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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

ORACLE AMERICA, INC.

Plaintiff,

v.

GOOGLE, INC.

Defendant.

Case No. CV 10-03561 WHA

**ORACLE AMERICA, INC.'S OPPOSITION
TO GOOGLE'S MOTION TO EXCLUDE
CERTAIN WITNESSES FROM THE
DAMAGES PHASE**

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

1 Oracle America, Inc. opposes Google’s motion to exclude Dr. Schmidt, Mr. Page, Mr.
2 Lindholm, and Prof. Mitchell from Phase 3.

3 Google’s description of the documents Oracle has disclosed for the Google executives makes
4 clear that its motion to exclude rests completely on its now well-worn arguments that the only
5 evidence relevant to infringer’s profits is “revenue expected from, or the need to take a license for use
6 of, rangeCheck or the test files” (Dkt. 1145 at 1), and that “Oracle should not be permitted to offer
7 evidence of Android’s gross revenues unless and until it has shown a causal link between the
8 infringing works and those revenues (which Oracle will not be able to do).” (*Id.*) For the reasons
9 Oracle has articulated several times, Google is simply wrong on the law. Google still does not
10 address the cases, from the Ninth Circuit as well as other appellate courts, that make clear that
11 Google’s attempt to limit the statutory inquiry into infringer’s profits to one about revenues ultra-
12 narrowly tailored to the infringing code, as opposed to the infringing product, cannot stand.

13 Oracle made its initial Phase 3 witness disclosures on Sunday, May 13. At that time, Oracle
14 contemplated that Phase 3 would address (1) infringer’s profits with respect to the nine literally
15 copied files, (2) willful infringement with respect to the copying of those files; (3) willful patent
16 infringement; and (4) damages for infringement of the ’104 and/or ’520 patent. Its disclosures of its
17 initial witnesses for Phase 3, including its disclosure not only of the witnesses at issue in the present
18 motion but also Mr. Gupta, Mr. Rubin, and Mr. Agarwal, were and are adapted to the combination of
19 all of those issues. Google’s present motion disregards the second, third, and fourth elements
20 altogether. The testimony of Messrs. Schmidt, Page and Lindholm will plainly be relevant to those
21 elements.

22 Since Oracle made its disclosures, the issue of willful patent infringement has been advanced
23 to Phase 2. Although this reduces the need to call Mr. Lindholm in Phase 3, Oracle submits that Mr.
24 Lindholm’s testimony, particularly relating to willfulness in Google’s practices regarding use of Sun
25 engineers and his repeated assessment of the need for a license from Sun, remains relevant to Phase
26 3. At the same time, Oracle recognizes that the need for Mr. Lindholm’s testimony in Phase 3 is
27 lower than its need for testimony from the other Google executives.

1 The testimony of Messrs. Page and Schmidt will be highly relevant in Phase 3, even if one
2 were to adopt Google’s incorrect view of relevance. Whereas Google argues that the issues it deems
3 relevant “are best addressed to Android business unit head Andy Rubin and Android financial analyst
4 Aditya Agarwal” (Dkt. 1145 at 1), Oracle has already tried that in repeated depositions, to no end.
5 Neither Mr. Rubin nor Mr. Agarwal can testify about core issues relating to accounting of Android
6 revenues, accounting for Android expenses, or allocation of expenses between business units or
7 activities.

8 Oracle previously filed a motion to exclude evidence of Google’s expenses because Mr.
9 Agarwal could not answer questions at his Rule 30(b)(6) deposition. The Court denied that motion,
10 but – recognizing that Mr. Agarwal did not demonstrate knowledge of the relevant issues as the
11 designated corporate representative of Google – ordered Google to produce another witness. Google
12 produced Mr. Rubin. Mr. Rubin, like Mr. Agarwal, was unable to answer significant questions
13 regarding Google’s revenues or practices regarding accounting for expenses. As a result, the Court
14 compelled another deposition of Mr. Agarwal, informed by financial documents that had been
15 provided to Mr. Rubin. Mr. Agarwal remained unable to answer basic questions about Android
16 finances and accounting practices. Because Google failed to produce lower-level employees with
17 relevant knowledge, Oracle is compelled to go higher. Indeed, Messrs. Schmidt and Page are
18 identified in the documents and depositions as part of an executive team who regularly reviewed
19 Android financials. Mr. Page has also been referred to internally at Google as the “executive
20 champion” of Android. (TX 432 at 9.)

21 In addition, Messrs. Page and Schmidt will testify to a number of other relevant topics, each
22 narrowly-tailored to issues remaining in Phase 3. These will include:

- 23 • *Google’s revenues and profits from Android.* Messrs. Schmidt and Page are important
24 witnesses because they each certified Google’s financial filings during the relevant time
25 period, and have made numerous statements – in tension with documents Google has
26 produced regarding Android finances – regarding the profitability of Android.
- 27 • *The value of the code copying to Google.* Both Dr. Schmidt and Mr. Page will testify
28 about key factors that contribute to the profitability of Android and bear on the jury’s
assessment of the proper amount of infringer’s profits to award in view of the scope of the
infringement currently at issue.

- 1 • *Google’s policies and procedures regarding business ethics, relationships, and use of*
2 *employees with conflicts of interest.* With regard to both infringer’s profits and
3 willfulness, the extent of Google’s willingness to disregard existing policies, or the
4 absence of policies to begin with, will be significant in the jury’s assessment of both the
5 importance and the willfulness of the infringement.

6 Google’s top executives, including Messrs. Schmidt and Page, made key decisions relating
7 to Android. Google may not have copied much code on a line-by-line basis, but the decision by
8 Google’s executives to reject a license from Sun, to not put procedures in place to prevent copying of
9 Sun’s code, and to not immediately remove the infringing code from Android is relevant to the value
10 of that infringement to Google.

11 The value of the copying is demonstrated in part by Google’s decision to put its valuable
12 reputation and brand at risk,¹ by refusing to take a license and then copying Sun’s code. Google’s
13 motto, trumpeted by Google’s top executives, is “Don’t be evil.” But Google rejected a partnership
14 with Sun and instead made the decision to permit an engineer with a clear conflict – Josh Bloch – to
15 work on Android and to hire a “super shady” contractor – Noser – to develop class libraries for
16 Android. (TX 281) The testimony of Google’s top executives will be relevant to the jury’s
17 assessment of these issues. The jury may conclude that the infringement was neither a major factor
18 in Android’s profitability nor intentional. But they should be permitted to make that decision based
19 on a full and fair presentation of evidence.

20 Google contends that Oracle should be required to make some “proffer” regarding how these
21 witnesses have relevant testimony for Phase 3. To the extent this is not fulfilled by the discussion
22 above, Oracle notes that it disclosed to Google the substance of their testimony months ago. In
23 October 2011, Oracle identified Mr. Schmidt and Mr. Page as witnesses who it would call live at trial
24 to testify about the “benefits to Google from Android,” “Google’s revenue and profit projections for
25 Android,” and the “facts relating to Google’s willful patent and copyright infringement.” (Dkt. 523-2
26 p. 6, 8.) Oracle disclosed Mr. Lindholm as a witness who would testify about “the facts relating to

27 ¹ In its most recent 10-K filing, Google stated: “Maintaining and enhancing the ‘Google’ brand is
28 critical to expanding our base of users, advertisers, Google Network Members, and other partners.”
 (TX 1216 at p. 14.)

1 Google’s willful patent and copyright infringement.” (*Id.* at p. 3.) Oracle has disclosed specific
2 documents that it intends to use with each of these witnesses.² All of these documents are relevant to
3 the issues in Phase 3.

4 Granting Google’s motion would be prejudicial given that the Court ordered that this trial
5 proceed in phases and limited the testimony that Oracle could elicit during the previous phases.
6 Thus, although Messrs. Page and Schmidt have each testified already once, their recall in Phase 3 was
7 required by the phased approach to trial. Oracle is not calling these witnesses to offer, as Google
8 suggests, “cumulative testimony already offered in prior phases.” (Dkt. 1145 at 2.) Oracle seeks to
9 call these individuals to testify about the key issues that go to Google’s decision-making and the
10 value of the infringement to Google, issues that Oracle was unable to address during the earlier
11 phases.³

12 Google also seeks to exclude the testimony of Professor Mitchell. This request is
13 unwarranted. Professor Mitchell evaluated, and disclosed his evaluation of, the code files that
14 Google copied, and Oracle plans to call him as a witness in Phase 3 to discuss the importance of
15 those code files. One component of infringer’s profits is the development costs and time that were
16 saved as a result of the infringement. Based on his disclosed opinions regarding the importance of
17 testing, Dr. Mitchell can provide testimony on this point as well. (Mitchell Opp. Report ¶¶ 91-95.)
18 Google’s claim that Dr. Mitchell has “nothing to say” beyond what he said in Phase 1 is wrong. To
19 the extent Google has concerns about whether certain testimony was disclosed in Dr. Mitchell’s
20 reports, those concerns can be addressed during the testimony, as has been the parties’ practice. It is
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23 ² Because Google has produced multiple versions of many financial documents, many of which are
24 redacted, inconsistent with each other, or incomplete, Oracle designated multiple iterations of
25 particular documents. This necessarily increased the number of disclosed financial documents.
Beyond this set, Oracle designated a relatively limited set of documents specially relating to
willfulness and the executives’ past statements regarding the profitability of Android.

26 ³ In a footnote, Google states: “Eric Schmidt has long-standing plans to be out of state during the
27 damages phase; he has business on the East Coast this week, and then will be out of the United States
28 for the remaining of May 2012.” Oracle notified Google of its intent to call Mr. Schmidt as a witness
in Phase 3 (along with Mr. Page and Mr. Lindholm) on May 2 – twelve days ago. This evening’s
motion is the first time Google indicated that Mr. Schmidt might be unavailable.

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improper to limit Dr. Mitchell’s testimony before-the-fact, based again on nothing more than say-so by Google’s attorneys about what Dr. Mitchell can testify to in Phase 3.

Oracle requests that the Court deny Google’s motion.

Dated: May 14, 2012

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Steven C. Holtzman

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ORACLE AMERICA, INC.