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22 UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 23 OAKLAND DIVISION

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

24 Plaintiffs,

25 v.

26 SAP AG, *et al.*,

27 Defendants.

28

No. 07-CV-01658 PJH (EDL)

ORACLE'S NOTICE OF MOTION AND
 MOTION FOR 1292(b) CERTIFICATION FOR
 INTERLOCUTORY REVIEW; MEMO OF
 POINTS AND AUTHORITIES

Date: January 11, 2012

Time: 9:00 a.m.

Place: 3rd Floor, Courtroom 3

Judge: Hon. Phyllis J. Hamilton

1 **NOTICE OF MOTION AND MOTION**

2 PLEASE TAKE NOTICE THAT on January 11, 2012, at 9:00 a.m., in the United
3 States District Court, Northern District of California, Oakland Division, located at 1301 Clay
4 Street, Oakland, California, Courtroom 3, 3rd Floor, before the Hon. Phyllis J. Hamilton,
5 Plaintiff Oracle International Corp. (“Oracle”) will and does hereby bring a motion to request
6 that the Court amend its Order Granting Defendants’ Motion for JMOL, and Motion for New
7 Trial; Order Denying Plaintiffs’ Motion for New Trial; Order Partially Vacating Judgment (the
8 “Post-Trial Order”) to certify the Post-Trial Order for interlocutory review, pursuant to 28 U.S.C.
9 1292(b) and Fed. R. App. Proc. 5(a)(3). This motion is based upon this Notice of Motion and
10 Motion and Memorandum of Points and Authorities, the Post-Trial Order, the evidence at trial,
11 the jury instructions and verdict, and the related prior motions, briefing, and orders.

12 **REQUESTED RELIEF**

13 Oracle respectfully requests that the Court certify the Post-Trial Order for
14 interlocutory appeal because it involves the following controlling question of law as to which
15 there is substantial ground for difference of opinion and an immediate appeal may materially
16 advance the ultimate termination of the litigation:

17 Whether copyright damages based upon the amount a willing buyer would
18 reasonably have had to pay a willing seller under a hypothetical license requires the copyright
19 owner to provide evidence of (a) actual licenses it entered into or would have entered into for the
20 infringed works and/or (b) actual “benchmark” licenses entered into by any party for
21 comparable use of the infringed or comparable works.

22 **MEMORANDUM OF POINTS AND AUTHORITIES**

23 **I. INTRODUCTION**

24 As the Court acknowledged in its Post-Trial Order, this case presents an important
25 question of copyright damages law that has not been definitively resolved by the Ninth Circuit:
26 namely, whether a *hypothetical* license theory of fair market value requires a copyright owner to
27 prove that it *actually* licensed or would have licensed the infringed work, and/or to prove the
28 existence of *actual* “benchmark licenses” for comparable use of the infringed or comparable

1 works. There is no dispute that “[t]he Ninth Circuit has endorsed a retroactive license fee as one
2 measure of the loss in fair market value of the copyright,” as measured by the amount ““a willing
3 buyer would have been reasonably required to pay a willing seller for the plaintiff’s work.””
4 Post-Trial Order at 6 (quoting *Jarvis v. K2 Inc.*, 486 F.3d 526, 533 (9th Cir. 2007)). No Ninth
5 Circuit decision, however, settles the question whether such a hypothetical license measure
6 depends upon proof of a copyright owner’s *actual* prior or likely future licensing practices or
7 evidence of *actual* “benchmark transactions, such as licenses previously negotiated for
8 comparable use of the infringed work, and benchmark licenses for comparable uses of
9 comparable works” (*id.* at 11 (“benchmark licenses”)). As the Court observed, “the Ninth
10 Circuit has never upheld a hypothetical license award absent such actual proof,” but the Ninth
11 Circuit also “has never explicitly held that hypothetical license damages are *not* available absent
12 actual proof that the plaintiff would have licensed the infringed work to the defendant or a third
13 party for the specific use at issue.” *Id.* at 12 (citing cases). Similarly, no Ninth Circuit (or any
14 other) case has held that recovery of fair market value damages requires proof of “benchmark
15 licenses.”

16 By contrast, other circuits have held that a copyright owner may obtain fair
17 market value damages based on a hypothetical license amount even where parties would not
18 have agreed to license their intellectual property. *See On Davis v. The Gap, Inc.*, 246 F.3d 152,
19 171-72 (2d Cir. 2001); *Deltak, Inc. v. Advanced Sys., Inc.*, 767 F.2d 357, 360-62 (7th Cir. 1985).
20 Similarly, it is commonplace in the patent context for courts to consider hypothetical license
21 damages even in the absence of evidence of actual historical or “benchmark” licensing practices.
22 *See, e.g., Panduit Corp. v. Stahhlin Bros. Fibre Works, Inc.*, 575 F.2d 1152, 1164 (6th Cir. 1978)
23 (remanding; district court “must” consider patent owner’s “unvarying policy of not licensing the
24 [patent in suit]” in determining hypothetical license fee); *Georgia-Pacific Corp. v. United States*
25 *Plywood Corp.*, 318 F. Supp. 1116, 1120 (S.D.N.Y. 1970), *modified and aff’d*, 446 F.2d 295 (2d
26 Cir. 1971) (one factor indicating a *higher* reasonable royalty is the absence of prior licenses).
27 The uncertainty and conflict that thus surround the core holding in the Post-Trial Order thus
28 warrant interlocutory appellate review. As a recent Northern District decision properly noted,

1 1292(b) “certification is appropriate where there is ‘a dearth of precedent within the controlling
2 jurisdiction and conflicting decisions in other circuits.’” *Ritz Camera & Image, LLC v. SanDisk*
3 *Corp.*, No. 5:10-cv-02787-JF, slip op. at 4 (N.D. Cal. Sept. 7, 2011) (quoting *APCC Servs., Inc.*
4 *v. AT&T Corp.*, 297 F. Supp. 2d 101, 107 (D.D.C. 2003)).

5 Appellate guidance on the scope of hypothetical license damages is especially
6 warranted before the Court, the parties, and a new jury are put to the enormous burden and
7 expense of a second trial. The Order itself indicates substantial ground for disagreement with
8 respect to the issues presented. If Oracle is correct that they were wrongly decided, no new trial
9 would be required. It will thus serve important interests in judicial efficiency if this Court grants
10 1292(b) certification, as well as Oracle’s companion motion to stay the proceedings in the trial
11 court and to extend the time for Oracle to accept or reject the remittitur until 10 days after final
12 appellate disposition.

13 **II. ARGUMENT**

14 Interlocutory appeal is the exception, not the rule, but it is warranted here, for the
15 Post-Trial Order involves a controlling question of law, as to which there is substantial ground
16 for difference of opinion, and a resolution thereof will materially advance the termination of this
17 litigation. 28 U.S.C. § 1292(b); *see Via Techs., Inc. v. Sonicblue Claims, LLC*, No. C 09–2109
18 PJH, 2011 WL 2437425, at *1 (N.D. Cal. June 17, 2011).¹ The party seeking certification of an
19 interlocutory appeal has the burden to show the presence of those exceptional circumstances.
20 *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 474 (1978).

21 Each of these three 1292(b) requirements is clearly satisfied here.

22 **1. The Post-Trial Order States Controlling Questions Of Law**

23 A question of law is “controlling” if its resolution on appeal could “materially
24 affect the outcome of the litigation in district court.” *In re Cement Antitrust Litig.*, 673 F.2d

25 ¹ This Court has authority to amend the Post-Trial Order to include a 1292(b) certification.
26 *See* Fed. R. App. Proc. 5(a)(3) (“If a party cannot petition for appeal unless the district court first
27 enters an order . . . stating that the necessary conditions are met, the district court may amend its
28 order, either on its own or in response to a party’s motion, to include the required permission or
statement.”). The Court of Appeals may then exercise discretion to permit an appeal. 28 U.S.C.
§ 1292(b).

1 1020, 1026 (9th Cir. 1982), *aff'd sub nom. Arizona v. Ash Grove Cement Co.*, 459 U.S. 1190
2 (1983); *United States Rubber Co. v. Wright*, 359 F.2d 784, 785 (9th Cir. 1966) (per curiam).
3 Review of the order need not be outcome-determinative; reversal of the order need not terminate
4 the litigation. *Kuehner v. Dickinson & Co.*, 84 F.3d 316, 319 (9th Cir. 1996) (order denying
5 arbitration involved controlling question because it “could cause the needless expense and delay
6 of litigating an entire case”). Instead, “a court will require only that the appeal present a
7 controlling question of law on an issue whose determination may materially advance the ultimate
8 termination of the case.” 19 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE
9 § 203.31[3] (3d ed. 1997).

10 The Court held as a matter of law that Oracle was not entitled to recover fair
11 market value damages measured by a hypothetical license for the rights infringed because it
12 failed to prove that Oracle had licensed or was likely to license the works to SAP or third parties,
13 or to prove the existence of “benchmark licenses” for the infringed or comparable works. *See*
14 Post-Trial Order at 10 (“Oracle presented no evidence, and did not argue, that it was entitled to a
15 hypothetical license fee because it lost an opportunity to license the works to third parties for the
16 same use as was made by TN.”); *id.* (“Thus, to establish its entitlement to recover hypothetical
17 license damages, Oracle was required to show that, but for infringement, the parties would have
18 agreed to license the use of the copyrighted works at issue.”); *id.* at 11 (“Absent evidence of
19 benchmarks, Oracle cannot recover a lost license fee award, because any such award would be
20 based on a subjective, not an objective, analysis of fair market value.”). Accordingly, the Court
21 granted Defendants’ motion for judgment as a matter of law and for a new trial.

22 These issues of law indisputably control the outcome in this case. The absence of
23 actual licensing history or “benchmark” license evidence led the Court to hold the evidence at
24 trial insufficient to support the jury’s award as a matter of law. *Id.* at 15; *see id.* at 14 (“[G]iven
25 the lack of history of past licensing of the copyrighted material to anyone (not just to SAP), and
26 the lack of any evidence that Oracle would ever license the material to SAP or to anyone in the
27 future, coupled with the absence of any benchmark evidence upon which to determine the value
28 of a license, the court finds no support for awarding Oracle actual damages in the form of lost

1 license fees.”). Similarly, the absence of actual licensing history or “benchmark” license
2 evidence led the Court to order a new trial (or remittitur). *Id.* at 17 (“Having already determined
3 that SAP is entitled to judgment as a matter of law that Oracle is not entitled to actual damages
4 for copyright infringement in the form of a hypothetical license, the court finds that the motion
5 for a new trial must be GRANTED, conditional upon Oracle’s rejection of a remittitur to \$272
6 million . . .”). The Court’s legal rulings led it to find unduly speculative Oracle’s considerable
7 evidence of hypothetical license value in the form of SAP’s contemporaneous valuation of the
8 rights infringed and corroborating evidence from Oracle’s executives.

9 2. There Are Substantial Grounds For Difference Of Opinion

10 As this Court has noted, “Substantial grounds for a difference of opinion required
11 to certify an order for interlocutory review arise when an issue involves one or more difficult and
12 pivotal questions of law not settled by controlling authority.” *Via Techs.*, 2011 WL 2437425, at
13 *1. In *Via Technologies*, the Court found “substantial grounds for difference of opinion” where
14 the court was “unable to locate any definitive authority that answered the exact question raised
15 by the” controlling legal issues. *Id.* at *2; *accord, Reese v. BP Exploration (Alaska) Inc.*, 643
16 F.3d 681, 687-88 (9th Cir. 2011) (“[W]hen novel legal issues are presented, on which fair-
17 minded jurists might reach contradictory conclusions, a novel issue may be certified for
18 interlocutory appeal without first awaiting development of contradictory precedent.”);
19 *Klinghoffer v. S.N.C. Achille Lauro Ed Altri-Gestione Motonave Achille Lauro in*
20 *Amministrazione Straordinaria*, 921 F.2d 21, 25 (2d Cir. 1990) (district court properly found
21 “substantial grounds for difference of opinion” under section 1292(b) because issues were
22 “difficult and of first impression”).

23 Here, too, there is substantial ground for difference of opinion. *First*, there is an
24 absence of definitive authority in the Ninth Circuit. As the Court noted, the Ninth Circuit “has
25 never explicitly held that hypothetical license damages are *not* available absent actual proof that
26 the plaintiff would have licensed the infringed work” (Post-Trial Order at 12); the Ninth Circuit
27 has never explicitly held that a copyright owner may not recover hypothetical license damages
28

1 “[a]bsent evidence of benchmarks” in the form of prior licenses (*id.* at 11);² and the Ninth Circuit
2 “has not held that hypothetical license damages are never available in cases where the parties are
3 competitors” (*id.* at 12 n.2 (citing cases)). Thus the decision of this Court breaks new ground on
4 an important set of issues lacking clear Ninth Circuit guidance.

5 *Second*, decisions in other circuits substantially support Oracle’s position and
6 conflict with the Post-Trial Order’s conclusion that “Oracle was required to show that, but for
7 infringement, the parties would have agreed to license the use of the copyrighted works at issue.”
8 *Id.* at 11. *See On Davis*, 246 F.3d at 171-72; *Deltak*, 767 F.2d at 360-62. In *On Davis*, the
9 district court had granted summary judgment to defendant on a copyright claim based on failure
10 to prove damages. The Second Circuit reversed, holding that the copyright owner could obtain
11 fair market value damages whether or not the parties actually would have entered into a license:

12 As the Goldstein treatise explains, whether the infringer might in
13 fact have negotiated with the owner or purchased at the owner’s
14 price is irrelevant to the purpose of the test. See II Goldstein
15 § 12.1.1.1, at 12:13. The pertinence of the test is not premised on
16 the fictive belief that the copyright owner is worse off than if the
17 infringer, instead of infringing, had done nothing. It proceeds on a
18 different basis. The hypothesis of a negotiation between a willing
19 buyer and a willing seller simply seeks to determine the fair market
20 value of a valuable right that the infringer has illegally taken from
21 the owner. The usefulness of the test does not depend on whether
22 the copyright infringer was in fact himself willing to negotiate for
23 a license.

24 246 F.3d at 171-72 (citing PAUL GOLDSTEIN, COPYRIGHT § 12.1.1 (2d ed. 2000)); *accord Deltak*,
25 767 F.2d at 260-62 (hypothetical license damages available in an action between direct
26 competitors who would not have entered into a license agreement) (citing *Sid & Marty Krofft*
27 *Television Prods., Inc. v. McDonald’s Corp.*, 562 F.2d 1157, 1174 (9th Cir. 1977)); *see also*
28 cases cited in Oracle’s Opposition to SAP’s Motion for JMOL or New Trial, Docket No. 1057, at
14-15.

29 ² The Post-Trial Order sets aside the verdict on the ground the Court’s previous ruling
30 assumed Oracle would present evidence that it had licensed the rights infringed to other parties –
31 a “past history of licensing” the rights infringed – or that it would have done so but for the
32 infringement. *Id.* at 14. The Ninth Circuit has never held such licensing history evidence is
33 necessary to establish fair market value.

1 Decisions on patent damages likewise permit hypothetical license awards in the
2 absence of actual prior (or “benchmark”) licenses, and indeed treat a party’s practice of declining
3 to license its valuable intellectual property as grounds for awarding higher hypothetical license
4 royalties. SAP agreed that the *Georgia-Pacific* factors apply to valuation of a hypothetical
5 license. Tr. 1982:1-24 (argument re jury instructions) (SAP conceding that “[o]nce you get to
6 the valuation, *Georgia-Pacific* is appropriate”). One of the *Georgia-Pacific* factors indicating a
7 *higher* reasonable royalty is “[t]he licensor’s established policy and marketing program to
8 maintain its ... monopoly by not licensing others to use the invention” 318 F. Supp. at 1120;
9 *see also Panduit Corp., Inc.*, 575 F.2d at 1164 (remanding; district court “must” consider
10 owner’s “unvarying policy of not licensing the [patent in suit]” in determining hypothetical
11 license fee); *Rosco, Inc. v. Mirror Lite Co.*, 626 F. Supp. 2d 319, 332 (E.D.N.Y. 2009) (“Mirror
12 Lite would not want to license its patent to its only competitor in the bus cross view mirror
13 market, since at the time of first infringement Mirror Lite supplied 95% of the cross view mirror
14 market. This factor weighs in favor of Mirror Lite, increasing the reasonable royalty rate.”).

15 Copyright owners have the same right as patent holders to not license, including
16 to competitors, so the exercise of that right cannot logically be held to extinguish the right to
17 recover damages for infringement based on a hypothetical license theory. *See Stewart v. Abend*,
18 495 U.S. 207, 228-29 (1990); *Worldwide Church of God v. Phila. Church of God, Inc.*, 227 F.3d
19 1110, 1113, 1119-22 (9th Cir. 2000) (granting permanent injunction against infringing
20 distribution of religious materials where rightholder had permanently discontinued publication
21 and remanding for damages trial); *Salinger v. Colting*, 641 F. Supp. 2d 250, 267-68 (S.D.N.Y.
22 2009) (infringement of copyrighted book would cause substantial harm even though author had
23 never licensed infringed rights; granting injunction), *injunction vacated on other grounds*, 607
24 F.3d 68 (2d Cir. 2010).

25 *Third*, the Court’s own varying treatment of the hypothetical license issue at
26 different stages of the litigation further confirms that there are substantial grounds for difference
27 of opinion. The Court twice denied SAP’s summary judgment motions resting on the argument
28 that proof of actual licensing was required, analyzing “relevant Ninth Circuit cases” and holding

1 that “Oracle ‘is not required to prove that it would have successfully negotiated a license with
2 SAP, nor is it precluded from seeking license damages simply because it has never before
3 licensed what SAP infringed.’” Post-Trial Order at 13 (quoting Order Denying Defendants’
4 Motion for Partial Summary Judgment, Docket No. 628, at 4). The Court’s decision to require
5 such actual licensing proof in the Post-Trial Order was in tension with these prior rulings. *See*
6 *id.* at 13-15. While it is true that the Court’s summary judgment denial was not based on a “fully
7 developed trial record” (*id.* at 14), the Court subsequently denied SAP’s Rule 50 motion that
8 was, noting that denial was “consistent with my prior ruling.” Tr. 2011:1-2. The Court also
9 approved jury instructions after the close of evidence that do not reflect the licensing requirement
10 in the Court’s Post-Trial Order. Jury Instruction No. 7 (“The reduction of the fair market value
11 of the copyrighted work is the amount a willing buyer would have been reasonably required to
12 pay a willing seller at the time of the infringement for the actual use made by Defendants of
13 Oracle’s works.”). Oracle submits that the Court’s rulings before and at trial were consistent
14 with and supported by “relevant Ninth Circuit cases,” and the Post-Trial Order is not.

15 Thus, the evidence Oracle presented at trial is exactly the kind those cases,
16 *Georgia-Pacific*, and the instructions to the jury in this case, approve as a “non-speculative”
17 measure of fair market value. That evidence of the parties’ “expectations” at the time of the
18 hypothetical license negotiation included contemporaneous documents containing projections
19 that reflect the value SAP’s top executives placed on the use of the infringed works,
20 contemporaneous evidence and related testimony from Oracle’s top executives of the value they
21 placed on that use, and reliable expert opinions based on that evidence and the *Georgia-Pacific*
22 factors. No prior case holds such evidence unduly “speculative” unless accompanied (or
23 replaced) by evidence of “past licensing history or a plaintiff’s previous licensing practices,” or
24 of “benchmark licenses.” Post-Trial Order at 11.

25 Only Ninth Circuit review can provide the “explicit[] authority” the Court itself
26 found lacking in its Post-Trial Order. *Id.* at 12. As in other cases, the Court’s acknowledgement
27 of the lack of clarity in the law justifies certification here. *See Via Techs.*, 2011 WL 2437425, at
28 *2; *see also Lakeland Village Homeowners Ass’n v. Great Am. Ins. Group*, 727 F. Supp. 2d 887,

1 896-97 (E.D. Cal. 2010) (“[C]ourts have held [a substantial ground for difference of opinion]
2 satisfied when there is a lack of binding authority on an issue.”); *In re Dynamic Random Access*
3 *Memory (DRAM) Antitrust Litig.*, No. M 02-1486 PJH, 2008 WL 863994, at *1 (N.D. Cal. Mar.
4 28, 2008) (“The court finds that this case meets all three criteria stated above for the reasons
5 advanced by plaintiffs and those acknowledged by the court in the orders plaintiff seeks to
6 appeal.”); CHRISTOPHER A. GOELZ AND MEREDITH J. WATTS, THE RUTTER GROUP PRACTICE
7 GUIDE: FEDERAL NINTH CIRCUIT CIVIL APPELLATE PRACTICE § 2:160.14 (2011) (“[A]lthough the
8 Ninth Circuit does not necessarily limit review under § 1292(b) to matters of first impression,
9 presenting such an issue ensures serious consideration of your petition.”).

10 **3. Certification Would Materially Advance The Termination Of**
11 **The Litigation**

12 “The third requirement – that the appeal be likely to materially speed the
13 termination of the litigation – is linked to the question whether an issue of law is ‘controlling,’ in
14 that the district court should consider the effect of a reversal on the management of the case. If,
15 on the other hand, an interlocutory appeal would delay resolution of the litigation, it should not
16 be certified.” *Via Techs.*, 2011 WL 2437425, at *1 (citations omitted). Certification is
17 appropriate “only in exceptional situations in which allowing an interlocutory appeal would
18 avoid protracted and expensive litigation.” *In re Cement Antitrust Litig.*, 673 F.2d at 1026.

19 This requirement is amply met here. A reversal of the Court’s decision would
20 avoid the “needless expense and delay” of re-trying the case. *Kuehner*, 84 F.3d at 319. A retrial
21 would be especially wasteful and inefficient if undertaken only to result in any event in an appeal
22 of the controlling legal rulings contained in the Post-Trial Order (in addition to any new
23 appellate issues that arise during a second trial). Even if the Ninth Circuit were to rule that a new
24 trial including the fair market value damages theory were required, it would materially advance
25 termination of the litigation to determine this before any new trial limited to lost/infringer’s
26 profits. Thus, a certain second trial will be deferred, perhaps avoided and, if required, conducted
27 pursuant to clear appellate guidance. *See Aggio v. Estate of Aggio*, No. C 04-4357 PJH, 2006
28 WL 149006, at *2 (N.D. Cal. Jan. 18, 2006) (certification would materially advance termination

1 where, even though “discovery has closed, there remains nonetheless a significant amount of
2 work necessary to litigate the case to its conclusion, including trial preparation and work on” a
3 summary judgment motion). Certification thus will facilitate the efficient and speedier
4 resolution of this litigation.

5 **III. CONCLUSION**

6 The Court should certify its Post-Trial Order for interlocutory appeal.

7 DATED: September 12, 2011

Bingham McCutchen LLP

8
9
10 By: /s/ Geoffrey M. Howard
11 **Geoffrey M. Howard**
12 **Attorneys for Plaintiffs Oracle USA, Inc., et al.**