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

22 ORACLE AMERICA, INC.  
 23 Plaintiff,  
 24 v.  
 25 GOOGLE INC.  
 26 Defendant.

Case No. CV 10-03561 WHA

**ORACLE'S MARCH 23, 2012 BRIEF  
 REGARDING COPYRIGHT ISSUES**

Dept.: Courtroom 8, 19th Floor  
 Judge: Honorable William H. Alsup

## INTRODUCTION

Google finally admits what everyone has known all along: “the Android specifications for the 37 API packages at issue have *substantially the same selection, arrangement and structure* of API elements as the J2SE specifications.” (ECF No. 778 (“Google Br.”) at 3 (emphasis added).) This was no accident. Google intentionally copied Oracle’s copyrighted Java API specifications.

Google tries to excuse its copying by claiming that no API can be copyrighted, regardless of its level of creative expression. But no court has ever so held, nor that a structure as rich, complex, and creative as the 37 Java API packages at issue in this case is ineligible for copyright protection. Much of Google’s submission re-hashes its summary judgment briefing, repeating arguments the Court has already rejected, at the expense of the questions it was asked to brief.

Google also tries to justify its copying on “compatibility” grounds. But Google did not have to copy the Java APIs to be compatible with the Java programming language. And Android is not compatible with Java. Google took only what it wanted from the Java specifications and left out the rest. As a result, many Java-compliant programs will not run on Android, and programs written for Android will not run on the Java platform. Compatibility is a misnomer.

Notwithstanding the above, the parties agree on many of the procedural issues the Court identified. Oracle identifies and discusses the points of agreement and disagreement below.

### I. COPYRIGHTS IN SUIT

The parties appear to agree on the asserted Oracle Java works from which Google copied: (a) 37 Java API design specifications and implementations and (b) 11 Java software code files. (Google Br. at 1.) However, Oracle’s allegations are not limited only to versions 1.4 and 5.0 of the Java 2 Standard Edition, as Google implies. (*See id.*) The registrations at issue were identified in response to interrogatories and are listed in Oracle’s opening brief. They are also incorporated and listed in the registration for J2SE 5.0. (*See* ECF No. 780 (“Oracle Br.”) at 1, 4.)

#### A. Google Copied The 37 Java API specifications

Google concedes that “[t]here is no dispute that the Android specifications for the 37 API packages at issue have substantially the same selection, arrangement and structure of API elements as the J2SE specifications.” (Google Br. at 3.) It follows that Android’s selection,

1 arrangement and structure of the names of the elements is similar as well. As a result, Google  
2 would be liable for infringement even if it could prove these individual API elements and names  
3 are unprotectable, “if those elements are numerous enough, and their selection and arrangement  
4 original enough that their combination constitutes an original work of authorship.” (See ECF No.  
5 433 at 8 (quoting *Lamps Plus, Inc. v. Seattle Lighting Fixture Co.*, 345 F.3d 1140, 1147 (9th Cir.  
6 2003).) Google cannot possibly prove that the selection and arrangement of the thousands of  
7 elements in the specifications was the result of something other than original creative effort.

8 **B. Google copied source code, object code and comments from 11 Java**  
9 **code files into Android**

10 Google does not dispute that it copied from the 11 Oracle source code files. Google  
11 argues that the infringement claim is moot because it removed the copied code after it was caught.

12 Not so. Oracle’s counsel confirmed after Google filed its brief that Google still makes  
13 copied code available for download from its website. But even if Google had in fact deleted the  
14 code, Oracle’s claim for injunctive relief would still not be moot. Oracle does not have to take  
15 Google’s word that it will not start using the code it copied again once this suit is over. See  
16 *Walling v. Helmerich & Payne, Inc.*, 323 U.S. 37, 43 (1944) (“Voluntary discontinuance of an  
17 alleged illegal activity does not operate to remove a case from the ambit of judicial power.”).

18 Google’s damages argument is also incorrect. The Court ruled only that “the jury will be  
19 instructed that if Google is found not liable for infringing the selection, arrangement, and  
20 structure of the API packages, then Dr. Cockburn’s copyright damages analysis is inapplicable.”  
21 (ECF No. 685 at 2.) The Court did not hold Oracle was not entitled to *any* damages. And Oracle  
22 may elect statutory damages “at any time before final judgment is rendered,” 17 U.S.C.

23 § 504(c)(1), although the Supreme Court suggests the election may not be made after a jury  
24 awards actual damages. See *Feltner v. Columbia Pictures Television*, 523 U.S. 340, 347 n.5  
25 (1998). Costs and attorneys’ fees can also be awarded to the prevailing party. 17 U.S.C. § 505.

26 Google’s code copying is also relevant because it proves Google’s access to Oracle’s  
27 copyrighted materials, puts the lie to Google’s “clean room” claim and proves Google’s copying  
28 was knowing and willful. Google cannot hide its line-for-line copying from the jury.

1           **II. ORACLE’S COPYRIGHT LIABILITY CLAIMS**

2           **A. Direct Infringement**

3           **1. Google Must Demonstrate the Works Are Not Copyrightable**

4           The parties disagree over who has the burden on copyrightability. Google’s brief does not  
5 challenge ownership or registration. Oracle’s copyright registration entitles it to a presumption of  
6 validity, shifting the burden to Google to demonstrate that the works are not copyrightable. (*See*  
7 Oracle Br. at 4-6 (citing cases).) *See also Transgo, Inc. v. Ajac Transmission Parts Corp.*, 768  
8 F.2d 1001, 1019 (9th Cir. 1985) *overruled on other grounds in Bellevue Manor Assoc. v. United*  
9 *States*, 165 F.3d 1259, 1256 (9th Cir. 1999) (“This presumption shifts the burden of proof to the  
10 challenging party to demonstrate why the item in question is not copyrightable.”). Google, citing  
11 *Jada Toys, Inc. v. Mattel, Inc.*, 518 F.3d 628, 636-37, n.6 (9th Cir. 2008)—where copyrightability  
12 was “tangentially” disputed and the presumption was not addressed—ignores the presumption.

13           Google is required to overcome the presumption of copyrightability as to each element it  
14 is challenging. In *Swirsky v. Carey*, the court held the defendant bore the burden of overcoming  
15 the presumption of originality as to the first measure of the chorus of a copyrighted song. 376  
16 F.3d 841, 851 (9th Cir. 2004) (“Carey can overcome this presumption only by demonstrating that  
17 Swirsky’s chorus is not original.”). *Swirsky* was recently followed in *Straughter v. Raymond*:

18           As an initial matter, defendants misapprehend the burden of proof based on their  
19 faulty argument that plaintiff is not entitled to a presumption of copyright validity.  
20 *See, e.g., Songwriters’ Supp. Mem.* at 6 (“Plaintiff does not enjoy a presumption of  
21 copyright validity or originality, and therefore, must demonstrate that the 18  
22 elements at issue are original to him.”). As discussed above, it is defendants’  
23 burden to rebut the statutory presumption of validity.

24           2011 U.S. Dist. LEXIS 93068, at \*22-24 (C.D. Cal. Aug. 19, 2011) (applying *Swirsky* to find  
25 defendants failed to carry burden). (*See also* Oracle Br. at 5-6 (citing cases).)

26           **2. Google Cannot Demonstrate That The Java APIs Do Not**  
27 **Contain Copyrightable Expression**

28           Google’s challenge to the copyrightability of the Java APIs relies on the same cases and  
arguments it made in its failed summary judgment motion and other briefing. Google does not  
challenge the copyrightability of the source code it copied.

Google’s argument that the APIs are unprotectable “methods of operation” again relies on

1 the First Circuit’s decision in *Lotus v. Borland*. But *Lotus* is not the law in the Ninth Circuit:  
2 “Whether the non-literal components of a program, including the structure, sequence and  
3 organization and user interface, are protected depends on whether, on the particular facts of each  
4 case, the component in question qualifies as the expression of an idea, or an idea itself.” *Johnson*  
5 *Controls, Inc. v. Phoenix Control Sys., Inc.*, 886 F.2d 1173, 1175 (9th Cir. 1989).

6 Further, *Lotus* is inapposite. The consumer menu command hierarchy at issue in *Lotus*  
7 was far simpler than that of the Java APIs, which are comprised of thousands of elements, layers  
8 of complex interdependencies, and data structures. Google’s expert and employees concede the  
9 creativity and skill required to design them. (See Oracle Br. at 9, 12-13.)

10 In the 17 years since *Lotus* was decided, no other circuit court has adopted its reasoning,  
11 and several have rejected it. The Tenth Circuit, for example, has expressly disagreed with *Lotus*:

12 We conclude that although an element of a work may be characterized as a method  
13 of operation, that element may nevertheless contain expression that is eligible for  
14 copyright protection. Section 102(b) does not extinguish the protection accorded a  
particular expression of an idea merely because that expression is embodied in a  
method of operation at a higher level of abstraction.

15 *Mitel, Inc. v. Iqtel, Inc.*, 124 F.3d 1366, 1372 (10th Cir. 1997). (See also ECF No. 339 at 9-11.)

16 Additionally, Google continues to distort *Sega*. The Ninth Circuit held:

17 We conclude that where disassembly is the only way to gain access to the ideas  
18 and functional elements embodied in a copyrighted computer program and where  
19 there is a legitimate reason for seeking such access, disassembly is a fair use of the  
20 copyrighted work, as a matter of law. Our conclusion does not, of course, insulate  
Accolade from a claim of copyright infringement with respect to its finished  
products.

21 *Sega Enters Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1527-28 (9th Cir. 1993).

22 This case could hardly be more different. Unlike *Sega*, Oracle accuses Google’s finished  
23 product of infringement. Unlike *Sega*, Google had no need to copy to gain access to any ideas  
24 and functional elements expressed in the Java APIs because they were published on Sun’s  
25 website, subject to copyright. And, whereas the *Sega* defendant copied a four letter code (S-E-G-  
26 A) consisting of only 20 to 25 bytes of data mandatory for its program to function with the Sega  
27 console, *id.* at 1515-16, Google copied API elements spanning 11,000 printed pages, and even its  
28 own expert concedes it would have been “technically possible” for Google to write its own APIs

1 for the 37 packages at issue. (Astrachan Dep. 251:21-252:2; 253:2-4.)

2 *Atari Games Corp. v. Nintendo of Am., Inc.*, 975 F.2d 832 (Fed. Cir. 1992) is much more  
3 on point. The Federal Circuit applied Ninth Circuit law to find the key to Nintendo’s console was  
4 entitled to copyright protection because it contained a “unique sequence” of code, and “[e]xternal  
5 factors did not dictate the design.” *Id.* at 840. Atari could reverse engineer the code to learn its  
6 unprotected features, but could not replicate it without infringing the copyrights. *Id.* at 844.

7 Indeed, Google’s entire compatibility argument is a fallacy. Its copying was not required  
8 for compatibility. Android is not compatible with Java. Google copied the specifications to tap  
9 into the developer community Sun had created through years of work and investment. Google  
10 took only those parts of the Java APIs it wanted and left out the rest, creating its own APIs in  
11 some instances and modifying others. The result is incompatibility and fragmentation.

### 12 **3. The Court Can Refer Threshold Issues Of Fact To The Jury**

13 Both parties agree it is unlikely the Court will need to refer threshold issues of fact to the  
14 jury. The parties dispute only whether the Court can do so. (*See* Google Br. at 3-4, n.3.) Cases  
15 in this Circuit have recognized that fact issues relating to copyrightability—in particular to  
16 originality—may be submitted to the jury. *See Kikker 5150 v. Kikker 5150 USA, LLC*, 2004 U.S.  
17 Dist. LEXIS 16859, at \*27 (N.D. Cal. Aug. 13, 2004) (“Here the Court cannot say, as a matter of  
18 law—although a jury may well say, as a matter of fact—that the originality required by the  
19 copyright rules is lacking.”). One case has held disputed fact issues relating to originality must be  
20 submitted to the jury. *See N. Coast Indus. v. Jason Maxwell, Inc.*, 972 F.2d 1031, 1034 (9th  
21 Cir.1992) (district court erred by not allowing issue of whether fashion design was sufficiently  
22 similar to preexisting work to lack originality to go to jury). *See also* Comment to Ninth Circuit  
23 Model Civil Trial Jury Instruction 17.2 (“*Generally*, whether a subject matter is copyrightable is a  
24 question of law to be determined by the court.”) (emphasis added). Here, the Court could refer a  
25 fact issue to the jury through properly structured jury instructions or verdict forms.

### 26 **4. Copying**

27 Google intentionally modeled the selection, arrangement and structure of the elements in  
28 the 37 Android APIs at issue on their Java counterparts, and does not dispute copying the 11

1 source code files. (*See, e.g.*, Google Br. at 3.) There is accordingly no need for the Court to  
 2 determine whether the standard of substantial similarity or virtual identity applies, as Google  
 3 contends. (*See id.* at 10.) “‘Substantial similarity’ is not an element of [] copyright  
 4 infringement.” *Range Road Music, Inc. v. East Coast Foods, Inc.*, 2012 U.S. App. LEXIS 3173,  
 5 at \*10 (9th Cir. Feb. 16, 2012). It is irrelevant where, as here, there is direct evidence of copying:

6 A showing of “substantial similarity” is irrelevant in a case like this one, in which  
 7 the Music Companies produced evidence that the public performances entailed  
 8 direct copying of copyrighted works. *See id.* (noting that a demonstration of  
 substantial similarity is only necessary to prove infringement “[a]bsent evidence of  
 direct copying”).

9 *Id.* (quoting *Funky Films, Inc. v. Time Warner Entm’t Co.*, 462 F.3d 1072, 1076 (9th Cir. 2006).)

10 Further, Google is wrong that Oracle would need to show “virtual identity.” The Court  
 11 previously rejected Google’s attempt to apply a “virtual identity” standard on summary judgment.  
 12 (*See* ECF No. 433 at 11.) This case is nothing like *Ets-Hokin v. Skyy Spirits Inc.*, where there was  
 13 a narrow range of protectable expression because there are “not very many” ways of shooting an  
 14 advertising photograph of a blue vodka bottle. 323 F.3d 763, 764, 766 (9th Cir. 2003). The range  
 15 of creative expression reflected in the APIs is exponentially more complex, with many different  
 16 possible structures and design choices extending across thousands of elements.

## 17 5. Originality

18 Google’s brief does not challenge originality, nor could it prevail on such a challenge.

### 19 B. Indirect Infringement

20 Google’s brief also does not address indirect infringement.

## 21 III. GOOGLE’S AFFIRMATIVE DEFENSES

### 22 A. Merger and *scenes a faire*

23 The parties disagree on burden. In the Ninth Circuit, merger and *scenes a faire* are treated  
 24 as defenses to infringement, and Google has the burden of proof. (*See* Oracle Br. at 10.) *See also*  
 25 *Satava v. Lowry*, 323 F.3d 805, 810 (9th Cir. 2003) (“The Ninth Circuit treats *scenes a faire* as a  
 26 defense to infringement rather than as a barrier to copyrightability.”) (citing *Ets-Hokin*).

27 Google cites no authority to the contrary. Instead it contends certain cases “implicitly”  
 28 placed the burden on the plaintiff. (*See* Google Br. at 9-10.) Google is incorrect. Google infers

1 the Ninth Circuit placed the burden on plaintiff in *Sega* because it “held there was no  
2 infringement by relying on the absence of evidence showing alternatives to the defendant’s  
3 copying.” (*Id.* at 9.) This is not true. *Sega* discusses the evidence in detail and concludes: “In  
4 summary, the record clearly establishes that disassembly of the object code in Sega's video game  
5 cartridges was necessary in order to understand the functional requirements for Genesis  
6 compatibility.” *Sega*, 977 F.2d at 1525-26. Defendant simply satisfied its burden of proof.

7 Google also argues that under merger and *scenes a faire*, the APIs as a whole are  
8 uncopyrightable. The Court rejected this sweeping approach in its order denying summary  
9 judgment. (ECF No. 433 at 9.) Google must make a showing as to individual elements. (*See id.*)

10 To prove merger, Google must show “the idea underlying the copyrighted work can be  
11 expressed in only one way, lest there be a monopoly on the underlying idea.” (*Id.* (quoting  
12 *Satava*, 323 F.3d at 812 n.5).) Google cannot possibly meet this burden as to the APIs as a  
13 whole, or entire categories or packages. Oracle is not claiming “a monopoly” on the idea of an  
14 API or an API package. It had innumerable design choices for the complex array of packages at  
15 issue and is claiming copyright protection for the particular choices it made as to the selection,  
16 arrangement, and structure of elements in them. This case is nothing like *Allen v. Academic*  
17 *Games League of Am., Inc.*, where the court found the rules of a game were not copyrightable  
18 because, “[t]o hold otherwise would give Allen a monopoly on such commonplace ideas as a  
19 simple rule on how youngsters should play their games.” 89 F.3d 614, 618 (9th Cir. 1996).

20 Similarly, for *scenes a faire*, Google must prove individual elements are “commonplace  
21 expressions [that] are indispensable and naturally associated with the treatment of a given idea.”  
22 (ECF No. 433 at 8 (quoting *Swirsky*, 376 F.3d at 850).) Google does not even try to show this. It  
23 cannot. The APIs express an elaborate set of interdependencies and relationships within and across  
24 different packages, that are neither commonplace nor preordained. (Oracle Br. at 2.)

25 Google turns *scenes a faire* on its head, arguing that because the Java APIs are widely  
26 used by developers, and developers wish to have them available, they have become unprotectable  
27 *scenes a faire*. (*See* Google Br. at 7-8.) Google miscites *Computer Associates*. Google’s citation  
28 refers to external constraints faced by the *plaintiff* in developing its copyrighted work. *See*

1 *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 982 F.2d 693, 710 (2d Cir. 1992) (court must “examine  
2 the structural content of an allegedly infringed program for elements that might have been  
3 dictated by external factors.”) (emphasis added). Google’s argument was rejected by the Tenth  
4 Circuit in *Mitel*. See *Mitel*, 124 F.3d at 1375 (“The court’s analytical focus should have remained  
5 upon the external factors that dictated Mitel’s selection of registers, descriptions, and values.”).

6 Google continues to rely on *Baystate Techs. v. Bentley Sys.*, 946 F. Supp. 1079 (D. Mass.  
7 1996), a case from the First Circuit that is bound by *Lotus*. *Baystate* is contrary to Ninth Circuit  
8 law on merger and *scenes a faire*, and is factually distinguishable. (See ECF No. 339 at 17.)

### 9 **B. Fair Use**

10 The parties agree Google will need to make its fair use case to the jury. (See Google Br.  
11 at 11.) Although Google does not mention it, Google bears the burden of proof on fair use. See  
12 *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146, 1158 (9th Cir. 2007).

### 13 **C. De Minimis Copying**

14 The parties agree the Court instructs the jury on what “work” to consider as the reference  
15 for determining whether Google’s copying was *de minimis*, but disagree over who has the burden  
16 of proof. (See Google Br. at 14.) It is Google. See *Merch. Transaction Sys., Inc. v. Nelcela, Inc.*,  
17 2009 U.S. Dist. LEXIS 25663, at \*61 (D. Ariz. Mar. 17, 2009) (“Thus, Nelcela will not escape  
18 liability unless it can show that the protectable elements in the Lexcel software constitute an  
19 insignificant (quantitatively and qualitatively) portion or aspect of the Lexcel software.”). Google  
20 relies only on cases from outside the Ninth Circuit.

### 21 **D. Equitable Defenses**

22 The parties agree the equitable defenses are for the Court to decide. (See Google Br. at  
23 14.) Google’s brief does not address the burden, but it is on Google. (See Oracle Br. at 14.)

24 The equitable defenses are baseless and there is insufficient evidence to justify bringing  
25 them to the jury even for an advisory verdict. For example, while reasonable reliance is an  
26 element of equitable estoppel, laches, and implied license, Google deliberately chose to develop  
27 Android knowing it did not possess the required license, deciding to “Do Java anyway and defend  
28 our decision, perhaps making enemies along the way.” (ECF No 398-6.)

1 Google argues that Apache Harmony and GNU Classpath “include implementations of all  
2 37 of the API package specifications at issue, and have done so openly for years” and thus it was  
3 perfectly acceptable to copy the Harmony APIs. (Google Br. at 8.) But Google was well aware  
4 that Sun’s field-of-use restrictions prohibited it from using Harmony’s API specifications in  
5 mobile devices. Google knew of Sun and Apache’s highly publicized dispute over this exact  
6 issue. Indeed, Google signed a public letter urging Sun to lift the restriction. But Sun never did.  
7 Google’s documents show that it knew using Harmony code did not give Android any kind of  
8 license from Sun or Oracle. Similarly, GNU Classpath is irrelevant because the GPL open source  
9 license has express restrictions that limit commercial use, which Google never followed.

10 Google’s equitable defenses are lawyer-crafted hindsight — a patchwork of statements on  
11 which Google did not rely, and could not reasonably have relied, such as blog entries or internal  
12 statements it learned about later. Google’s documents reflect over and over that it knew the API  
13 specifications at issue were copyrighted and it could not simply take them. And during the period  
14 Google claims it believed it was free to go forward, the parties continued to negotiate a license.  
15 Even as late as August 2010, Mr. Lindholm told Google’s top executives it still needed a license,  
16 just as he and others had said five years before. Google’s equitable defenses are a sham.

17 The evidence relating to the equitable issues significantly overlap with willfulness. Proof  
18 of willful infringement can negate Google’s equitable defenses. *Haworth, Inc. v. Herman Miller,*  
19 *Inc.*, 1993 WL 761974, at \*3-4 (W.D. Mich. July 20, 1993); *see also Wang Labs., Inc. v.*  
20 *Mitsubishi Elecs. Am., Inc.*, 1994 WL 471414, at \*2 (C.D. Cal. Mar. 3, 1994), *aff’d on other*  
21 *grounds*, 103 F.3d 1571 (Fed. Cir. 1997) (willfulness bears on equitable estoppel defense). The  
22 jury should not be asked to render any advisory verdict on these defenses, and the Court should  
23 defer its ruling on the defenses until after the third phase of trial.

#### 24 **IV. JAVA PROGRAMMING LANGUAGE VERSUS ORACLE’S JAVA API** 25 **IMPLEMENTATIONS AND DOCUMENTATION**

26 The Court has asked the parties to “explain the mechanism by which the Java  
27 programming language is free and open for anyone to use but the APIs are not,” and “If the  
28 Android platform does not infringe Oracle’s copyrights by using the Java programming language,

1 how has Google infringed Oracle's copyrights by using Java APIs?" (ECF No. 793.) The short  
2 answer is that Oracle owns the copyrights to its Java API specifications and source code; those  
3 rights are distinct from any rights Oracle has in the Java language, which are not asserted in this  
4 case. (Oracle's statements to the Court on this issue can be found at ECF No. 87 at 8:5-9:8, ECF  
5 No. 110 at 17:1-22:18, and ECF No. 445 at 12:9-17:9.)

6 The Java language and the Java API specifications are two different things. Only a very  
7 small number of elements in the Java APIs are required for the Java programming language.  
8 Oracle's Java API specifications and source code implementations are original works of  
9 authorship, written partly in Java and partly in English. These works contain the expression of  
10 the Java API designers' ideas. Google copied expression from Oracle's works into its own API  
11 specifications and source code. The English language may be free for anyone to use, but a book  
12 or poem written in English is copyrightable, and when others copy from it without permission,  
13 they infringe. Works written in the Java programming language are copyrightable as well.

14 Finally, the Court asks: "Did Sun statements that made the Java programming language  
15 available for all to use expressly reserve as to the Java APIs?" The answer is "yes." Sun  
16 expressly and publicly asserted its copyrights and reserved its rights as to the Java APIs. There  
17 has never been any uncertainty on this point. The API documentation reserves all rights, and the  
18 API specification license only permits use on specified terms. *See, e.g.*, Java™ 2 Platform  
19 Standard Edition 5.0 API Specification, <http://docs.oracle.com/javase/1.5.0/docs/api/index.html>  
20 ("Copyright © 2004, 2010 Oracle and/or its affiliates. All rights reserved. Use is subject to  
21 license terms."); <http://docs.oracle.com/javase/1.5.0/docs/relnotes/license.html> (specification  
22 license terms). The API specification license requires complete compatibility, no derivation from  
23 Oracle source code or binary materials, and passing Oracle's compatibility test suites. Android  
24 fails on all counts.

25 Dated: March 23, 2012

MORRISON & FOERSTER LLP

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28 ORACLE AMERICA, INC.