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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ORACLE USA, INC., *et al.*,

Plaintiffs,

v.

SAP AG, *et al.*,

Defendants.

No. 07-CV-01658 PJH (EDL)

ORACLE'S OPPOSITION TO SAP'S MOTION FOR STAY OF JUDGMENT THROUGH APPEAL AND APPROVAL OF PROPOSED SECURITY PURSUANT TO FRCP 62

Date: May 4, 2011
Time: 9:00 a.m.
Place: 3rd Floor, Courtroom 3
Judge: Hon. Phyllis J. Hamilton

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I. INTRODUCTION

SAP finishes its Motion where it should have started – by conceding that it could finalize a bond in just 14 days. Rather than just do that, as directed under Federal Rule of Civil Procedure 62, SAP asks this Court to order Oracle into a complex escrow contract (the "Proposed Escrow Agreement," attached as Exhibit 1 to the Lanier Declaration, Dkt. No. 1052). Due to the significance and complexity of SAP's request, Oracle has spent over 100 attorney hours in the past three months attempting in good faith to negotiate an escrow agreement that would not leave Oracle worse off than if SAP simply posted a bond. The Proposed Escrow Agreement, which SAP significantly modified even on the date that it filed this Motion, does just that. It would allow SAP to reap significant financial benefits by avoiding bond fees while simultaneously claiming a huge current tax deduction. At the same time, it potentially would trigger significant adverse income tax consequences for Oracle. Although Oracle has spent months negotiating with SAP, Oracle objects to the Proposed Escrow Agreement because it would expose Oracle to far more risk and uncertainty than a bond ever would.

The Court should deny the Motion for at least three reasons.

First, SAP has not shown it is impossible or impracticable for it to post a full supersedeas bond. This is the legal test SAP must meet but its motion makes no mention of it, perhaps because SAP admits that it could post a full bond within 14 days. The expense and inconvenience that SAP speculates it "might" incur primarily arise from obligations SAP assumed after it knew it would need to provide this security and, in any event, do not make a bond impossible or impracticable to obtain.

Second, SAP has not shown that the Proposed Escrow Agreement would safeguard Oracle's interests, another legal requirement. The Proposed Escrow Agreement instead subjects Oracle to potential tax risks and uncertain indemnification liability. Now, because Oracle will not assume those risks voluntarily, SAP asks the Court to impose them. Doing so would prejudice Oracle and only safeguard SAP's interests by providing the convenience and financial benefit SAP identifies. That result would turn the law on its head.

Third, SAP asks the Court to do something that a Court cannot – force a party to

enter into a highly complex contract with the other side. The gravity of what SAP asks this Court to do cannot be overstated, as it concerns the investment, control, disbursement, and tax treatment of over $1.3 billion in escrow funds.

The Court should deny SAP's Motion. The Court should order SAP to obtain a supersedeas bond in the agreed initial amount of $1,325,033,547 within 14 days of the Court's Order, with further instructions for the bonding company to provide a quarterly report to the Parties and increase the bond amount as needed to cover post-judgment interest accrued in the future.

II. FACTUAL BACKGROUND

At SAP's request, the Parties began negotiations over an alternative form of security on December 17, 2010. *See* Alinder Declaration in Support of Oracle's Opposition ("Alinder Decl."), Ex. A. SAP proposed an escrow agreement. *See id.* Oracle agreed to meet and confer in an attempt to negotiate an escrow agreement that would provide adequate security for the judgment but did not subject Oracle to any additional risk, costs or uncertainty. *See id.*, ¶ 2. By the time the Court entered judgment on February 3, 2011, the Parties had devoted considerable time to the negotiations and would devote more. *See id*., ¶ 3.

To facilitate discussions, Oracle agreed to extend the stay on execution of the judgment three times (and offered a fourth, unaccepted extension before SAP filed this Motion). *See id.* To date, Oracle has devoted well over 100 attorney hours negotiating the terms of an acceptable escrow agreement. *See id*. The Parties first exchanged approximately five drafts of a proposed escrow term sheet, followed by exchange of at least ten drafts related to the Proposed Escrow Agreement itself, about which the Parties held at least five telephonic meet and confers and exchanged dozens of emails. *See id.*, ¶ 4. During these negotiations, when Oracle asked why SAP preferred the escrow, SAP only cited "convenience," "cost" and "internal administrative reasons." *See id.*, ¶ 4 & Ex. B. SAP never explained or revealed that it had entered into the third party agreements (in one case two days before initially proposing an escrow) which it now says "might" make the bond inconvenient or expensive. *See* Declaration of Michael Junge in Support of SAP's Motion for Stay, Dkt. No. 1054 ("Junge Decl."), ¶¶ 2

(revealing December 15, 2010 credit facility, entered two days prior to first contacting Oracle about the proposed escrow) & 3-6. At no time did SAP state it would take only 14 days to obtain the bond. *See* Alinder Decl., ¶ 5.

On March 24, 2011, both sides needed to obtain final client approval on the overall escrow agreement and one principal item remained in dispute between counsel: Oracle did not agree to indemnify SAP's Escrow Agent (an obligation Oracle would not have with a bond). *See id.*, ¶ 6.[1]

That same morning, SAP informed Oracle that it had also decided to change the tax reporting section in the Proposed Escrow Agreement back to language that the Parties had abandoned a week earlier, purporting to treat the escrow as a "qualified settlement fund" ("QSF") under U.S. Treasury Regulations.[2] *See id.* Earlier, SAP had agreed to "give up" this tax language to "alleviate Oracle's concern regarding the tax implications of a QSF and its request for a tax indemnity." *See id.*, Ex. C. SAP explained this filing-day change, stating that the "proposals discussed have been and are subject to client approval," and that SAP "believe[d] this is the most appropriate form of security for both parties under all of the circumstances." *See id.*, ¶ 7 & Exs. D & E. SAP rejected Oracle's offer for a further extension of the filing deadline to allow time to resolve the outstanding issues, and filed this Motion pursuant to Federal Rule of Civil Procedure 62, Dkt. No. 1051 (the "Motion"). *See id.*

III. LEGAL STANDARD FOR ALTERNATIVE FORM OF SECURITY

"Because the stay operates for the appellant's benefit and deprives the appellee of the immediate benefits of his judgment, ***a full supersedeas bond should be the requirement in normal circumstances*** . . . ." *Fed. Prescription Serv., Inc. v. Am. Pharm. Ass'n*, 636 F.2d 755, 760 (D.C. Cir. 1980) (emphasis supplied). "The general rule is for the district court to set a

[1] The proposed tax reporting and tax indemnity language also was subject to client approval. *See* Alinder Decl., ¶ 6.

[2] The tax implications of treatment as a qualified settlement fund are discussed in detail in Section V.A. below.

supersedeas bond in the full amount of the judgment plus interests, costs, and damages for delay." *Funai Elec. Co., Ltd. v. Daewood Elecs. Corp.*, No. C-04-01830 JSC, 2009 U.S. Dist. LEXIS 35371, at *3 (N.D. Cal. Apr. 9. 2009) (citation omitted). SAP must "objectively demonstrate" why the Court should "depart from the usual requirement of a full security supersedeas bond," and that its Proposed Escrow Agreement meets the requirements for alternate forms of security under Federal law. *Poplar Grove Planting & Refining Co., Inc. v. Bache Halsey Stuart, Inc.*, 600 F.2d 1189, 1191 (5th Cir. 1979).

Courts only accept "an alternate form of security . . . where two conditions are met: (1) it is impossible or impracticable for the party to post the supersedeas bond, and (2) the proposed alternative is adequate to safeguard the interests of the other party." *Hynix Semiconductor, Inc. v. Rambus, Inc.*, No. C-00-20905 RMW, 2010 U.S. Dist. LEXIS 97751, at *12 (N.D. Cal. Sept. 17, 2010) (citing *Olympia Equip. Leasing Co. v. Western Union Tel.*, 786 F.2d 794, 796 (7th Cir. 1986)).

Courts generally accept an escrow arrangement as an alternative form of security only when the parties have agreed to the escrow terms. *See, e.g., Funai*, 2009 U.S. Dist. LEXIS 35371, at *5 (ordering a supersedeas bond for 125% of the judgment amount, even though plaintiff did not object to escrow, but leaving open option of escrow "if the parties can reach agreement as to the terms."); *Int'l Telemeter, Corp. v. Hamlin Int'l Corp.*, 754 F.2d 1492 (9th Cir. 1985) ("The escrow account was *only court ordered pursuant to stipulation of the parties.*") (emphasis supplied). This makes sense. Courts do not make contracts for parties, and certainly not complex escrow agreements like the one SAP proposes. *See, e.g., Headlands Reserve, LLC v. Ctr. for Nat'l Lands Mgmt.*, 523 F. Supp. 2d 1113, 1123 (C.D. Cal. 2007) ("Courts do not make contracts for the parties.") (citation omitted); *Stockton Exec. Limousine Charter Serv., Inc. v. Union Pac. R.R.*, No. S-04-1999-LKK, 2006 WL 769623, at *6 (E.D. Cal. 2006) ("[A] court does not have the power to create for the parties a contract which they did not make . . . .") (citation omitted).

IV. AS SAP CONCEDES, IT CAN EASILY OBTAIN A BOND

An alternative security "is appropriate ***only*** where it is impossible or

impracticable for the party to post a bond." *Hynix Semiconductor*, 2010 U.S. Dist. LEXIS 97751, at *12 (emphasis supplied). The "desire to avoid incurring the expense of giving a supersedeas bond" is not sufficient to meet the standard for impracticability. *Crowley v. Chait*, No. 85-2441, 2005 U.S. Dist. LEXIS 40830, at *4-5 (D.N.J. Sept. 23, 2005); *United States v. Kurtz*, 528 F. Supp. 1113, 1115 (E.D. Pa. 1981) (requiring showing of "extraordinary circumstances" for approval of security other than a bond). SAP's Declarations demonstrate that SAP has failed to prove impracticability under these standards.

SAP's Corporate Risk Manager avers that a bond would cost more than an escrow arrangement. *See* Declaration of Marcin Plonka in Support of SAP's Motion to Stay, Dkt. No. 1053 ("Plonka Decl."), ¶ 5 ("It would save Defendants millions of dollars if they could secure the judgment in this case through an escrow agreement as opposed to a supersedeas bond."). However, posting a full bond rather than paying the judgment is a "privilege" to the judgment debtor; the Federal Rules contemplate those expenses. *Poplar Grove*, 600 F.2d at 1191. The fact that the judgment is large, requiring a large bond, does not make the bond impracticable to obtain. *See, e.g.*, *Bolt v. Merrimack Pharms. Inc.*, No. S-04-0893 WBS, 2005 U.S. Dist. LEXIS 46591, *12 (E.D. Cal. Sept. 20, 2005) (bond not impracticable where defendant claims "financial hardship," but not that it would cause defendant to "face bankruptcy" or "jeopardize[] its other creditors").

SAP's General Counsel says that over the past year, *including after the jury verdict in this matter*, SAP voluntarily entered into credit facilities and other financial arrangements, which "might" restrict SAP's ability to obtain a bond. Junge Decl., ¶ 6.[3] Despite the passage of time and the significant efforts expended in meet and confer, Mr. Junge admits that SAP never has confirmed that its creditors would object to a bond or what amount, if any,

[3] Oracle objects to paragraphs 3-4 and 6 of the Junge Declaration as improper speculation and lacking foundation. Fed. R. Evid. 602. The Junge Declaration does not establish *any* basis for statements about what bond issuers "would require" or any basis for his statement that a bond "might cause [SAP's] creditors to seek additional concessions from Defendants, such as a fee for the consent, a requirement that the current secured creditors be provided *in rem* security, an increased interest rate, or other fees." Junge Decl., ¶¶ 3-4 and 6.

they would request to receive their consent. *See id*. He even concedes that "SAP AG might be able to secure the agreement of the creditors . . . allowing Defendants to" post a bond. *Id*.

Despite these predicted (but unsupported) hurdles, Mr. Plonka confirms that SAP can get the bond in short order: "I estimate that the administrative process of obtaining the bond could take 14 days after the Court's order is entered." Plonka Decl., ¶ 6; Motion at 8:17-20. Nothing in these declarations demonstrates impossibility or impracticability.

Further, even if Mr. Junge's speculation about inconvenience and expense turned out to be correct, the cost imposed by creditors under agreements entered by SAP with full knowledge of their consequences cannot justify the alternate security. *See Crowley*, 2005 U.S. Dist. LEXIS 40830, at *4-5; *Bolt*, 2005 U.S. Dist. LEXIS 46591, at *12. Any restrictions imposed by SAP's credit facilities are a problem entirely of SAP's making. SAP entered these credit agreements over the past year, including one after the jury verdict and just two days before SAP first proposed using an escrow agreement to Oracle. *See* Junge Decl., ¶ 2; *see* Alinder Decl., Ex. A. SAP knew before entering these agreements that it either already owed well over $1 billion in damages to Oracle (in the case of the RCF facility) or, at the very least, that it could very well owe substantially more than the $40 million it claimed to owe Oracle at trial (in the case of the Sybase facility and the USPP). *See* Junge Decl., ¶ 2. In addition, if SAP's credit arrangements require creditor consent to approve a bond, surely the creditors also had to consent to the additional credit facilities SAP entered last year. *See id*. Thus, SAP asks this Court to treat the minor inconvenience it would suffer in seeking further agreement from these creditors as "impracticability," even though SAP must also have sought their consent for other recent "financial indebtedness" when it suited SAP's own needs. *See* Junge Decl., ¶¶ 2-6.[4] SAP's

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[4] Mr. Junge also claims that the bond issuer "would also require as a condition of issuing a bond that SAP AG or its affiliates post cash collateral or other *in rem* security, or agree in the future to post cash collateral or other *in rem* security." Junge Decl., ¶ 4. However, he then states that only the "*in rem* security" not the "cash collateral" would be prohibited as "financial indebtedness" under its credit facilities. *Id*. Thus, SAP concedes that it can meet the demands of the bond issuers and stay within the terms of these credit facilities by posting cash collateral.

evidence fails to establish any cost or difficulty with certainty, and falls far short of demonstrating impossibility or impracticability.

V. SAP'S PROPOSED ESCROW AGREEMENT BENEFITS SAP BUT EXPOSES ORACLE TO RISK AND UNCERTAINTY

SAP's Proposed Escrow Agreement also fails the second prong of the test for alternative forms of security. First, SAP's apparent intention to claim a tax deduction at the time of its transfer to the escrow exposes Oracle to a risk that the IRS could assess against Oracle, for the same period, a potentially large tax liability. Second, the Proposed Escrow Agreement would expose Oracle to cost of defense and indemnification liability. Neither risk would exist if SAP posted a bond.

A. The Proposed Escrow Agreement Would Expose Oracle To Tax Risks

1. To Set Up A Large Tax Deduction, SAP Claims That The Proposed Escrow Qualifies As A QSF

SAP "plan[s]" to have the proposed escrow treated as a QSF so that SAP can take advantage of "certain Congressionally-mandated tax benefits." Motion at 5-6. The tax rules governing QSFs are set out in Treasury Regulations §§ 1.468B-1 through 1.468B-5,[5] and the only material benefit for a transferor under those rules is that the transfer is deemed to constitute "economic performance." Treas. Reg. § 1.468B-3(c)(1). Economic performance is one of the criteria that SAP would need to meet in order to claim a tax deduction related to its liability to Oracle. Treas. Reg. § 1.461-1(a)(2)(i).

Thus, SAP intends to seek QSF treatment so that it can take a tax deduction worth hundreds of millions of dollars that SAP could not claim if it simply posted a bond. As explained below, by claiming that deduction, SAP would expose Oracle to a significant tax risk,

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[5] References to "Treasury Regulations" or "Treas. Reg." are to Title 26 of the Code of Federal Regulations. References to the "Code" or "I.R.C." are to the Internal Revenue Code of 1986, as amended, Title 26 of the United States Code. Except as otherwise specified, "Section" references are to sections of the Code.

even though SAP concedes (*see* Motion at 6-7) that Oracle should not be liable for any current tax.

2. There Are Serious Questions About Whether The Proposed Escrow Qualifies As A QSF

Pursuant to Code Section 468B and the applicable Treasury Regulations, a QSF is only one of several possible classifications for an escrow. As the name suggests, the regulations governing "qualified settlement funds" were designed to deal with settlements. QSF status is reserved for funds that are "established to *resolve or satisfy* one or more" claims for legal liability.[6] Treas. Reg. § 1.468B-1(c)(2) (emphasis supplied). Escrows that provide a security arrangement with respect to *disputed* funds or property may be classified instead as "disputed ownership" accounts pursuant to Treasury Regulations Section 1.468B-9.[7] Unlike contributions to a QSF, contributions to a "disputed ownership" account are deductible, if at all, *only when they are paid out to another claimant*. *See* Treas. Reg. § 1.468B-9(e)(2)(i) (transfer *from* disputed ownership account treated as transfer from transferor to claimant for purpose of determining timing of deduction).

SAP has not agreed to any settlement of Oracle's claims. To the contrary, SAP continues – through post-trial motions, including this Motion to stay the judgment through its planned appeal – to contest this Court's judgment against it on those claims. Accordingly, SAP's transfer to an escrow may not be seen to "resolve or satisfy" any of Oracle's claims.

Since the Proposed Escrow Agreement would simply provide security for SAP's potential liability to Oracle, and would not resolve or satisfy that liability, there are serious questions as to whether it constitutes a QSF. For example, if the IRS views the escrow as a "disputed ownership fund," SAP's transfer to the escrow would not entitle SAP to the $1.3

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[6] Although the regulations do not include a general definition of the term "resolve or satisfy," they provide that, in the case of a liability to provide services or property, the liability must be "extinguished by a transfer or transfers to the fund, account or trust." Treas. Reg. § 1.468B-1(f)(1).

[7] A disputed ownership account is any court-supervised "escrow account, trust, or fund . . . established to hold money or property subject to conflicting claims of ownership" that is not a QSF. Treas. Reg. § 1.468B-9(b)(1).

billion tax deduction that SAP is proposing to claim.

3. SAP's Deduction Of Amounts Transferred To The Proposed Escrow Would Conflict With Oracle's Reporting And Would Create Tax Risk For Oracle

It is a general principle of tax law – notwithstanding some exceptions not relevant here – that where a liability gives rise to a deduction for one taxpayer and income for another, the deduction should not be available to one before the income is included by the other. *See generally* Julie A. Roin, *Unmasking the "Matching Principle" in Tax Law*, 79 Va. L. Rev. 813 (1993). In its Motion, SAP describes the "all events" test for the accrual of income to an obligee. Motion at 6 (citing Treas. Reg. § 1.451-1(a), along with two Revenue Rulings applying the test in situations not involving an escrow account). What SAP fails to mention is that the exact same test – with one additional criterion – governs the accrual of deductions by the obligor. A deduction generally is taken into account "in the taxable year in which all the events have occurred that establish the fact of the liability, the amount of the liability can be determined with reasonable accuracy, and economic performance has occurred with respect to the liability." Treas. Reg. § 1.461-1(a)(2)(i).[8]

Thus, in order to claim a deduction for its $1.3 billion transfer to the proposed escrow, SAP will need to claim that "all events" have occurred to establish its liability to Oracle in that amount.[9] That creates a potential conflict. It is not clear how SAP could claim – as it does at pages 6-7 of the Motion – that the escrow deposit "will not" constitute income to Oracle because SAP's liability will not be fixed under the "all events" test, when at the same time SAP anticipates a tax deduction, the availability of which seems to turn on a conflicting resolution of

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[8] The first two criteria, "all the events have occurred" and "the amount ... can be determined with reasonable accuracy," are materially identical to the test for accruing income under Treas. Reg. § 1.461-1(a)(2)(i). The third criterion, "economic performance," would be satisfied only if the escrow constitutes a QSF, which is uncertain for the reasons discussed above.

[9] By themselves, the QSF rules – even if they did apply to the escrow – would do no more than permit SAP to satisfy the economic performance portion of the test for deductibility. The QSF rules do not have any bearing on whether or when the "all events" test is satisfied.

the same legal test.

Even if the Proposed Escrow Agreement would not "cause any adverse tax consequences" for Oracle as SAP argues, inconsistent tax treatment like this still creates risk.[10] Motion at 6. When two parties take conflicting positions as to the treatment of a particular tax item, as SAP proposes that it and Oracle would do with respect to SAP's escrow payment, the IRS is permitted to, and frequently does, pursue tax assessments *against both parties* on a protective basis. *See, e.g., Indeck Energy Servs., Inc. v. Comm'r*, 85 T.C.M. (CCH) 1128, 1134 & n.6 (2003) (IRS proposed inconsistent protective assessments against two parties to a litigation settlement who had reported inconsistent tax treatment of settlement proceeds); Int. Rev. Man. 36.2.6.2.3 (listing, among other things, "[d]isputes over the year in which an item should be taxed" as situations that may require protective appeals by IRS). This practice prevents the IRS from being "whipsawed" if the period allowed for making an assessment against one taxpayer expires while the IRS is litigating (and ultimately loses) a case against the other taxpayer. *See Indeck Energy*, 85 T.C.M. (CCH) at 1134.

Oracle would suffer severe consequences if the IRS or a state taxing authority proposed a protective assessment against Oracle in connection with SAP's escrow deposit. At the current maximum federal corporate income tax rate of 35%, the tax liability associated with the proposed $1,325,033,547 payment could be $463,761,741. Using California's corporate income tax rate of 8.84%, the state income tax liability (even after accounting for federal tax benefit) could add another $76,136,428.[11] Oracle also would expend significant resources just to

[10] Though the risk may be small that the IRS would view the Proposed Escrow Agreement as failing to meet the QSF requirements, when multiplied by the potential tax liability, it is not a risk that Oracle should have to take.

[11] The federal and California tax rates cited are set forth in Code § 11(b)(1)(D) and Cal. Rev. & Tax Code § 23151(f)(2). The figures for potential tax liability are simply the product of those rates and the initial amount that the Parties agreed SAP should transfer pursuant to the Proposed Escrow Agreement (but, in the case of the state tax, the nominal rate of 8.84% is first multiplied by 65% to account for the fact that the state tax would itself give rise to a federal deduction at a 35% rate). Oracle provides these figures for explanatory purposes only, and does not contend these figures accurately represent the actual tax that would be owed by either Oracle or SAP.

contest a liability of that magnitude. Even then, depending on the forum in which it chose to contest such an assessment, Oracle could be required to pay the tax, plus accrued interest, prior to disputing the liability. *See*, *e.g.*, *Flora v. United States*, 362 U.S. 145 (1960) (tax must be paid in full before suing for refund in District Court).

4. SAP Refused To Indemnify Oracle For These Tax Risks

During meet and confer, Oracle identified the tax risk arising from SAP's proposed treatment of the escrow as a QSF. *See* Alinder Decl., ¶ 6 & Ex. C. Oracle proposed that SAP either (a) indemnify Oracle against any adverse tax consequences that would arise from SAP's escrow proposal, or (b) draft the escrow agreement in a manner that would not create these tax risks for Oracle (nor the corresponding tax benefit to SAP). *See id.* Although SAP initially agreed to modify the language based on these concerns, it changed its mind on the day it filed its motion and rejected both proposals. *See id*., ¶¶ 6-7 & Exs. C-E.

This is SAP's Proposed Escrow Agreement, for SAP's benefit. SAP has the burden to show that it safeguards Oracle's interests. Oracle should not bear *any* additional risk in this situation, let alone the half billion dollar tax risk that SAP would have this Court impose on Oracle. If SAP truly believed that no tax risk existed, SAP would have agreed to indemnify Oracle. Because the risk does exist, the Court should deny the Motion.

B. Oracle Should Not Have To Indemnify SAP's Escrow Agent

SAP's Proposed Escrow Agreement also requires Oracle to indemnify SAP's Escrow Agent for what SAP calls "defined losses to the agent caused solely by Plaintiffs' conduct." Motion at 7-8. SAP argues that it is unfair to put such risks on the Escrow Agent. *See id*. Perhaps that is true (although the Escrow Agent would certainly benefit from this arrangement as well). But even if the Escrow Agent should not have to bear these risks, *SAP should*, by indemnifying its Escrow Agent for all losses that arise from SAP's Proposed Escrow Agreement.

SAP's argument also fails for three additional reasons.

First, SAP's claim that Oracle could "harm the escrow agent with impunity" is illogical. Motion at 7-8. Oracle has no reason or desire to "harm the escrow agent," but the fact

that SAP raises this prospect does give Oracle pause about entering this contract with SAP.

Second, in the Proposed Escrow Agreement, SAP defines "losses" to the Escrow Agent as "any and all losses, damages, claims, liabilities, penalties, judgments, settlements, litigation, investigations, costs or expenses (including, without limitation, the fees and expenses of outside counsel and experts and their staffs and all expense of document location, duplication and shipment." *See* Lanier Decl., Ex. 1 (Proposed Escrow Agreement) at Section 8. Calling these losses "defined" in this Motion does not make them so; the language provides no limit or boundary to the exposure SAP would have Oracle undertake. *See id.*; Motion at 7-8.

Third, even if SAP appropriately defined the scope of the indemnity, Oracle would still have to litigate against SAP to determine whether losses were "solely" attributable to Oracle's conduct or not. *See* Lanier Decl., Ex. 1 (Proposed Escrow Agreement) at Section 8. Oracle should not – and will not – accept uncertain litigation risks and costs resulting *solely* from SAP's desire to use an escrow agreement here, rather than a bond.

VI. THE COURT SHOULD NOT ORDER THE PARTIES INTO A COMPLEX CONTRACTUAL RELATIONSHIP

SAP's Motion and this Opposition establish one thing for certain. There is no "agreement" here. As the caselaw, including that cited by SAP, confirms, agreement on the terms of the escrow is a fundamental pre-condition to the Court ordering the relief that SAP seeks in its Motion. *See* Motion at 3, 8; *Int'l Telemeter, Corp.*, 754 F.2d at 1495 ("The escrow account was *only court ordered pursuant to stipulation of the parties.*") (emphasis supplied); *see also Funai*, 2009 U.S. Dist. Lexis 35371, at *5-6 (ordering that 125% bond be posted, or that same amount may be deposited in escrow "*if the parties can reach agreement as to the terms of the escrow.*") (emphasis supplied).[12]

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[12] The *Townsend* case cited by SAP does not address alternative forms of security other than noting that a motion to stay was not sanctionable, because a court "may permit" a form of security other than a bond. *See* Motion at 3; *Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1367 (9th Cir. 1990).

Meanwhile, SAP does not appear remotely to appreciate the gravity of what it requests – that this Court order Oracle to agree to 15 pages of highly complex escrow terms proposed by SAP that would govern the investment, control, distribution, and tax treatment of over $1.3 billion. SAP cites no case where a court has ordered a party to enter an escrow agreement, much less under the circumstances SAP proposes. Oracle is aware of none. The order SAP seeks, while inventive, has no legal support. *See Honolulu Waterfront Ltd. P'ship v. Aloha Tower Dev. Corp.*, 692 F. Supp. 1230, 1235 (D. Haw. 1988), *aff'd*, 891 F.2d 295 (9th Cir. 1989) ("[W]hile the power of the court to fashion in appropriate cases an equitable remedy is great, it does not encompass a right to make an agreement for the parties.") (citation omitted).

Given the significant efforts already expended by the Parties in a good faith attempt to reach an agreement and the serious remaining risks and uncertainties described above, it would be futile to order that the Parties resume their negotiations. *See id.* at 1235 (finding it "futile" to order the parties to negotiate agreement without the "power to order them to agree.").[13] Indeed, the failure of the escrow negotiations to date proves that these Parties would both be better off not entering into a complex escrow agreement with each other. The Court should order SAP to post a full bond, so that the Parties and the Court can focus on the post-trial and appellate issues that remain.

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[13] Should the Court consider such relief though, given the significant time and expense Oracle has incurred to date, the Court should order SAP to pay half of Oracle's past and future legal fees expended in negotiating the terms of SAP's Escrow Agreement. *See, e.g.*, *Sibia Neurosciences, Inc. v. Cadus Pharm. Corp.*, No. 96-1231-IEG (POR), 1999 WL 33554683 (S.D. Cal. Mar. 10, 1999), at *5 (requiring defendant to pay half of plaintiff's legal fees in negotiating escrow agreement in addition to conditioning approval on the parties actually reaching an agreement).

VII. CONCLUSION

For the foregoing reasons, the Court should deny SAP's Motion for Stay and Approval of Security, and order SAP to obtain a supersedeas bond in the agreed initial amount of $1,325,033,547 within 14 days of the Court's Order, with further instructions for the bonding company to provide a quarterly report to the Parties and increase the bond amount as needed to cover post-judgment interest accrued in the future.

DATED: April 13, 2011

Bingham McCutchen LLP

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