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 14 GOOGLE INC.

15 UNITED STATES DISTRICT COURT
 16 NORTHERN DISTRICT OF CALIFORNIA
 17 SAN FRANCISCO DIVISION

18 ORACLE AMERICA, INC.,
 19 Plaintiff,
 20 v.
 21 GOOGLE INC.,
 22 Defendant.

Case No. 3:10-cv-03561 WHA
**GOOGLE'S OPPOSITION TO ORACLE
 AMERICA, INC.'S MOTION IN LIMINE
 CONCERNING TESTIMONY BY
 JONATHAN SCHWARTZ**
 Dept.: Courtroom 8, 19th Floor
 Judge: Hon. William Alsup

1 **I. INTRODUCTION**

2 This motion is Oracle’s attempt to shut the barn door after the horse has already gone.
3 Despite its title, it is not a motion in limine at all. Instead, it is a belated motion to strike and
4 request for a curative instruction involving testimony that entered the record more than a week
5 earlier, and that Google expressly relied on in its closing argument. Not only is the motion
6 untimely, but the Court should also deny it because of the prejudice Google would suffer if the
7 requested relief were granted now.

8 Obviously, Oracle would like to entirely disclaim Jonathan Schwartz’s actions and
9 decisions during years he was Sun’s CEO, because Sun and Schwartz publicly announced and
10 pursued policies and strategies that are inconsistent with restrictions that Oracle (the so-called
11 “new sheriff in town”) now wants to impose. But nothing about Oracle’s about-face makes the
12 affirmative decisions and actions of Sun’s former CEO any less relevant, or somehow demotes
13 them to being merely “personal” – rather than corporate – decisions and actions.

14 In this case, the fact that Sun’s CEO made an affirmative decision not to sue Google, in
15 conjunction with his public announcement and private confirmation of Sun’s support for Android,
16 is highly relevant to Google’s equitable defenses. Google is also entitled to argue that his
17 decision as CEO supports findings in its favor on non-infringement, damages and willfulness in
18 Phases 2 and 3 – just as Google has already argued to the jury, without any objection from
19 Oracle, that those decisions and comments support findings in its favor on copyright issues. With
20 regard to Mr. Schwartz’s additional testimony that “[w]e didn’t feel we had any grounds” to
21 pursue litigation against Google, nothing in that statement reflects or discloses communications
22 from Sun’s legal counsel about the merits of the action Oracle has now brought. Mr. Schwartz
23 could, as a layperson, easily conclude the common sense view that Sun would have no grounds to
24 sue Google for using precisely what Sun had actively encouraged the world to use, including the
25 Java language and its APIs.

26 For all the above reasons, Oracle’s motion should be denied.
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1 **II. ARGUMENT**

2 **A. This Motion is a Disguised Motion to Strike, and Is Therefore Untimely.**

3 As the Supreme Court has noted, the term “motion in limine” is used “in a broad sense to
4 refer to any motion, whether made before or during trial, to exclude anticipated prejudicial
5 evidence *before the evidence is actually offered.*” *Luce v. U.S.*, 469 U.S. 38, 40 at n.2 (1984)
6 (emphasis). As a result, despite its title, Oracle’s motion is not a motion in limine, but rather an
7 untimely motion to strike, because the evidence at issue is already part of the trial record and
8 indeed has already been offered to the jury in closing argument in the copyright phase, without
9 any objection from Oracle.

10 Any evidence received in Phase 1 is automatically part of the trial record for later phases
11 and thus may be referenced in any subsequent openings and closings:

12 Evidence and stipulations presented in an earlier phase will count as part of the
13 trial record for all later phases and may be referenced in openings and closings for
14 later phases Witnesses will not be permitted to return to a subsequent phase
to repeat testimony already given by them in an earlier phase. The jury will have
already heard it.

15 Final Pretrial Order (ECF# 675) at 3:11-15.

16 Oracle suggests that some of the evidence at issue entered the record through a partially
17 non-responsive answer to an otherwise unobjectionable question, but if that were the case,
18 Oracle’s only recourse would have been a motion to strike. *See* Rutter Group Prac. Guide Fed.
19 Civ. Trials & Ev. Ch. 8 at § 8:4671 (“A motion to strike is the only remedy available where
20 testimony is given before a proper objection can be made or ruled upon. For example: . . . Witness
21 gives nonresponsive answer to otherwise unobjectionable question (i.e., witness volunteers
22 information not asked).”) It is far too late for Oracle to seek that relief.

23 Under the Federal Rules of Evidence, a party can preserve a claim of error as to the
24 admission of evidence only if the party “*timely* objects or moves to strike.” Fed. R. Evid. 103
25 (emphasis added). A motion to strike is waived unless it is made at the earliest possible
26 opportunity after the ground for objection becomes apparent. *See Durham v. U.S.*, 403 F.2d 190,
27 197 & n.15 (9th Cir. 1968) (“Failure to object as soon as the applicability of the objection is
28 known is said to constitute a waiver of the objection, which thereafter may be properly

1 denied. . . . A motion to strike is governed by this rule where the evidence involved should have
2 been objected to when offered, as was the case here.”) (Citations omitted); *see also San Antonio*
3 *Cnty. Hosp. v. So. Cal. Dist. Council of Carpenters*, 125 F.3d 1230, 1238 (9th Cir.1997)
4 (concluding that the failure to raise a hearsay objection until the close of direct examination
5 waived the objection).

6 Here, Oracle’s request for relief is manifestly untimely. It did not seek relief the moment
7 Mr. Schwartz gave the testimony in question, as it should have, or at any point during his
8 examination, or before the Court released him from Google’s subpoena and excused him from
9 further testimony, or even when Google referred to his testimony in its closing argument.
10 Instead, it waited more than a week after Mr. Schwartz had left the stand to bring its motion. This
11 constitutes a waiver. “The requirement of timely and specific objections serves to ensure that the
12 nature of the error [is] called to the attention of the judge, so as to alert him [or her] to the proper
13 course of action and enable opposing counsel to take corrective measures.” *Jerden v. Amstutz*,
14 430 F.3d 1231, 1236 (9th Cir. 2005) (internal citations and quotations omitted; alterations in
15 original).

16 Had Oracle raised any of its objections to Mr. Schwartz’s testimony at the time – and had
17 the Court sustained those objections – Google could have counteracted any negative impression a
18 curative instruction might have had on the jury by conducting further questioning to reinforce the
19 points that Mr. Schwartz, as Sun’s CEO, had full authority to decide that it was not in Sun’s best
20 interest to pursue litigation against Google as a business matter, that he made that affirmative
21 decision on Sun’s behalf, and that he did not require permission from Sun’s board of directors,
22 Scott McNealy, or anyone else to do so. Instead of moving to strike, Oracle chose to cross-
23 examine Mr. Schwartz to attempt to establish that he was not qualified to give a legal assessment
24 of the strength of any potential legal claims, and that his decisionmaking was driven by
25 judgments about what would be best for Sun as a matter of business strategy, rather than
26 assessments of the strengths of any potential legal claims. RT at 2014:7-18. Oracle then allowed
27 the testimony to enter the record and even sat by without objection as Google relied on that
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1 evidence in its closing argument. RT at 2519:4-25. Having featured that evidence in its Phase 1
2 closing, Google would be severely prejudiced if the Court were to instruct the jury to disregard
3 that evidence now.

4 This motion is untimely and the Court should deny it for that reason alone.

5 **B. Oracle's Objections Also Fail on Their Merits**

6 Oracle's attempt to downplay the significance of Mr. Schwartz's actions and decisions
7 runs counter to its CEO's own testimony. As Larry Ellison acknowledged, while Mr. Schwartz
8 was Sun's CEO, he was ultimately responsible for all decisionmaking at Sun, setting corporate
9 policy and also for deciding how the company would conduct its negotiations, including with
10 companies like Google. RT 310:21-311:6. Although Oracle asserts that "the suggestion that
11 Oracle had decided not to sue is clearly against the weight of the evidence presented in this case,"
12 Motion at 2:5-6, that statement is flatly contradicted by Mr. Schwartz's testimony that, as CEO,
13 he made the decision that Sun would not pursue litigation against Google over Android. RT at
14 2002:5-7. As CEO, his decision certainly trumps that of a salesperson like Leo Cizek, even
15 though the latter may have taken it upon himself to make remarks that he was in no position to
16 carry out.

17 Oracle also incorrectly argues that the fact that Mr. Schwartz never communicated his
18 decision to Google, and the fact that Sun engaged in negotiations with Google after the SDK
19 release, somehow fatally undermine Google's defenses. That is not the case, however. In *Baker*
20 *Mfg. Co. v. Whitewater Mfg. Co.*, 430 F.2d 1008, 1013 (7th Cir. 1970), the Seventh Circuit
21 reversed a district court's denial of a claim of laches, specifically noting that, "[t]he fact that
22 Baker did not suggest that it was abandoning its claim of infringement is irrelevant. *The*
23 *important fact is that at no time did it notify Whitewater in any manner that it was pressing its*
24 *claim.*" *Id.* at 1013 (emphasis added). Here, Sun and Google had numerous discussions after
25 Android's release. None of these discussions involved Sun asserting infringement by Android
26 and demanding payment without any further consideration being offered by Sun. Instead, each
27 was a negotiation over further partnerships where Sun would offer its commercial products for
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1 incorporation into Android. Nothing about such garden-variety business negotiations could have
2 put Google on notice that Sun intended to assert legal claims against Android for the specific and
3 narrow alleged intellectual property rights asserted in this case. Mr. Schwartz’s testimony that he
4 had decided not to sue Google because he had no basis for doing so is entirely consistent with his
5 subsequent actions, and supports the conclusion that the totality of Sun’s conduct and statements
6 indicated a lack of intent to assert an infringement claim.

7 This evidence at issue is also relevant to Phase 2 and Phase 3 in other respects. Google is
8 entitled to argue that the fact that Sun consciously considered and then decided not to sue for lack
9 of grounds is evidence that Sun knew full well that the pending claims are indeed meritless as
10 applied to Android – or at a minimum (for willfulness purposes) do not present an objectively
11 high likelihood of infringement. Again, it is no surprise that Sun and its CEO reached the
12 conclusion that Sun had no grounds to sue given Sun’s business strategy to make numerous
13 aspects of the Java platform freely available for all to use in the hopes of spreading the adoption
14 of the Java language, as well as Sun’s repeated and direct encouragement of the distribution and
15 use of the Android platform over the years.

16 Finally, Oracle is wrong to argue that Mr. Schwartz’s statement that “[w]e didn’t feel we
17 had any grounds” either reflects privileged communications or impermissible legal opinion by a
18 lay witness. At trial, Oracle had a chance to ferret out whether Mr. Schwartz’s statement was
19 based on privileged communications, but Oracle never asked those questions and never raised the
20 issue in a timely fashion. Further, it would have been entirely reasonable for Mr. Schwartz to
21 have concluded on Sun’s behalf that Sun had no grounds to sue (regardless of any legal advice
22 received) where Sun had “given Java to the world,” made the Java language and Java APIs freely
23 available, encouraged independent implementations of the Java platform and open sourced Sun’s
24 own implementation of the Java platform.¹

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27 ¹ If Oracle is correct, however, that Mr. Schwartz’s testimony implicates Sun’s assertions of
28 privilege, then it was even more incumbent on Oracle to protect that privilege with a timely
objection or motion to strike.

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III. CONCLUSION

For the foregoing reasons, Google respectfully requests that the Court deny Oracle's motion and refuse its request to excise from the jury trial evidence that is squarely and fairly before the jury on important issues in this case.

Dated: May 5, 2012

KEKER & VAN NEST LLP

By: /s/ Robert A. Van Nest
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GOOGLE INC.