirm  
4 Mr. Meyer will not be available, it simply demonstrates that he will be busy. An expert witness  
5 of Mr. Meyer's experience can surely manage the two to three days necessary for his more  
6 focused testimony at the retrial around his busy schedule, even assuming the other trials in which  
7 he is involved actually go to trial on their currently scheduled dates.

8 The third potential conflict is a New York state court trial scheduled in June led by David  
9 Bois, who is Oracle's lead trial counsel in this case. Defendants acknowledge Oracle's  
10 representation that this trial date was previously scheduled and that if the New York case  
11 continues to trial as scheduled it will create a conflict with the June 18, 2012 date for this case.  
12 But, some cases settle, and schedules do change.

13 The *Oracle v. Google* matter is apparently a reason that neither Oracle nor its lawyers can  
14 be involved in any other trials this year. Yet, both Oracle and its lawyers have plenty of other  
15 trials scheduled during the affected months, notwithstanding that *Oracle v. Google* case. And, it  
16 not clear that the trial will even happen this year. In fact, just today Judge Alsup directed the  
17 parties to submit statements by March 9 on whether the trial should be delayed to permit  
18 reexaminations of Oracle's asserted patents to run their course. D.I. 726, February 24, 2012  
19 Order Regarding Reexaminations, C3:10-cv-03561 WHA.

20 Obviously, a lot can change between now and June that affects the availability of parties  
21 and counsel for trial. At the same time, preparing this case for retrial should not be unduly  
22 difficult, as the parties and Court have years of familiarity with the issues and the Court has  
23 provided clear guidance for the retrial.

24 Defendants therefore propose the following approach: Trial should be tentatively set for  
25 June 18, 2012, for two weeks, with the final pretrial conference on May 3, as set forth in the  
26 Scheduling Order (along with the dates dictated by the Court's standing orders and federal and  
27 local rules for submissions leading up to the pretrial conference). If Oracle's lead trial counsel's  
28 trial conflicts are resolved by the May 3 conference, then the retrial of this case would remain on

1 June 18; if not, then this case should trail (ideally on four week's notice) or be reset for such other  
2 time as may be available on the Court's calendar, should other times have opened based on  
3 developments in the next few months. Uncertainty is never ideal, but such flexibility by both  
4 sides' trial teams ought to be possible for a retrial that will be much shorter and more focused  
5 than the original.

6  
7 Dated: February 24, 2012

JONES DAY

8  
9 By: /s/ Tharan Gregory Lanier  
10 Tharan Gregory Lanier

11 Counsel for Defendants  
12 SAP AG, SAP AMERICA, INC., and  
TOMORROWNOW, INC.

13 In accordance with General Order No. 45, Rule X, the above signatory attests that  
14 concurrence in the filing of this document has been obtained from the signatory below.

15 Dated: February 24, 2012

BOIES, SCHILLER & FLEXNER LLP

16  
17  
18 By: /s/ Steven C. Holtzman

19 Steven C. Holtzman  
20 Attorneys for Plaintiffs  
Oracle USA, Inc., Oracle International  
21 Corporation, and Siebel Systems, Inc.  
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25  
26  
27  
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