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KEKER & VAN NEST LLP
ROBERT A. VAN NEST - # 84065
rvannest@kvn.com
CHRISTA M. ANDERSON - # 184325
canderson@kvn.com
MICHAEL S. KWUN - # 198945
mkwun@kvn.com
633 Battery Street
San Francisco, CA 94111-1809
Tel: 415.391.5400
Fax: 415.397.7188

KING & SPALDING LLP
DONALD F. ZIMMER, JR. - #112279
fzimmer@kslaw.com
CHERYL A. SABNIS - #224323
csabnis@kslaw.com
101 Second Street, Suite 2300
San Francisco, CA 94105
Tel: 415.318.1200
Fax: 415.318.1300

KING & SPALDING LLP
SCOTT T. WEINGAERTNER
(Pro Hac Vice)
sweingaertner@kslaw.com
ROBERT F. PERRY
rperry@kslaw.com
BRUCE W. BABER (Pro Hac Vice)
1185 Avenue of the Americas
New York, NY 10036
Tel: 212.556.2100
Fax: 212.556.2222

IAN C. BALLON - #141819
ballon@gtlaw.com
HEATHER MEEKER - #172148
meekerh@gtlaw.com
GREENBERG TRAUIG, LLP
1900 University Avenue
East Palo Alto, CA 94303
Tel: 650.328.8500
Fax: 650.328.8508

Attorneys for Defendant
GOOGLE INC.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

ORACLE AMERICA, INC.,

Plaintiff,

v.

GOOGLE INC.,

Defendant.

Case No. 3:10-cv-03561 WHA

**GOOGLE INC.'S OPPOSITION TO
ORACLE AMERICA'S MOTION FOR
ADMINISTRATIVE RELIEF TO DEEM
FACTS ADMITTED BY GOOGLE**

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

1 **I. INTRODUCTION**

2 The facts Oracle seeks to have deemed admitted for purposes of trial include a statement
3 that inaccurately reflects Google’s concession regarding the originality of the APIs as a whole, a
4 statement that the Court has already ruled is an issue of fact for trial, and three irrelevant and
5 misleading statements taken from Google’s Amended Answer and Counterclaims. For the
6 reasons set forth below, the Court should deny Oracle’s motion as to each of them.

7 **II. ARGUMENT**

8 **A. Google does not deny that the APIs as a whole meet the extremely low**
9 **threshold for originality required under the Constitution.**

10 Oracle seeks to have the following statement deemed admitted: “Google has admitted that
11 the 37 Java APIs meet the threshold for originality required by the Constitution.” But the cited
12 March 23 Reply Copyright Trial Brief does not square with Oracle’s request:

13 The [API] packages *as a whole*, however, are not completely lacking in
14 originality. Thus, while reserving the right to present evidence that many aspects
15 of the APIs are unoriginal, Google does not dispute that the APIs *as a whole* meet
16 the “extremely low” threshold for originality required by the Constitution. The
17 jury therefore need not be asked to address whether the APIs are original.

18 Dkt. No. 823 at 9 (emphasis added); Motion at 1.

19 There are three important differences between Google’s concession and Oracle’s
20 requested “admission.” First, Google conceded that the API packages “as a whole” are not
21 completely lacking in originality for constitutional purposes. Google’s concession was never
22 limited to the 37 APIs, as Oracle’s proposed statement is. Moreover, Google reserved its right to
23 “present evidence that many aspects of the APIs are unoriginal,” which would include the right to
24 argue that portions of the 37 APIs are unoriginal. Second, Google qualified its statement by
25 noting that the threshold for originality required by the Constitution is “extremely low.” Oracle’s
26 statement removes this important qualifier, thereby threatening to mislead the jury. Third, there is
27 no reason—other than to lend undue weight—to begin the statement with the phrase “Google
28 admits that.” As a procedural matter, this is not true. Google does not admit originality of the
APIs as a whole; it has simply chosen not to dispute it. With respect to the other facts the Court
deemed true, the Court adopted simple factual statements. (Dkt. No. 896.) The same should be

1 true here.

2 Notably, Google told Oracle that it was willing to stipulate to the following statement,
3 which would have corrected for the various errors in Oracle’s statement: “The Java APIs as a
4 whole meet the low threshold for originality required by the Constitution.” *See* Ex. 2 to the Decl.
5 of Marc David Peters In Support of Oracle America’s Motion for Administrative Relief to Deem
6 Facts Admitted by Google [Dkt. No. 908-2]. Oracle declined. Instead, it asks the Court to bend
7 Google’s concession into an altogether different one. The Court should deny Oracle’s request.

8 **B. The Court has already ruled that whether the Java programming language is**
9 **distinct from the Java APIs is a dispute for trial.**

10 Oracle asks the Court to tell the jury that “Google has admitted that the Java programming
11 language is distinct from the Java APIs and class libraries.” But as Oracle concedes in its brief,
12 the Court’s April 11 Order (Dkt No. 896) identifies a live dispute between the parties on this very
13 issue. Motion at 2.

14 One thing is for sure, the Java programming language is open and free for anyone to use.
15 Dkt No. 896. Whether the APIs are therefore also free and open to use is an issue for trial,
16 regardless whether they are “distinct from” the programming language as a technical matter. It is
17 that technical point that Google makes in its counterclaims: the term “Java” may refer to many
18 different things, including the language, the runtime environment, and the platform. Google
19 Amended Counterclaims, Dkt. No. 51, at 13 ¶ 1. But however one carves “Java” into its
20 architectural sub-parts, the jury must decide whether it is possible to use one part—the
21 programming language—without the other parts—the APIs. As such, deeming it true that the
22 Java APIs and class libraries are “distinct from” the programming language threatens to confuse
23 the jury. For example, the jury may be misled into believing that one can technically use the
24 programming language standing alone, without any of the APIs, which Google contests. Because
25 the Court has already recognized the parties’ disagreement in ruling on Google’s deeming
26 motion, the Court should deny Oracle’s request.

1 **C. Oracle’s third, fourth, and fifth facts take isolated statements from Google’s**
2 **Amended Counterclaims out of context, and would serve only to confuse the**
3 **jury.**

4 Each of the third, fourth, and fifth facts that Oracle moves to deem admitted consist of
5 isolated sentences plucked from the middle of paragraphs in Google’s Amended Counterclaims
6 [Dkt. No. 51]. Elevating these out-of-context statements to judicial admissions would serve only
7 to confuse the jury concerning the disputed issues in this case.

8 Further, the very cases Oracle cites undermine its suggestion that every quasi-factual
9 statement made in any pleading constitutes a judicial admission. In *American Title Ins. Co. v.*
10 *Lacelaw Corp.*, 861 F.2d 224, 227 (9th Cir. 1998), which Oracle cites throughout its brief, the
11 Ninth Circuit held that “statements of fact contained in a brief *may* be considered admissions of
12 the party at the discretion of the district court,” and then **affirmed** a district court’s decision **not** to
13 treat a party’s pleading statement as a judicial admission. *Id.* at 227-28 (emphasis in original).
14 Courts that have found admissions have focused on very specific facts, such as the date counsel
15 was retained, *Leorna v. United States*, 105 F.3d 548, 551 n.2 (9th Cir. 1997), the address of a
16 company’s principal place of business, *Gradetech, Inc. v. Am. Emp’rs Grp.*, No. C 06-02991
17 WHA, 2006 U.S. Dist. LEXIS 47047, at *9 (N.D. Cal. Jun. 29, 2006), or whether a plaintiff class
18 was limited to those arrested for misdemeanors as opposed to felonies, *Barnett v. County of*
19 *Contra Costa*, No. C-04-4437-THE, 2007 U.S. Dist. LEXIS 8131, at *9-10 (N.D. Cal. Jan. 24,
20 2007). On the other hand, “conduct requiring elaboration does not constitute a judicial
21 admission—to become an admission, the conduct must be ‘deliberate, clear, and unequivocal.’”
22 *Truckstop.Net, L.L.C. v. Sprint Communications Co., L.P.*, 537 F. Supp. 2d 1126, 1136 (D. Id.
23 2008) (quoting *Heritage bank v. Redcom Laboratories, Inc.*, 250 F.3d 319, 329 (5th Cir. 2001)).

24 Google’s purported “admissions” here do not meet this test. The third and fourth “facts”
25 that Oracle moves to deem admitted are selections from a longer paragraph in Google’s Amended
26 Counterclaim criticizing the way in which Sun open-sourced Java. Google wrote:

27 Upon information and belief, Sun also released the specifications for Sun’s Java
28 platform, including Sun’s Java virtual machine, under a free-of-charge license that
 can be found at
 http://java.sun.com/docs/books/jls/third_edition/html/jcopyright.html and
 http://java.sun.com/docs/books/jvms/second_edition/html/Copyright.doc.html,

1 respectively. The license allows developers to create “clean room”
2 implementations of Sun’s Java specifications. If those implementations
3 demonstrate compatibility with the Java specification, then Sun would provide a
4 license for any of its intellectual property needed to practice the specification,
5 including patent rights and copyrights. One example of a “clean room”
6 implementation of Sun’s Java is Apache Harmony, developed by the Apache
7 Software Foundation. The only way to demonstrate compatibility with the Java
8 specification is by meeting all of the requirements of Sun’s Technology
9 Compatibility Kit (“TCK”) for a particular edition of Sun’s Java. Importantly,
10 however, TCKs were only available from Sun, initially were not available as open
11 source, were provided solely at Sun’s discretion, and included several restrictions,
12 such as additional licensing terms and fees. In essence, although developers were
13 free to develop a competing Java virtual machine, they could not openly obtain an
14 important component needed to freely benefit from Sun’s purported open-sourcing
15 of Java.

9 Google’s Amended Counterclaims, Dkt. No. 51, at 15 ¶ 6.

10 Oracle pulls two statements from their context in the middle of this paragraph and asks the
11 Court to treat them as standalone admissions. First, it moves to deem admitted that “the only way
12 to demonstrate compatibility with the Java specification is by meeting all of the requirements of
13 Sun’s Technology Compatibility Kit (‘TCK’) for a particular edition of Sun’s Java.” Motion at 3.
14 In the above paragraph, this sentence merely describes one of Sun’s license requirements: that
15 Java implementations using Sun’s intellectual property had to satisfy Sun’s definition of
16 compatibility. In other words, the sentence simply describes Sun’s tautological approach to
17 defining “compatibility with the Java specification.” For Sun, that phrase meant anything that
18 satisfied the TCK. What actual, substantive “compatibility” might mean could be very different.
19 Oracle is trying to treat Google’s *criticism* of Sun’s tautological definition of “compatibility” as
20 an *admission* of the correctness of that definition. That is baseless.

21 Second, Oracle moves to deem admitted that:

22 TCKs were only available from Sun, initially not available as open source, were
23 provided solely at Sun’s discretion, and included several restrictions, such as
24 additional licensing terms and fees. In essence, although developers were free to
25 develop a competing Java virtual machine, they could not openly obtain an
26 important component needed to freely benefit from Sun’s purported open-sourcing
27 of Java.

25 Motion at 4. As above, this sentence is confusing and misleading when viewed in isolation. It
26 includes numerous phrases, such as “competing Java virtual machine,” “important component,”
27 “freely benefit,” and “purported open-sourcing of Java” that make sense only when read together
28

1 with earlier parts of the paragraph. Moreover, the context of this paragraph is another criticism of
2 Sun—the fact that Sun’s purported decision to open source the *entire Java platform*, including its
3 source code implementations of the virtual machine, was deceptive because Sun required
4 developers using those open-source implementations to pass the TCK, for which Sun charged a
5 fee. Divorced from that context, the statement can be misinterpreted in numerous ways, including
6 suggesting that a TCK was required in order to use the Java APIs. Again, this is inconsistent with
7 the Court’s recognition of a live dispute as to whether the Java APIs are part of the programming
8 language.

9 The fifth point that Oracle moves to deem admitted is an isolated statement from another
10 paragraph in Google’s Counterclaim. Specifically, Oracle moves to deem admitted that
11 “Although Sun offered to open source the TCK for Java SE, Sun included field of use (‘FOU’)
12 restrictions that limited the circumstances under which Apache Harmony users could use the
13 software that the Apache Software Foundation created. Sun refused the ASF’s request for a TCK
14 license without FOU restrictions.” Motion at 4. This sentence comes from the middle of a
15 section in Google’s Counterclaims that describes how Oracle first encouraged Sun to grant
16 Apache a TCK license for Harmony, and then opposed granting Apache such a license after
17 acquiring Sun. Google’s Amended Counterclaims, Dkt. No. 51, at 15-17 ¶¶ 7-9. As Google has
18 argued elsewhere, *see, e.g.*, Dkt. No. 831, Apache’s goal in obtaining a TCK license was to call
19 itself “Java.” Once Sun sought to impose FOU restrictions on its TCK license, Apache refused to
20 take the license and continued to distribute Harmony, including its independent implementations
21 of the Java APIs. Sun never suggested that Apache, without obtaining such a license, could not
22 distribute Harmony, including for use in mobile devices. Indeed, Jonathan Schwartz, Sun’s CEO,
23 specifically endorsed Apache’s distribution of Harmony. TX 2341 (“[T]here is no reason that
24 Apache cannot ship Harmony today.”). Moreover, Oracle’s statement is false. Sun never finally
25 refused Apache’s request; it was *Oracle* who did that after buying Sun. Again, Oracle is trying to
26 confuse the jury into thinking that Sun required that Apache have a license to distribute Harmony
27 for use in mobile devices, when in fact the evidence will show that Sun objected only to Apache
28 calling Harmony “Java.” Google never admitted the contrary.

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Dated: April 13, 2012

KEKER & VAN NEST LLP

By: /s/ Robert A. Van Nest
ROBERT A. VAN NEST

Attorneys for Defendant
GOOGLE INC.