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21	OAKLAN	D DIVISION	
22	ORACLE USA, INC., et al.,	Case No. 07-CV-1658 PJH (EDL)	
23	Plaintiffs,	DEFENDANTS' OPPOSITION TO	
24	V.	ORACLE'S MOTION FOR 1292(b) CERTIFICATION FOR	
25	SAP AG, et al.,	INTERLOCUTORY REVIEW	
26	Defendants.	Date: N/A Time: N/A	
27		Courtroom: 3, 3rd Floor Judge: Hon. Phyllis J. Hamilton	
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I. <u>INTRODUCTION</u>

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As Oracle admits, interlocutory appeal under 28 U.S.C. § 1292(b) is an exception to the rule against piecemeal appeals, "to be used only in exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). No such "exceptional situation" exists here, and granting Oracle's motion only serves to unnecessarily prolong this case.

The fundamental problem with Oracle's motion is that despite the Court's clarifying order, Oracle's proposed questions for certification continue to mischaracterize the bases for the Court's 9/1/11 Order, requesting appellate review of issues on which the Court never ruled. These proposed questions all relate to whether certain categories of evidence are sufficient to support a "hypothetical" license-fee award and incorrectly presume that Oracle's trial evidence was objective. But the Court did not, as Oracle's questions suggest, rule that whole categories of evidence are per se insufficient to value license damages, or that objective value could be proved only by particular kinds of evidence. Rather, the Court found that Oracle failed to offer any evidence of lost licensing opportunities or any objective evidence to support a non-speculative license price, and then held that Oracle was not entitled to actual damages in the form of "hypothetical" license fees. Even if the Ninth Circuit ruled that certain categories of evidence can suffice to price a hypothetical license, this would not result in reversing any part of the Court's 9/1/11 Order. Instead, appellate answers about categories of evidence would be merely advisory. Thus, Oracle's questions are not "controlling." And if what Oracle really wants is for the Ninth Circuit to re-analyze whether the evidence Oracle offered at trial was objective, then these questions are not even "questions of law" that can be considered on interlocutory appeal.

Moreover, no substantial grounds for difference of opinion exist as to the law governing Oracle's proposed questions. Ninth Circuit law uniformly supports the Court's rulings that license-fee-based damages for copyright infringement are available only upon proof of lost licensing opportunities and that objective evidence (including, but not limited to, evidence of "benchmark" transactions) must be offered to establish a license's value. Oracle's attempt to manufacture an appeal-worthy controversy by misconstruing the Court's previous orders and re-

arguing the sufficiency of evidence presented at trial fails because the Court correctly applied controlling case law. Relying on inapposite patent law does not further Oracle's argument.

Ultimately, because interlocutory appeal will uselessly impede, rather than materially advance, termination of this long-running dispute, the Court should deny Oracle's motion. Oracle must either accept the remittitur and end the case or elect a new trial. Given the much narrowed scope of a new trial, it should conclude far earlier than the proposed interlocutory appeal.

II. <u>ARGUMENT</u>

A. <u>Standard for Certifying Interlocutory Appeal.</u>

28 U.S.C. § 1292(b) provides a limited exception to the rule that an appellate court should not review a district court ruling until entry of final judgment. 28 U.S.C. § 1291. The statute allows a district court to exercise discretion and certify a non-final order for immediate appeal if there is: (1) a "controlling question of law," (2) on which there are "substantial grounds for difference of opinion," and (3) resolution of which would "materially advance the ultimate termination of the litigation." *In re Cement*, 673 F.2d at 1026. Because Section 1292(b) derogates from the usual final-judgment rule and runs contrary to the strong federal policy against piecemeal appeals, a district court must "strictly" construe the statute's requirements and allow certification only "when exceptional circumstances warrant it." *Safeway Inc. v. Abbott Labs.*, No. C 07-05470 CW, 2010 U.S. Dist. LEXIS 61721, at *6 (N.D. Cal. June 1, 2010).

Even if these three factors are met, a district court possesses unreviewable discretion to deny certification. *See Exec. Software N. Am., Inc. v. U.S. Dist. Ct. for Cent. Dist. of Cal.*, 24 F.3d 1545, 1550 (9th Cir. 1994) (stating that district court's decision as to 1292(b) certification is "unreviewable"); *Brizzee v. Fred Meyer Stores, Inc.*, CV-04-1566-ST, 2007 U.S. Dist. LEXIS 99155, at *8 (D. Or. Dec. 10, 2007) ("Even when all three statutory criteria are satisfied, district court judges have 'unfettered discretion' to deny certification."). And even if a district court grants certification, the court of appeals must exercise its own discretion to determine whether to permit the appeal. *See Shurance v. Planning Control Int'l, Inc.*, 839 F.2d 1347, 1348 (9th Cir. 1988); *United States v. Woodbury*, 263 F.2d 784, 788 (9th Cir. 1959).

B. Oracle Does Not Seek to Certify a "Controlling Question of Law."

In offering what it claims to be "controlling questions" meriting certification, Oracle ignores the Court's actual post-judgment rulings and poses questions as to whether certain categories of evidence are sufficient to obtain "copyright damages based upon the amount a willing buyer would reasonably have had to pay a willing seller under a hypothetical license." Mot. at 1. A "question of law" is "controlling" only if resolving the question on interlocutory appeal "could materially affect the outcome of litigation in the district court." *In re Cement*, 673 F.2d at 1026. Oracle's questions are not "controlling" because the Court's grant of judgment as a matter of law and a new trial limited to lost profits and infringers' profits (or remittitur) still will stand regardless of the Ninth Circuit's answers. As a result, immediate appeal will not affect the outcome of the litigation, other than to needlessly delay it.

Judgment as a Matter of Law ("JMOL"). The Court granted JMOL on two separate grounds—Oracle is not entitled to "hypothetical" license fees as actual damages because:

(1) Oracle failed to prove that it actually lost any licensing opportunities, and (2) even if "hypothetical" license fees were recoverable absent proof of lost licensing opportunities, Oracle failed to offer *any* objective (let alone sufficient) evidence upon which to calculate a non-speculative license price. ECF No. 1081 at 10-15. Resolving Oracle's proposed questions would not affect *either* basis for the Court's grant of JMOL and thus do not qualify as "controlling."

First, Oracle's questions do not address the first basis for the Court's order—that, as a

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Oracle's three proposed questions for certification are: "(1) Whether copyright damages measured by the amount a willing buyer would have paid a willing seller for a hypothetical license to the rights infringed are sufficiently established by evidence of: (a) the infringer's contemporaneous projections of the profits it would realize from use of the rights, (b) the copyright owner's contemporaneous evidence valuing the business it would lose if it licensed those rights, and (c) reliable expert testimony as to the fair market value of a hypothetical license to the rights, based upon that evidence. (2) Whether a jury's assessment of the fair market value of the rights infringed may be set aside as speculative when based upon such objective evidence. (3) Whether a jury's verdict falling within the reasonable range of hypothetical-license damages established by such objective evidence, may be set aside as excessive." Mot. at 1-2.

² The Court found that Oracle failed to offer any "evidence of the type on which plaintiffs ordinarily rely to prove that they would have entered into such a license" and that the evidence instead confirmed that Oracle "would not ever license to anyone." ECF No. 1081 at 10-11, 14.

³ The Court found that Oracle offered only subjective evidence in the form of "what Oracle would have demanded" for a license. ECF 1081 at 11, 14.

threshold matter, Oracle cannot recover actual damages for copyright infringement in the form of a "hypothetical" license because it failed to offer any evidence that it actually lost licensing opportunities. Instead, Oracle's questions focus on whether certain categories of evidence may be "sufficient" to calculate an objective, non-speculative hypothetical license price, once entitlement to lost license fees is proven. *See* Mot. at 1-2. Thus, a ruling on Oracle's questions would not affect the Court's holding that Oracle is not entitled to recover actual damages in the form of "hypothetical" license fees for failure to establish lost licensing opportunities. The parties still would proceed to a new trial limited to lost profits and infringer's profits.

Contrary to Oracle's suggestion, the Court's 9/16/11 Order did not "clarify" that the sole basis for the Court's grant of JMOL was Oracle's failure to offer evidence sufficient to value the hypothetical license. See Mot. at 2, 13. The 9/16/11 Order addressed only the question that Oracle previously sought to certify for interlocutory appeal, which mischaracterized the basis for the Court's second JMOL holding. The Court clarified that it did not hold that hypothetical license damages must be quantified through "evidence of actual licenses it entered into or would have entered into for the infringed works, and/or actual 'benchmark' licenses" ECF No. 1088 at 2. Rather, it held that the evidence Oracle offered at trial was insufficient to "establish an objective, non-speculative license price," having found that all of the evidence Oracle offered in support of calculating a "hypothetical" license price was subjective. *Id.* (stating that Oracle "failed to provide objective evidence of what a willing buyer would have paid" or any other objective "evidence sufficient to allow the jury to assess fair market value without undue speculation"). The Court did not purport to reiterate all the ways in which Oracle failed to prove its entitlement to a hypothetical license remedy, including Oracle's failure, as a threshold matter, to offer evidence that it actually lost any licensing opportunities. As a result, there is no merit to Oracle's claim that its questions "control" the Court's grant of JMOL.

Second, Oracle's revised questions continue to mischaracterize the second basis for the Court's grant of JMOL—that Oracle failed to offer any objective evidence sufficient to establish a non-speculative license price. The Court held that the particular evidence that Oracle presented at trial, in the form of "purported value of the intellectual property as a whole, . . . self-serving

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testimony from its executives regarding the price they claim they would have demanded in an
admittedly fictional negotiation, and \dots the speculative opinion of its damages expert, which was
based on little more than guesses about the parties' expectations," was insufficient to "establish an
objective, non-speculative license price." ECF No. 1081 at 11, 17. The Court did not, as Oracle's
proposed questions suggest, rule that whole categories of evidence are per se insufficient to value
license damages or that "objective value could be proved only by particular kinds of evidence."
Mot. at 1, 5. Nor did the Court rule that an award based on certain categories of evidence or
falling "within the reasonable range of hypothetical-license damages established" by these
categories of evidence must be set aside as speculative and/or excessive. <i>Id.</i> at 2.

Because Oracle's proposed questions are not presented by this case, they are inappropriate to certify for interlocutory appeal. *See Hulmes v. Honda Motor Co.*, 936 F. Supp. 195, 209 (D.N.J. 1996) (denying certification where "Plaintiff has asked this court to certify for interlocutory appeal a question that it did not decide"); *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 212 F. Supp. 2d 903, 907 (S.D. Ind. 2002) (denying certification where party "mischaracterize[d]" court's ruling "[i]n an effort to make this issue a question of law"). A ruling by the Ninth Circuit that certain categories of evidence can suffice to price a hypothetical license would not alter the Court's holding that the purely subjective evidence Oracle presented at trial failed to support a non-speculative license amount. Instead, this ruling would simply be an advisory opinion that, in the abstract, a copyright owner may support a non-speculative license-based damages amount with objective evidence falling into the categories Oracle lists. Thus, Oracle's proposed questions are not "controlling"; they are purely academic.

Further, Oracle's arguments in support of its proposed questions demonstrate that these questions are not even "questions of law." Although Oracle frames its questions in terms of abstract categories of evidence, Oracle devotes much of its brief to rearguing its specific trial evidence, including whether the evidence showed the parties' "expectations" and whether Oracle's damages expert, Paul Meyer, offered reliable trial testimony valuing a lost license fee. *See* Mot. at 10-17. If what Oracle actually seeks is appellate review of the Court's finding that the evidence Oracle offered at trial was subjective, its proposed questions are not "questions of

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law." Indeed, this appears to be Oracle's ultimate objective, but it is well settled that under
section 1292(b), a "question of law" means a "pure question of law," "not a mixed question of
law and fact or an application of law to a particular set of facts." Brizzee, 2007 U.S. Dist. LEXIS
99155, at *10-11; Keystone Tobacco Co. v. U.S. Tobacco Co., 217 F.R.D. 235, 238-39 (D.D.C.
2003) (denying certification, as "crux of an issue decided by Court [was] fact-depend[e]nt" and
appellate review "could only result in the court of appeals improperly wading into the factual
pond of an ongoing matter"). Certification is appropriate only where a party seeks review of "an
abstract legal issue," Brizzee, 2007 U.S. Dist. LEXIS 99155, at *11, not simply a court's
"application of the governing law to the relevant facts of this case." Hulmes, 936 F. Supp. at 210
("Section 1292(b) was not designed to secure appellate review of 'factual matters' or of the
application of the acknowledged law to the facts of a particular case, matters which are within the
sound discretion of the trial court."); Ahrenholz v. Bd. of Trs. of Univ. of Ill., 219 F.3d 674, 676-
77 (7th Cir. 2000). Analyzing whether Oracle's evidence is objective or subjective requires the
Ninth Circuit to undertake the same fact-intensive review that this Court carried out to evaluate
the parties' post-judgment motions. Questions requiring such analysis are not "questions of law"
appropriate for interlocutory appeal.

New Trial. Oracle's proposed questions have even less bearing on the Court's grant of a new trial, which rested on the Court's discretionary determination that "the \$1.3 billion verdict is contrary to the weight of the evidence." ECF No. 1081 at 3-4, 17. After observing weeks of trial, the Court found that the damages award failed to reflect Defendants' actual use of the works at issue, as required by Ninth Circuit law, and improperly was based on "evidence of the purported value of the intellectual property as a whole, . . . self-serving testimony from [Oracle] executives regarding the price they claim they would have demanded in an admitted fictional negotiation, and . . . the speculative opinion of [Oracle's] damages expert, which was based on little more than guesses about the parties' expectations." *Id.* at 17. Such evidence not only was insufficient to support an award of actual damages, but also resulted in a verdict that "grossly exceeded the actual harm to Oracle in the form of lost customers." *Id.* Just as with its rulings on JMOL, the Court's new trial order would not be affected by the Ninth Circuit's answers regarding what

categories of evidence theoretically suffice to support an actual damages award. Further, because

the Court's new-trial order was an exercise of judicial discretion, reviewed on appeal with

extreme deference, see Silver Sage Partners, Ltd. v. City of Desert Hot Springs, 251 F.3d 814,

818-19 (9th Cir. 2001), the low probability of reversal makes an immediate appeal extremely

unlikely to advance the ultimate termination of the litigation. Such an appeal would not present a

"controlling question of law," but instead only a routine question of judicial discretion. See, e.g.,

new trial based on finding that "a monetary verdict is not supported by the evidence but rather is

so high as to shock the judicial conscience . . . is not a question of law as to which an immediate

interlocutory appeal is appropriate under § 1292(b)"); McCabe v. Basham, No. 05-CV-73-LRR,

"excessiveness of a verdict is basically, and should be, a matter for the trial court which has had

the benefit of hearing the testimony and of observing the demeanor of witnesses and which knows

the community and its standards," "court's decision to order a partial new trial . . . on the issue of

2008 U.S. Dist. LEXIS 81941, at *4-5 (N.D. Iowa Oct. 14, 2008) (holding that because

damages is, by its very nature, a particularly poor candidate for interlocutory review").

Casey v. Long Island R.R. Co., 406 F.3d 142, 147 (2d Cir. 2005) (holding that court's grant of

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Oracle also fails to show that a substantial ground for difference of opinion exists as to the law governing its proposed questions. To determine if a "substantial ground for difference of opinion" exists under section 1292(b), "courts must examine to what extent the controlling law is unclear." Couch v. Telescope Inc., 611 F.3d 629, 633 (9th Cir. 2010). Such grounds typically exist only where "the circuits are in dispute on the question and the court of appeals of the circuit has not spoken on the point, if complicated questions arise under foreign law, or if novel and difficult questions of first impression are presented." Id. "That settled law might be applied differently does not establish a substantial ground for difference of opinion." *Id.*; see also N. Carolina ex. rel. Long v. Alexander & Alexander Servs., Inc., 685 F. Supp. 114, 116 (E.D.N.C. 1988) (denying request where party raised only "dispute with the application of facts to existing

and well-settled law"). "A party's strong disagreement with the Court's ruling is not sufficient

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Oracle's Proposed Questions Do Not Present a Substantial Ground for C. Difference of Opinion.

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for there to be a 'substantial ground for difference.'" Couch, 611 F.3d at 633-34.

Here, there are no substantial grounds for difference of opinion; clear Ninth Circuit precedent establishes (which Oracle acknowledges) that recovering lost license fees requires offering objective evidence sufficient to calculate a non-speculative license price. See Jarvis v. K2 Inc., 486 F.3d 526, 534 (9th Cir. 2007); Polar Bear Prods., Inc. v. Timex Corp., 384 F.3d 700, 709 (9th Cir. 2004); *Mackie v. Rieser*, 296 F.3d 909, 917 (9th Cir. 2002); Mot. at 4. The Ninth Circuit rejects license awards based only on subjective evidence. See Mackie, 296 F.3d at 917; Frank Music Corp. v. Metro-Goldwyn-Mayer, Inc., 772 F.2d 505, 513-14 (9th Cir. 1985) (upholding refusal to award license damages where plaintiffs offered "no disinterested testimony" in support of alleged damages). Applying this controlling law, the Court held that the subjective evidence Oracle offered at trial could not support an "objective non-speculative license price." ECF No. 1081 at 11 (citing *Jarvis*, 486 F.3d at 534; *Polar Bear*, 384 F.3d at 709; *Mackie*, 296 F.3d at 917); see also ECF No. 1088 at 2. Having decided, on multiple grounds, that Oracle was not entitled to recover actual damages in the form of a lost license fee, the Court then properly determined that the \$1.3 billion award grossly exceeded the only evidence of actual harm, in the form of lost customers. ECF No. 1081 at 17. Oracle's claim that the Court should have come to a different conclusion in applying this "settled law . . . does not establish a substantial ground for difference of opinion." Couch, 611 F.3d at 633-34.

In an attempt to manufacture substantial grounds for difference of opinion, Oracle argues that "the Court's Orders incorrectly interpreted this body of law by requiring that this objective value could be proved only by particular kinds of evidence"—namely, "prior actual license transactions or 'benchmark licenses"—and cannot be proven through other categories of evidence, including "the parties' contemporaneous projections of defendants' anticipated profits or plaintiffs' anticipated losses." Mot. at 5-6. But as the Court explained in its 9/16/11 Order, it did not hold as a matter of law that whole categories of evidence are necessary or insufficient to establish an objective, non-speculative license price. *See* ECF No. 1088 at 2. Rather, the Court found that *none* of the evidence (regardless of category) that Oracle offered at trial to support its license fee calculation was objective, and thus held as a matter of law that Oracle failed to offer

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evidence sufficient to establish a non-speculative license price. *See id.* The Court also observed that Oracle had not offered the usual "objective evidence of benchmark transactions, such as licenses previously negotiated for comparable use of the infringed work, and benchmark licenses for comparable use of comparable works," ECF No. 1081 at 11, which is "one way" in the Ninth Circuit to "establish an objective, non-speculative license price." ECF No. 1088 at 2. Because the Court's 9/1/11 Order did not "restrict the scope of [the] objective evidence" adequate to establish a non-speculative license price, Oracle's claim that it "conflicts with precedent" fails. Mot. at 4; *see also Hulmes*, 936 F. Supp. at 209 (denying certification where plaintiff misconstrued order as not applying controlling law).

Oracle's arguments premised on patent law also fail to create substantial grounds for difference of opinion as to the correct legal standard in this copyright case. As this Court has recognized, a reasonable royalty under patent law and a "hypothetical" license under copyright law are different remedies. *See, e.g.*, ECF No. 1081 at 12. Whereas the Patent Act requires that damages be "in no event less than a reasonable royalty for the use made of the invention by the infringer," 35 U.S.C. § 284, the Copyright Act permits recovery of actual damages only upon proof that the infringement caused the asserted loss. *See* 17 U.S.C. § 504(b). As a result, each area of law developed its own rules for calculating its respective remedy. Courts apply the factors from *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F. Supp. 1116, 1119-20 (S.D.N.Y. 1970) to determine the amount of a patent-law reasonable royalty, but apply the objectivity rule to price a "hypothetical" license in copyright law. *See Jarvis*, 486 F.3d at 534. Oracle fails to identify a single copyright case that does what it seeks to do here—import evidentiary standards from the reasonable royalty context into the "hypothetical license fee" context.

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D. <u>Immediate Appeal Will Not Materially Advance Termination of the Litigation.</u>

Oracle fails to show that an immediate appeal will materially advance the termination of this litigation. An early appeal now would serve only to interrupt and prolong the district court proceedings by years, and undoubtedly would be followed by additional appeals. By contrast, denying interlocutory appeal and following the path set by the Court's 9/1/11 Order will materially advance ultimate termination of the litigation: Oracle may either (1) accept the

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Court's remittitur (the quickest way to resolve the case), or (2) elect a new trial, which, given its limited scope, could be concluded much earlier than an interlocutory appeal.

Whether an appeal "materially advances" termination of a litigation "is linked to whether an issue of law is 'controlling' in that the Court should consider the effect of a reversal by the Ninth Circuit on the management of the case." *Mateo v. M/S Kiso*, 805 F. Supp. 792, 800-01 (N.D. Cal. 1992), abrogated on other grounds by Brockmeyer v. May, 361 F.3d 1222 (9th Cir. 2004). As Oracle acknowledges, a court should certify an interlocutory appeal only when doing so "would avoid protracted and expensive litigation." In re Cement, 673 F.2d at 1026. By contrast, if an appeal "delay(s) resolution of the litigation, it should not be certified." *Matsunoki* Group, Inc. v. Timberwork Or., Inc., No. C 08-04078 CW, 2011 U.S. Dist. LEXIS 33178, at *5 (N.D. Cal. Feb. 18, 2011) (denying certification where trial would be done in approximately five months); Sonoda v. Amerisave Mortgage Corp., No. C-11-1803 EMC, 2011 U.S. Dist. LEXIS 100275, at *6 (N.D. Cal. Sept. 7, 2011). Thus, if "interlocutory review would . . . carry with it a greater risk for delay than its promise for ultimate savings of both time and resources," denial of certification is appropriate. FTC v. Swish Mktg., No. C 09-03814 RS, 2010 U.S. Dist. LEXIS 47948, at *6 (N.D. Cal. Apr. 14, 2010). Consistent with these principles, courts have denied certification if trial in the district court likely would conclude before resolution of the appeal. See Shurance, 839 F.2d at 1348 (refusing to hear certified interlocutory appeal in part because appellate decision might come after scheduled trial date and thus delay resolution); Kraus v. Bd. of Cnty. Rd. Comm'rs for Cnty. of Kent, 364 F.2d 919, 922 (6th Cir. 1996) (denying certification where "only a few days would be required for a jury trial and final disposition of the case in the district court . . . which would avoid a piecemeal appeal," in contrast to the "many months" that would pass before appeal on Sixth Circuit's "congested docket").

Similarly, given how "time-consuming and expensive" the appeals process is, courts have found that certifying an interlocutory appeal will not materially advance termination of a litigation if it would result in multiple appeals, as opposed to a single appeal that would result from denying certification. Brizzee, 2007 U.S. Dist. LEXIS 99155, at *13-15 (holding that certification would not materially advance litigation since it "will result in an appeal of a limited

issue with the virtual assurance of a second appeal to the Ninth Circuit, followed by the possibility of one or two trials"); *see also United States ex rel. Wilson v. Maxxam, Inc.*, No. C 06-7497 CW, 2009 U.S. Dist. LEXIS 14375, at *34 (N.D. Cal. Feb. 9, 2009) (denying certification where, "if the appeal were to fail, the termination of the litigation would be delayed, and the Court of Appeals would be burdened with a second appeal").

Oracle incorrectly argues that immediate appeal will materially advance the termination of the litigation because "reversal of the Court's decision . . . would avoid the 'needless expense and delay' of re-trying the case." Mot. at 18-19 (citation omitted). Not so. As explained above, because the questions that Oracle seeks to certify for interlocutory appeal are not "controlling," resolving them in Oracle's favor would not affect the holdings in the Court's 9/1/11 Order and would not avoid a new trial limited to lost profits and infringers' profits. Instead, such an appeal—to what is objectively the most congested court of appeals in the country—would result only in the unnecessary delay of the inevitable new trial.⁴

Even if Oracle could avoid retrial by prevailing on appeal, certification still is not warranted. Courts consistently hold that the extraordinary procedure of interlocutory appeal is not justified simply because prevailing on appeal would avoid a second trial, as this "is true with respect to virtually every case in which a trial court has made a legal ruling either before or during trial that is reversed on appeal." *Barbaro v. United States ex rel. Fed. Bureau of Prisons*, 05 Civ 6998 (DLC), 2008 U.S. Dist. LEXIS 123837, at *4 (S.D.N.Y. Feb. 21, 2008); *Mazzella v. Stineman*, 472 F. Supp. 432, 436 (E.D. Pa. 1979) ("[T]he savings that would result from the possible avoidance of an unnecessary [s]econd trial is not so significant as to warrant allowance of an immediate appeal."). Because the parties have already completed discovery and much of the preparation required for a lost/infringers' profits trial, the time and resources that would be expended for retrial are minimal compared to those required for the first of what inevitably would be several appeals. This case is distinguishable from exceptional cases in which early appeal was

⁴ The median time from notice of appeal to disposition in the Ninth Circuit is estimated at 16.3 months, the longest in all of the thirteen judicial circuits. *See* U.S. Courts of Appeals—Median Time Intervals In Months In Cases Terminated After Hearing or Submission, by Circuit, During the 12-Month Period Ending September 30, 2010, http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2010/appendices/B04Sep10.pdf (last checked Sept. 27, 2011).

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warranted to materially advance termination of the litigation. See, e.g., Aggio v. Estate of Aggio,
No. C 04-4357 PJH, 2006 WL 149006, at *2 (N.D. Cal. Jan. 18, 2006) (holding that interlocutory
appeal would materially advance termination of litigation because there remained "a significant
amount of work necessary to litigate the case to its conclusion, including trial preparation ").
In light of the significant delay that interlocutory appeal would cause, the better approach
(assuming that Oracle rejects the remittitur) is to promptly proceed to the Court-ordered new trial
Given its limited scope, this new trial should take no more than eight trial days (jury selection
through closing arguments) and, the Court's calendar permitting, could be concluded soon—

certainly before any interlocutory appeal could be resolved. At the close of the trial, the parties

could appeal all issues at once, avoiding a piecemeal appeal and the delay inherent in serial

appeals. These circumstances compel denial of Oracle's certification request. See Shurance, 839

F.2d at 1348 (refusing to hear interlocutory appeal where appellate decision might come after

scheduled trial date); Kraus, 364 F.2d at 922; Brizzee, 2007 U.S. Dist. LEXIS 99155, at *13-15.

III. <u>CONCLUSION</u>

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Oracle's proposed questions for certification meet none of Section 1292(b)'s requirements, and permitting interlocutory appeal only would prolong this already protracted dispute. This is, and properly has always been, a case about alleged lost profits and infringers' profits for copyright infringement. The appropriate next step is Oracle accepting the Court's remittitur or, if Oracle insists, a short, focused new trial. Oracle's motion should be denied.

Dated: October 7, 2011 JONES DAY

21 By: <u>/s/ Tharan Gregory Lanier</u>
Tharan Gregory Lanier

Counsel for Defendants
SAP AG, SAP AMERICA, INC., and
TOMORROWNOW, INC.

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