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**SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SANTA CLARA**

HEWLETT-PACKARD COMPANY,

Plaintiff,

v.

ORACLE CORPORATION,

Defendant.

Case No. 1-11-CV-203163

**REPLY BRIEF RE MOTION OF
PLAINTIFF HEWLETT-PACKARD
COMPANY TO FILE COMPLAINT
UNDER SEAL**

Date: August 12, 2011
Time: 9:00 a.m.
Dept: 1

Assigned for All Purposes to the Honorable
James P. Kleinberg

I. HP is More Than Willing to Make the Complaint Public

Oracle argues in its Opposition that by moving to file its complaint under seal HP is trying to suppress the truth about the basis for its claims against Oracle. Nothing could be further from the truth. There is not a single word in HP's complaint that HP is not willing – indeed eager – to make public. As Oracle well knows, HP filed its complaint with references to the Settlement Agreement redacted because at the insistence of all the parties – Oracle, HP and Hurd – the agreement contains a provision that precludes the parties from disclosing the terms of the agreement for any purpose. HP was bound to honor the terms of the strict confidentiality provision and took the appropriate procedural steps to do so. Rather than acknowledging this, or making any attempt to address the confidentiality issue with HP's counsel, Oracle took the opportunity to try to land a cheap shot, making false accusations of “McCarthyism” and inappropriately larding the record with misleading and inflammatory assertions about the merits of the case.¹

Oracle's accusations are misplaced to say the least in light of the actual facts. During the negotiation of the Settlement Agreement, Oracle went to great lengths to insist on confidentiality as it sought to keep from public view not only information about the terms of the settlement but also

Oracle and Hurd wanted to keep this information and other terms of the Settlement Agreement confidential. They therefore bargained for express contractual provisions to accomplish that goal, just as HP bargained for express contractual provisions to accomplish its goals of confidentiality.

¹ Oracle's brief was obviously written not for this Court but rather for public consumption. Indeed, in connection with the filing of its Opposition, Oracle launched a coordinated press campaign to publicize its position on the case, including a press release that directed the public to a copy of its Opposition hosted at www.oracle.com/nothingtohide. This press campaign, like Oracle's response to the motion to seal itself, makes the specious allegation that HP is trying to “suppress truths” simply because it honored its contractual commitment to Oracle and Hurd not to publicize the terms of the Settlement Agreement. Ironically, it is Oracle that accuses HP of engaging in a “publicity stunt.”

Oracle says that HP was not required to comply with the confidentiality provision because “the settlement agreement is by its explicit terms not confidential in an action to enforce it” (Opp. at 3). The language which Oracle references, however, does not obviate the confidentiality requirement and merely allows relevant provisions of the agreement to be used in litigation between the parties to enforce its terms.² Oracle’s argument that a party could obviate the confidentiality provision and publish the agreement to the world simply by filing a lawsuit to enforce a term of the agreement is not supported by the express language of the agreement. Nor is it consistent with Oracle’s own demands during negotiations that all the terms of the agreement be subject to an iron-clad confidentiality requirement. Therefore, of necessity, HP filed the motion to seal the public version of the complaint. In light of the great importance that Oracle and Hurd have previously placed on maintaining absolute confidentiality with respect to the Settlement Agreement, HP is surprised that Oracle’s position is that HP should have done otherwise.

Now that HP understands Oracle’s position, HP is more than willing to make the complaint public, and to move forward with the understanding that confidentiality has been waived as to Paragraph 1 of the Settlement Agreement, the specific provision at issue in this case. HP is not willing to waive confidentiality as to any other provisions of the Settlement Agreement, or as to the agreement itself. Nor does HP understand Oracle to be suggesting that it is willing to waive the confidentiality obligations otherwise imposed by the agreement. For example, HP does not understand Oracle to be waiving confidentiality [REDACTED]

[REDACTED] The parties had a mutual, bargained-for exchange on confidentiality, which should be honored as to all provisions of the agreement except Paragraph 1, the only provision for which both parties have now expressed a specific intent to waive confidentiality.

² Rather, as HP interprets the agreement, the exception permits the parties to use the agreement to the extent necessary to proceed with litigation, taking standard precautions to honor the commitment to maintain the agreement and its terms in confidence (such as filing designated materials under seal).

II. Oracle's Misleading Portrayal of the Facts

While HP will not respond at length here to Oracle's entire long-winded litany of factual misstatements concerning the merits of this case, it is compelled to address several of Oracle's most egregious falsehoods. Oracle characterizes the contractual provision at issue in this case as a mere "corporate hug" that required Oracle to do nothing more than issue a press release reaffirming the partnership between the two companies. (Opp. at 2.) Oracle ignores the plain and unambiguous language of its contractual commitment, [REDACTED]

[REDACTED] The language is unambiguous and makes no exclusion for the Itanium platform.

Oracle argues that the provision is merely a "general reaffirmation of a non-contractual 'partnership'" that "HP cannot seriously contend" requires Oracle to continue to port its database and other software to HP's platforms. Yet that is exactly what Oracle's own general counsel expressly told HP the provision meant during negotiation of the agreement. In an email to counsel for HP on September 12, 2010, Dorian Daley, Oracle's General Counsel, wrote that this provision reflected "an agreement to continue to work together as the companies have—with Oracle porting products to HP's platform and HP supporting the ported products and the parties engaging in joint marketing opportunities—for the mutual benefit of customers."

Oracle quotes a more detailed version of the provision proposed by HP that specifically referenced not only HP-UX (Itanium platform) but also other HP platforms (x86) and notes that Oracle rejected HP's proposed language. Here again, Ms. Daley's email made it clear that Oracle's reason for rejecting this detailed language was not that Oracle did not intend to obligate itself to continue to support HP's platforms but that negotiating "detailed operative terms" was "not necessary" because the companies were committing to continuing to do exactly what they had been doing prior to Oracle's hiring of Hurd, with Oracle continuing to port its products to HP's platforms. Indeed, at the time Oracle signed the Settlement Agreement, promising HP that it was going to be "business as usual" and that Oracle would continue to port its products to HP's platforms, Oracle had been working with HP for months to prepare to port Oracle's new database (version 12g) to HP's Itanium platform. Oracle cannot possibly contend that its promise to continue to port its products to

1 HP's platforms, made while it was working with HP to port 12g to the Itanium platform, somehow
2 does not obligate it to continue with the porting of 12g.

3 Moreover, Oracle's description of the HP-Oracle relationship as it existed in the past – based
4 on what is “often colloquially referred to as ‘partnerships’” with only “the occasional binding
5 commitment” – exposes the hypocrisy of Oracle's argument that “[s]uch an important contract” as
6 the one HP alleges, “if it existed, would obviously be a heavily negotiated, fully documented formal
7 contract, with terms and conditions and payment obligations and all the other characteristics of real-
8 world commercial agreement.” (Opp. at 2.) Having asserted that the HP-Oracle relationship wasn't
9 heavily negotiated in the past and involved only the occasional formal contract, Oracle cannot claim
10 that only a lengthy formal contract could support this type of commitment.

11 Indeed, the cracks in Oracle's story are already starting to show. Oracle initially said that it
12 decided to discontinue Itanium support because “Intel management made it clear” to Oracle that
13 “Itanium was nearing the end of its life.” Oracle Press Release March 22, 2011. Intel has firmly and
14 repeatedly rebutted that contention. Oracle now says that its CEO Larry Ellison “concluded” (even
15 though Intel had not announced an end-of-life for Itanium), that Itanium's end of life “had to be no
16 more than a few years away.” (Opp. at 11.) “Had to be no more than a few years away”? It is
17 unclear what this even means, yet Oracle says that this is the “information” that formed the basis for
18 its decision to pull the plug on Itanium, a decision that could have major ramifications for Oracle's
19 own business and customers.

20 Oracle clearly has no idea what the future support plan is for Itanium. It nonetheless stated
21 emphatically to the marketplace that Itanium is “nearing its end of life” and that “HP is knowingly
22 withholding this information from our joint Itanium customers.” HP looks forward to showing, “in
23 the sunshine” as Oracle proposes, not only that Oracle is contractually obligated to continue to
24 support HP's Itanium platform but that Oracle's claimed justification for its breach of its obligation is
25 a sham.

1 **III. Oracle's Accusations Unrelated to the Issues in this Case**

2 Oracle's Opposition is replete with accusations against HP and its Board that have nothing to
3 do with the issues raised by HP's motion or its complaint. Oracle takes gratuitous shots at HP and
4 goes out of its way to attempt to belittle the serious misconduct by Mark Hurd that led to his
5 resignation from HP.³

6 Oracle's accusations are an obvious effort to distract this Court from the actual claims in this
7 case, claims to which Oracle has no defense. While Mr. Hurd will certainly be a witness in this case
8 and his credibility very much at issue, HP will resist the temptation to sink to Oracle's level and will
9 refrain from discussing Mr. Hurd's wrongdoing in this filing.

10 **IV. Retaining the Parties' Bargained-For Agreement on Confidentiality**

11 As discussed above, while there is no dispute between the parties that the complete,
12 unredacted complaint lodged with the Court should now be filed in the public record, this does not
13 vitiate the parties' bargained-for agreement on confidentiality as it applies to all other provisions of
14 the Settlement Agreement, which the parties agreed to keep strictly confidential.

15 For example, Oracle bargained heavily for the confidentiality

16 [REDACTED]
17 [REDACTED] HP does not

18 understand Oracle to be proposing that the accord to make the complaint public (including paragraph
19 1 of the Settlement Agreement) relieves HP or Oracle of all other bargained for confidentiality
20 obligations under the Settlement Agreement.

21 Thus, the redacted references in Oracle's Opposition, other than to the contractual provision at
22 issue, should remain confidential.⁴ Likewise, the redacted references in this Reply Brief, other than

23 _____
24 ³ It is noteworthy that Oracle does even try to explain to this Court on what basis it portends to
25 have sufficient personal knowledge of Hurd's actions while the CEO and Chairman of HP to
make the representations contained in its improper filing.

26 ⁴ California courts have held that there is an overriding public interest protecting from disclosure
27 information subject to contractual confidentiality restrictions, including confidentiality
28 restrictions contained in litigation settlement agreements. *Universal City Studios, Inc. v. Superior Court*, 110 Cal. App. 4th 1273, 1283 (2003).

1 to the contractual provision at issue, should remain confidential as required by the Settlement
2 Agreement.

3 To that end, HP requests that the unredacted version of Oracle's Opposition that was lodged
4 with the Court be returned to Oracle (as it references a confidential provision of the Settlement
5 Agreement at page 8, lines 13-15, that is irrelevant to this motion). Similarly, the unredacted version
6 this Reply Brief should be returned to HP and only the redacted version should remain filed.⁵

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8 DATED: July 7, 2011

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9 BARTLIT BECK HERMAN PALENCHAR & SCOTT
10 LLP

11
12 By: /s/ Robert E. Cooper
Robert E. Cooper

13 Attorneys for Plaintiff
14 HEWLETT-PACKARD COMPANY

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27 ⁵ The California Rules of Court provide for the return to the parties of unredacted briefs lodged in
28 connection with motions to seal where the underlying material for which sealing is requested is
not sealed. See Cal. R. Ct. 2.551(b)(6).