

Court Decides - HP 1, Oracle 0

August 2012

Oracle, after thirty years of close cooperation with HP, issued on March 12, 2011, a press release in which it declared that it would no longer support its products on Itanium processors. The Itanium processors form the basis of HP's new blade systems upon which its predominant operating system, HP-UX, runs. About 140,000 customers run Oracle on HP-UX. HP immediately launched a lawsuit to require Oracle to continue its support of Itanium for all of Oracle's current and future products.

On August 1, 2012, the Superior Court of the State of California released its decision on that lawsuit. Judge James P. Kleinberg likened Oracle's arguments to a *Seinfeld* sitcom – a lot of nothing. He directed Oracle to continue its support of Itanium to the same extent that it had supported HP products in the past, including the porting of all new Oracle product versions.

We summarize the Court's deliberations and decisions in this article. The full decision can be found in Hewlett-Packard Company, plaintiff, vs. Oracle Corporation, defendant, Proposed Statement of Decision, Case No. 1-11-CV-203163; August 1, 2012.¹ (Note: the decision is clear, entertaining, and easily readable in a couple of hours.)

The trial of the HP/Oracle case began on May 31, 2012, proceeded through June 26, 2012, and took twelve trial days. Thirty witnesses testified, and over 500 exhibits were introduced into evidence.

The case caused the Court to revisit the centuries-old issue of whether a contract exists and, if so, what does it mean. When a dispute arises over the meaning of contract language, the first question to be decided is whether the language is "reasonably susceptible" to the interpretation urged by the plaintiff. If it is not, the case is over. Otherwise, the Court moves to the second question: what did the parties intend the language to mean?

Findings of Fact

The Long-Term HP/Oracle Relationship

For approximately three decades, Oracle ported its database, middleware, and key application software to HP's server platforms. Throughout this period, HP and Oracle engaged in joint sales activities, with HP selling its hardware and Oracle selling its software to mutual customers. The relationship was profitable for both companies.

In January, 2010, Oracle acquired Sun Microsystems. Sun sold Sparc systems that competed directly with HP's Itanium servers. HP was concerned whether Oracle would continue to offer its software on HP's

¹ http://www.scefilling.org/filingdocs/194/53309/endorse_85234_111CV203163_PSOD.pdf

servers now that Oracle would be competing with HP in the server market. Approximately 80% to 90% of HP's customers ran the Oracle database.

In a meeting on February 26, 2010, David Donatelli, the executive in charge of HP's enterprise server business, was told by Thomas Kurian, Oracle's most senior software executive second only to Larry Ellison, that Oracle remained committed to the HP-Oracle partnership. New, fully functional versions of Oracle software would continue to be released for HP-UX/Itanium platforms at substantially the same time as for Oracle's Solaris/Sparc and IBM's AIX/Power platforms. This practice is known as "release parity."

Furthermore, in a meeting on April 16, 2010, Oracle's president, Safra Catz, and other senior Oracle executives met with Ann Livermore, HP Executive Vice President, Donatelli, and other senior HP executives. The Oracle executives reiterated that Oracle remained committed to the HP alliance and to ensuring that Oracle software was optimized on HP servers.

However, in May, 2010, HP discovered that Oracle's sales force was suggesting that Oracle's commitment to HP-UX was no longer available. Confronted with this information, Catz assured HP that Oracle was committed to running Oracle software on HP platforms with release parity with Sun and IBM.

Good Bye, Mark Hurd

Things took a turn for the worse on August 26, 2010, when Mark Hurd, CEO of HP, was forced to resign by the HP Board of Directors. On September 6, 2010, Oracle announced that Hurd would be joining Oracle as its Co-President. The next day, HP initiated a lawsuit against Hurd in an effort to protect its trade secrets (the Court agreed that this was a reasonable approach for HP to take). This elicited a same-day flaming response from Larry Ellison:

"Oracle has long viewed HP as an important partner. ... By filing this vindictive lawsuit against Oracle and Mark Hurd, the HP Board is acting with utter disregard for that partnership, our joint customers, and their shareholders and employees. The HP Board is making it virtually impossible for Oracle and HP to continue to work together in the IT marketplace."

The Reaffirmation Agreement

Interestingly, on the same day as Ellison's press release, top HP and Oracle executives indicated to each other that they wanted to get this lawsuit behind them as quickly as possible so as to preserve the relationship that each company valued. Negotiations proceeded rapidly, and on September 20, 2010, a Settlement and Release Agreement was executed between HP, Oracle, and Hurd. Key to Judge Kleinberg's decision on August 1, 2012, was the first paragraph of this agreement:

Reaffirmation of the Oracle-HP Partnership: Oracle and HP reaffirm their commitment to their longstanding strategic relationship and their mutual desire to continue to support their mutual customers. Oracle *will* [emphasis added] continue to offer its product suite on HP platforms, and HP will continue to support Oracle products (including Oracle Enterprise Linux and Oracle VM) on its hardware in a manner consistent with that partnership as it existed prior to Oracle's hiring of Mark Hurd."

The term "will" in the opening paragraph is highlighted as it became the key to the judge's decision. The agreement required both companies to keep the agreement confidential. It was not released to even key employees of either company, including such executives as Martin Fink.

A press release following the execution of the agreement stated that the parties reaffirmed "HP and Oracle's commitment to delivering the best products and solutions to our more than 140,000 customers." It also quoted Ellison as saying that "Oracle and HP will continue to build and expand" their partnership.

The Post-Agreement Period

Following the execution of the agreement, the parties continued to engage in product development and porting. Then six months later, on March 22, 2011, Oracle dropped its bomb. Without any warning to HP, it announced the night before HP's annual shareholders' meeting that it had decided to discontinue all software development for HP's Itanium servers. Oracle conceded in court that its announcement meant that customers who ran the Oracle software on Itanium would now have to choose another hardware platform.

HP immediately launched a lawsuit to require Oracle to continue its support of Itanium for all of Oracle's current and future products.

The Arguments

HP's argument was quite simple – the agreement stated that “Oracle *will* continue to offer its product suite on HP platforms.” The term “will” implied a contractual obligation, and Oracle could not on a whim refuse to port future product versions to Itanium.

Oracle presented two arguments to support its position:

- The Reaffirmation paragraph was nothing more than a “public hug” between HP and Oracle and imposed no obligations on either party.
- Oracle claimed that the phrase “in a manner consistent with the HP-Oracle partnership” was only an agreement to an approach and left Oracle with absolute discretion with regard to porting.

The Decision

The judge found the following with respect to Oracle's two arguments:

- Oracle's “public hug” interpretation disregards the mandate in the second sentence of the agreement. The mandate states that “Oracle *will* continue to offer its product suite on HP platforms.” The term “will” implies a contractual obligation. Oracle did not offer an alternative meaning for the sentence but instead asserted that it had no meaning.
- The phrase “in a manner consistent with the HP-Oracle partnership” does not suggest that the mandatory phrase Oracle “*will* continue” actually means that Oracle “may continue” or has the “discretion to continue” offering its products. Such an interpretation flatly contradicts the plain language of the contract.

In conclusion, the judge found that the only reasonable interpretation was HP's, which is founded on the plain language of the Reaffirmation paragraph. The Reaffirmation paragraph is unambiguous. The contract is certain and enforceable.

Promissory Estoppel

Another cause of action in HP's lawsuit is that Oracle violated verbal contracts (promissory estoppel). In many meetings between HP and Oracle executives, right up to the March 22, 2011, announcement that Oracle would stop support for Itanium,² Oracle executives continued to promise support for Itanium. Relying on these assertions, HP made major investments in Itanium, such as its Itanium Collaboration Agreement (ICA) with Intel, whereby it committed to invest \$264 million in Itanium.

² Oracle's statement that it would no longer support Itanium meant that it would no longer port new versions of its products to Itanium. It would, however, continue to support customers with existing versions.

The judge agreed with HP's assertion that verbal contracts were violated.

The Order

In his Summary of Decision, Judge Kleinberg concluded that "the core argument of Oracle is that this dispute, like a *Seinfeld* sitcom, is about nothing." He issued the following orders:

1. In this action for declaratory relief, the Court finds in favor of HP and against Oracle on both the breach of contract and promissory estoppel causes of action brought by HP.
2. The Settlement and Release Agreement entered into by HP, Oracle, and Hurd on September 20, 2010, requires Oracle to continue to offer its product suite on HP's Itanium-based server platforms and does not confer on Oracle the discretion to decide whether to do so or not.
3. The term 'product suite' means Oracle software products that were offered on HP's Itanium-based servers at the time Oracle signed the September 20, 2010, Settlement and Release Agreement, including any new releases, versions or updates of those products.
4. Oracle's obligation to continue to offer its product suite on HP's Itanium-based server platforms lasts until such time as HP discontinues the sale of its Itanium-based servers.
5. Oracle is required to port its products to HP's Itanium-based servers without charge to HP.

Summary

In an email to its AllianceONE Partner Program, HP said "This is a very positive result for you and HP. We remain committed to our partners, our 140,000 customers who run Oracle software and to our long-term mission-critical server roadmap, including Integrity, HP-UX, OpenVMS, and NonStop as well as our new investments in x86, Windows, and Linux. Similarly, Intel has repeatedly reinforced its ongoing commitment to the Itanium roadmap."

However, this is only Step One in the process. Oracle is certain to appeal this decision. Stay tuned for the next installment in the HP/Oracle saga.