

1 Robert A. Mittelstaedt (SBN 060359)
 Jason McDonell (SBN 115084)
 2 Elaine Wallace (SBN 197882)
 JONES DAY
 3 555 California Street, 26th 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.¹ 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 ¹ 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
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: February 24, 2012

JONES DAY

By: /s/ Tharan Gregory Lanier
Tharan Gregory Lanier

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

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

Dated: February 24, 2012

BOIES, SCHILLER & FLEXNER LLP

By: /s/ Steven C. Holtzman
Steven C. Holtzman

Attorneys for Plaintiffs
Oracle USA, Inc., Oracle International
Corporation, and Siebel Systems, Inc.