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Via Electronic Delivery

The Honorable Phyllis J. Hamilton
United States District Court
Northern District of California
1301 Clay Street, South Tower
Oakland, CA 94612-5212

RE: *Oracle USA, Inc., et al. v. SAP AG, et al.*, Case No. 07-CV-1658

Your Honor:

Last night, Oracle's counsel received an e-mail from counsel for Defendants SAP AG and SAP America (collectively "Defendants") notifying Oracle that Defendants "are electing not to contest the claim for contributory infringement" and therefore will shortly ask the Court to "shorten the trial to no more than 20 hours per side" and exclude "evidence and argument related solely to contributory infringement." *See* October 28, 2010 e-mails (5:36pm email from G. Lanier (SAP counsel) to S. Holtzman (Oracle counsel)), attached hereto as Exhibit A.

Oracle will oppose Defendants' requests.

In light of Defendants' last-minute concession, and in anticipation of their promised request to the Court, we write to respectfully request, pursuant to Local Rule 7-11,[1] that trial in this matter, scheduled to commence on Monday, November 1, 2010, be continued to Thursday, November 4, 2010. We further request that the parties be required to submit letter briefs of no more than five pages (SAP to file by 3:00 p.m. today and Oracle to file by 9:00 p.m. tonight) regarding Defendants' promised requests and, if the Court wishes, appear for a hearing tomorrow, October 29. SAP counsel has ignored Oracle's request to discuss this issue. *See id.* (October 27, 2010, 5:46pm e-mail from G. Howard (Oracle counsel) to G. Lanier).

[1] *See* Dkt. No. 84 (Court's Case Management and Pretrial Order) at paragraph E ("No provision of this order may be changed except by written order of this court upon its own motion or upon motion of one or more parties made pursuant to Civil. L. R. 7-11 with a showing of good cause. Parties may file a formal brief, but a letter brief will suffice. The requesting party shall serve the opposing party on the same day the motion is filed and the opposing party shall submit a response as soon as possible but no later than three days after service.").

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Oracle welcomes Defendants' admissions of all liability, however belated. At the same time, the irony of and tactical motivation behind the last-minute concession, after over three years of steadfast and public denials of SAP's role in and responsibility for the vast copyright infringement involved this case, is readily apparent.

Defendants disclosed their new trial strategy two days before jury selection is set to begin, three business days before the beginning of trial, and less than three calendar days before the parties had proposed to exchange opening statement demonstratives and initial witness exhibits. There is no reason Defendants could not have communicated this decision earlier. Instead, in lengthy negotiations regarding what ultimately became Trial Stipulation # 1, entered by the Court in early September, SAP pointedly refused to stipulate to the very liability it now says it will not contest. 9/13/10 Trial Stipulation and Order No. 1 Regarding Liability, Dismissal of Claims, Preservation of Defense and Objections to Evidence at Trial (Dkt 866). That same Stipulation (now Order), which was overseen by Judge Spero, allocates 36 hours to each side for the presentation of its case. *Id.* at ¶ 8. If Defendants wish to reduce the amount of time they devote to the presentation of evidence and argument, that is their choice to make. But they should not be permitted to foist the same decision upon Oracle through gamesmanship on the eve of trial.

This eleventh hour tactic and request to dramatically alter the scope, duration and ground rules of a trial scheduled to commence in just four days, after years of preparation, potentially requires the parties to completely reconstitute their evidentiary presentations, opening statements and arguments. Accordingly, Oracle respectfully requests that trial in this matter be continued to Thursday, November 4, 2010. During this time period, Oracle will revise its trial plans and is prepared to try to streamline the case, including by negotiating with Defendants as to stipulations regarding the details of how a post-concession trial should look. Though the details will need to be ironed out, Oracle expects that even with a continuance, the trial should be able to be finished by the currently-scheduled early December completion of evidentiary presentations and argument, particularly if Defendants wish to curtail their trial presentation.

For the last two months, Oracle has been preparing its case based on the Court's Order that it would have 36 hours and based on the liability and damages issues it believed would be at issue in the case. It is neither fair nor reasonable to assert on the eve of trial that Oracle must cut back its presentation by 45% and somehow limit its presentation to evidence that relates solely to damages and not to liability – a limitation that is fundamentally inconsistent with the carefully-crafted agreement reflected in Trial Stipulation # 1.

In order to have a fair trial, Oracle must be able to demonstrate facts such as the extent of the infringement and SAP's role in, knowledge of, and business plans regarding that infringement. These facts inherently relate to the fact and amount of damages appropriate in this case. In short, because of the nature of the damages proof, essentially all of the evidence that was important for liability is also relevant for damages. Some streamlining may be possible, but 45% is fundamentally unfair and unwarranted, and

seeking to preclude "evidence and argument related solely to contributory infringement" ignores the fundamental problem that one cannot simply draw neat boundaries between evidence relating to contributory infringement and evidence relating to the harm caused by Defendants' conduct and the compensatory and punitive damages that flow from them.

However, even if Defendants' requests to dramatically shorten trial and curtail Oracle's right to choose the evidence and argument on which it wishes to spend its trial time is denied, while it is pending Oracle must scramble to adjust its case to take account of Defendants' last-minute admissions of SAP's wrongdoing. This is the case even if all the relevant evidence remains the same, because SAP's last-minute concession requires revisions to the factual themes and arguments that Oracle will emphasize at trial. The necessary adjustments will entail, among other things, re-editing video, re-doing graphics, revising witness outlines, changing witness schedules,[2] and altering trial arguments and themes. For Oracle, this cannot occur overnight. SAP is not affected in the same way, because it already knew that it would concede all liability and has been planning accordingly.

Oracle therefore respectfully requests a hearing tomorrow, October 29, preceded by letter briefs of no more than five pages: SAP to file by 3:00 p.m. today and Oracle to file by 9:00 p.m. tonight. Separately, Oracle also requests that the trial be continued for three days, until Novemalterber 4, 2010.

Sincerely yours,

/s/ Geoffrey M. Howard

[2] Indeed, on Defendants' proposed shortened schedule, some of Oracle's planned trial witnesses, including key witnesses as to damages, may not be available.