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11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 SAN FRANCISCO DIVISION

15 INXIGHT SOFTWARE, INC., a Delaware
 corporation,

16 Plaintiff,

17 v.

18 VERITY, INC., a Delaware corporation

19 Defendant.

Case No. C 05-01660 CRB

**INXIGHT SOFTWARE, INC.’S
 OPPOSITION TO VERITY’S *EX*
PARTE APPLICATION FOR ORDER
 CONTINUING PRE-TRIAL AND
 TRIAL DATES BY SIXTY (60) DAYS,
 OR IN THE ALTERNATIVE,
 CONTINUING EXPERT REPORT
 DATES BY THIRTY (30) DAYS**

21 VERITY, INC., a Delaware corporation,

22 Counter-complainant,

23 v.

24 INXIGHT SOFTWARE, INC., a Delaware
 corporation, ALPHA LUK and ROES 1-10,
 25 inclusive,

26 Counter-defendants.
 27

Related Case No. C 04-05387 CRB

1 **I. INTRODUCTION**

2 Verity's *ex parte* application to continue the pre-trial and trial dates, or in the
3 alternative, to continue expert report dates should be denied. The trial date in this matter was
4 advanced to October 11, 2005 from December 2005 in order to resolve the serious issues raised
5 by Inxight's motion for a preliminary injunction. Delaying trial will be prejudicial to Inxight in
6 light of the Court's earlier decision to merge the hearing on Inxight's preliminary injunction with
7 the trial. Verity's claims of "stonewalling" are unfounded. While fact discovery in these
8 consolidated matters is voluminous and at times burdensome for both parties, Inxight is
9 attempting in good faith to fulfill its discovery obligations and has recently produced over
10 350,000 pages of documents in response to Verity's document requests. At the same time,
11 Inxight is awaiting production of certain categories of documents from Verity, requested as early
12 as fall 2004 and as recently as May 2005.

13 Inxight still believes that written fact discovery and document production should
14 be completed by July 29, 2005. However, in order to efficiently conduct depositions without
15 having to recall witnesses and to prevent additional motions to compel, Inxight has proposed that
16 the deadline for conducting fact depositions be extended through August 2005. To accommodate
17 Verity's concerns about its expert's schedule, Inxight has also proposed a two-week continuance
18 of all expert and summary judgment deadlines to August 19, 2005. Unfortunately, Verity rejected
19 Inxight's proposal and still seeks to delay all facets of the case by two months. Inxight requests
20 that the Court deny Verity's application, and adopt Inxight's proposed schedule modifications set
21 forth in the accompanying proposed order, which do not change the current trial date.

22 **II. STATEMENT OF FACTS**

23 On October 22, 2004, Inxight filed suit against Verity in the Superior Court for the
24 State of California, County of Santa Clara (the "LXP case"). Months later, on December 20,
25 2005, Verity filed a lawsuit against Inxight in the United States District Court for the Northern
26 District of California (the "KeyView case").¹ The LXP case was removed to Federal Court after
27

28 ¹ Verity wrongly suggests that the KeyView case was "first filed" and that the LXP case was "later filed."
Application at 3. Clearly, Inxight initiated the present lawsuit by first filing the LXP case on October 22, 2005.

1 Inxight filed its second amended complaint on March 22, 2005.

2 Inxight began seeking discovery from Verity early on in the case. On November
3 5, 2004, Inxight served its first set of discovery in the LXP case. Declaration of Thomas J. Gray
4 In Support of Inxight's Opposition to Verity's *Ex Parte* Application ("Gray Decl.") ¶ 2. On
5 December 15, 2004, Verity served its responses to Inxight's initial round of written discovery and
6 produced 492 pages of non-confidential documents, including drafts and various versions of the
7 licenses between the parties and a small amount of email correspondence between the parties. *Id.*
8 ¶ 2. Verity then delayed for over one month the entry of a stipulated protective order and its
9 production of key, confidential documents. *Id.* ¶¶ 3-6. Not until after the Honorable Kevin E.
10 McKenney of the Santa Clara County Superior Court granted Inxight's Motion to Compel on
11 March 30, 2005, did Verity produce the source code relevant to the LXP case and other
12 confidential documents. *Id.* ¶ 7. To this date, Verity has not stated that it has completed its
13 production of documents responsive to the November 2004 requests, and even recently produced
14 additional documents, eight months after the requests were served.

15 In contrast to Inxight's diligent efforts to obtain the necessary documents and
16 source code to prepare its case, for months Verity never attempted to obtain discovery from
17 Inxight. Verity finally served written discovery on Inxight in the KeyView case on April 21,
18 2005, five months after the case had been filed. *Id.* ¶ 8. It was the first round of discovery that
19 Verity served on Inxight in any case. On May 13, 2005, Verity served written discovery on
20 Inxight in the LXP case, nearly seven months after the lawsuit had been filed. *Id.* Despite
21 Verity's claims, to date, Inxight has produced nearly 400,000 pages of documents in the two
22 cases. *Id.* ¶ 9. In addition, Inxight has produced the source code for SmartDiscovery, the main
23 product at issue in the KeyView case.

24 **III. ARGUMENT**

25 **A. Verity's Accusations Of Stonewalling Are False And Its Delay In Pursuing** 26 **Discovery Caused Its Current Predicament.**

27 Verity accuses Inxight of "stonewalling" by failing to produce documents Verity
28 needs to prepare its case. *See* Application at 2, 4. Verity's claims are without merit and its

1 problems are of its own making. In reality, Inxight has produced nearly 400,000 pages of
2 documents in response to Verity's broad document requests. It is not surprising, however, that
3 Inxight has only recently produced significant numbers of documents because Verity first served
4 document requests in April and May of 2005.

5 Verity attempts to support its claims by comparing its document production to
6 Inxight's production. The comparison is irrelevant and misleading. Verity states that it
7 "produced months ago the technical and financial documents Inxight experts need to complete
8 discovery." Application at 6. Verity produced those documents because Inxight propounded
9 discovery in a timely fashion. Even then, it took a motion to compel to force Verity to comply
10 with its discovery obligations. Verity cannot evade the fact that its own delay in serving
11 discovery until late April and early May is the primary cause of its purported inability to prepare
12 for trial. If Verity currently lacks any documentation needed for its expert reports, it is a result of
13 its failure to timely seek documents regarding its affirmative claims or defenses. The accusation
14 that Inxight is "stonewalling" is unfounded and should not be grounds to grant Verity the delays it
15 requests.

16 **B. Verity Also Delayed Retaining The Software Consultant Who Is Now**
17 **Unavailable Due To His Other Engagements.**

18 Verity also seeks relief from the Court because "on June 28, [it learned] that its
19 software consultant now has a scheduling conflict that will prevent him from completing a report
20 by August 5." Application at 5. Not surprisingly, Verity blames Inxight for its consultant's
21 inability to complete his report; however, Verity's own application and previous filings belie that
22 argument. Based on the Declaration of Christopher Wanger filed in support of Verity's *ex parte*
23 application to continue the hearing on Inxight's motion for preliminary injunction, it is obvious
24 that Verity only retained its software consultant in late May after Inxight filed its preliminary
25 injunction. *See* Gray Decl. ¶ 10 ("Verity is in the process of retaining an independent expert to
26 rebut the Declaration of Inxight's expert, Paul Jacobs. Verity's expert has been in Santa Fe, New
27 Mexico since May 16 and Inxight's motion papers are scheduled to arrive in Santa Fe on May
28 18."). Verity also acknowledges that its expert misjudged his prior commitments. "Verity's

1 expert believed he would have sufficient time to review Inxight's code and complete his expert
2 witness report, even though he had previously been retained in another litigation matter during
3 this same time period." Application at 5. Moreover, Verity states that its expert is unavailable
4 because "he [has] to generate another expert report in a preexisting case that had been dormant."
5 *Id.* Verity's expert's time constraints are properly blamed on his own scheduling conflicts, Verity
6 delay in retaining him, and Verity's assumptions as to the case schedule.

7 Verity's claim that it cannot prepare its expert reports in the time given seems
8 dubious in light of the nature of Inxight's claims. The LXP case raises primarily one technical
9 issue: whether Verity exceeded the scope of its license to use Inxight's LinguistX Platform
10 ("LXP") by allowing its unlicensed products, such as Extractor and Classifier, to access and use
11 the LXP technology. Inxight raised this issue with Verity in October 2004, before it even filed
12 suit. Importantly, Verity possesses all of the documentation and source code needed by Verity's
13 expert to analyze this issue and rebut Inxight's expert report. Notably, Verity does not claim in
14 its *ex parte* application that it cannot prepare its report for the LXP case.

15 With respect to the KeyView case, Inxight has already produced the source code
16 for SmartDiscovery, Inxight's product that Verity claims exceeds the scope of its license. Inxight
17 is also diligently attempting to collect and produce source code for other products that Verity has
18 requested. Inxight hopes to produce that source in the near future.

19 In an effort to accommodate Verity's expert's pre-existing obligations and
20 scheduling conflicts, but keep the October 11, 2005 trial date, Inxight has proposed that expert
21 reports be exchanged on August 19, 2005. Verity, however, flatly rejected Inxight's offer.
22 Inxight requests that the Court deny Verity's application, but adopt Inxight's proposal to continue
23 expert reports to August 19, 2005 which should give Verity's expert ample time to conduct his
24 review and produce his report.

25 **C. A Continuance Of The October 11 Trial Date Will Further Prejudice Inxight.**

26 Verity's unsupported statement that "[a] sixty-day continuance of the pre-trial and
27 trial date in the consolidated cases would not prejudice Inxight," is wrong. Inxight is being
28 irreparably harmed by Verity's unauthorized use of Inxight's proprietary LXP technology every

1 day the matter is not heard. Granting Verity a sixty-day continuance of the pre-trial and trial
 2 dates will continue to irreparably harm Inxight's goodwill, reputation, and ability to compete in
 3 evolving software markets. The issues presented by Inxight's motion for preliminary injunction
 4 are important and should not be casually dismissed or delayed by Verity. After Inxight filed its
 5 preliminary injunction motion, the Court advanced the trial date because it chose not to conduct a
 6 preliminary injunction hearing just months before trial. As a logical and fair result, the trial was
 7 moved up to October 11, 2005. Continuing the trial date will prejudice Inxight.

8 Inxight believes that written fact discovery and the parties' document productions
 9 should be completed by July 29, 2005, the close of fact discovery. However, in recognition of the
 10 facts that both parties still need to produce numerous documents and that over thirty depositions
 11 still need to be taken, Inxight proposed to Verity extending the deadline for fact depositions until
 12 August 31, 2005. Verity again rejected Inxight's proposal. Inxight requests that the Court deny
 13 Verity's application, and adopt Inxight's modifications to the schedule.

14 **IV. CONCLUSION**

15 For the foregoing reasons, Inxight requests that the Court deny Verity's *ex parte*
 16 application, adopt Inxight's proposed order permitting fact depositions to occur in August,
 17 continuing expert and summary judgment deadlines for two weeks, and keeping the October 11,
 18 2005 trial date unchanged.

19 Dated: July 7, 2005

ORRICK, HERRINGTON & SUTCLIFFE LLP

21 /s/

22 _____
 23 Thomas J. Gray
 24 Attorneys for Plaintiff and Counter-Defendants
 25 INXIGHT SOFTWARE, INC. and ALPHA LUK