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16 FOR THE COUNTY OF SANTA CLARA

17 HEWLETT-PACKARD COMPANY,

18 Plaintiff,

19 v.

20 ORACLE CORPORATION,

21 Defendant.  
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CASE NO. 1-11-CV-203163

**ORACLE CORPORATION'S OPPOSITION  
TO MOTION TO SEAL RECORDS**

Assigned for All Purposes to  
the Honorable James P. Kleinberg

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1 **I. INTRODUCTION**

2 This case is an abuse of the judicial process—a publicity stunt in a broader  
3 campaign to lay the blame on Oracle for the disruption that will occur when HP’s Itanium-based  
4 server business inevitably comes to an end. HP untenably has put itself and thousands of  
5 customers out on the end of a very long limb because HP, almost alone now, clings to a decades-  
6 old microprocessor architecture—Intel’s Itanium chip line—that has no future. Intel has wanted  
7 to discontinue Itanium production for years, and HP knows it. The performance advantage over  
8 Intel’s x86-based microprocessors that once justified Itanium is today effectively gone. But the  
9 end of Itanium is a business disaster for HP, which generates a large percentage of its overall  
10 profit from Itanium support agreements. So rather than telling its customers the truth about Intel’s  
11 plans for phasing out the Itanium platform, and helping those customers transition to Intel Xeon  
12 systems or other alternatives, HP perpetuates the myth that there is a long 10-year roadmap for  
13 Itanium development.

14 Now HP is suing Oracle for the temerity to tell customers the truth. In March  
15 2011, acting on information it received directly from Intel, Oracle announced that like Microsoft,  
16 Red Hat and other software companies before it, Oracle would be ending software development  
17 specific to systems based on Intel’s Itanium platform. Importantly, Oracle also announced that  
18 customers with Itanium systems will be supported *for years* to come, so that their migration to  
19 other systems can be as painless as possible. But Oracle is not going to pretend that Itanium has a  
20 future when it does not. Insofar as Intel platforms are concerned, the time has come to focus on  
21 Xeon and future x86 chips. That is Intel’s direction, and that is the direction of all other major  
22 vendors—except HP. And Oracle certainly is not going to deny customers the information it has  
23 about Itanium, which is crucially important for those customers to make future plans.

24 Few have ever “protested too much” the way HP has. It has engaged in a massive  
25 campaign to vilify Oracle for this announcement, planting anti-Oracle stories in the press and  
26 setting up a web page with propaganda that attempts to make Oracle the villain for allegedly  
27 discontinuing Itanium support. This lawsuit is just part of that plan. The claims themselves are  
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1 utterly specious. The core allegation in this case—which HP has aggressively sold to the press—  
2 is that HP has a contract with Oracle guaranteeing that Oracle will develop new versions of its  
3 flagship database product (and apparently everything else Oracle makes) to run on HP’s Itanium  
4 systems. Such an important contract, if it existed, would obviously be a heavily negotiated, fully  
5 documented formal contract, with terms and conditions and payment obligations and all the other  
6 characteristics of real-world commercial agreements. But there is no such agreement for porting  
7 the Oracle database to Itanium, which is why HP is advancing implied contract and promissory  
8 estoppel claims. And as for the written contract HP alleges, that is a mere two-sentence  
9 commitment Oracle made just nine months ago—not in the ordinary course of business but in the  
10 context of a lawsuit HP filed against its own former CEO, Mark Hurd—the substance of which  
11 the parties revealed in a press release announcing the end of that litigation: “HP and Oracle Corp.  
12 today reaffirmed their long-term strategic partnership and the resolution of litigation regarding  
13 Mark V. Hurd’s employment at Oracle. \*\*\* The agreement also reaffirms HP and Oracle’s  
14 commitment to delivering the best products and solutions to their more than 140,000 shared  
15 customers.” It was an agreement to make the “corporate hug” that immediately followed.

16           HP cannot seriously contend that this general reaffirmation of a non-contractual  
17 “partnership” guaranteed HP apparently perpetual new versions of Oracle software—and pricing  
18 guarantees to boot. No sophisticated corporation would ever secure a supposedly life-or-death  
19 software support commitment with two fuzzy sentences in an agreement that primarily deals with  
20 an employment dispute—to do so would be not only utterly irresponsible, but a violation of every  
21 imaginable duty of care owed to shareholders. In fact, to make this all the more bizarre, in the  
22 context of the Hurd dispute HP actually asked for a commitment from Oracle to “support all  
23 ongoing versions of HP-UX with Oracle’s relevant database, middleware and application  
24 products”—and Oracle unequivocally *rejected the request* because, among other things, it was so  
25 out of line in that context.

26           The immediate problem is that HP is alleging these “contractual commitments”  
27 and then moving to seal the complaint that specifically discusses and quotes the actual Hurd  
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1 settlement agreement. This vintage McCarthyism is as unfair as it is hypocritical: HP proclaims  
2 “I have a contract” and then claims that confidentiality interests preclude it from showing anyone  
3 the alleged agreement. Yet the actual substance of the agreement *has already been revealed*: the  
4 parties said they agreed to make-up and had their photo-op together. HP is trying to use  
5 confidentiality to “protect” commitments that do not exist. And HP’s “PR via litigation” strategy  
6 is working. The statements HP issued and the redacted complaint it filed have generated dozens  
7 of stories reporting Oracle’s supposed “legally-binding commitments” and “contractual  
8 commitments” to HP. And the motion to seal, simply by its filing, constrains Oracle’s ability to  
9 fully correct the record in public.

10           The motion to seal is groundless because the settlement agreement is by its  
11 explicit terms not confidential in an action to enforce it—which this case purports to be. HP  
12 therefore had no basis even to request confidential treatment as a matter of contract. Nor did HP  
13 try to advance a non-contractual rationale for sealing *anything*, never once identifying any threat  
14 of “serious injury” or any “overriding interest” sufficient to overcome the broad public interest in  
15 the full availability of civil litigation proceedings. This motion must therefore be denied.

16           Beyond the motion itself, Oracle asks the Court to make clear now that this  
17 litigation will take place in the sunshine. HP’s deceptive representations about Itanium and  
18 Oracle can and will be revealed in this case as soon as the world sees what the agreement actually  
19 says and the parties can take discovery from the definitive source: Intel. This truth needs to  
20 come out. Oracle understands and is deeply committed to minimizing the disruption to all  
21 Itanium server users, HP customers included. But no one—with the exception of HP—benefits  
22 from denying reality, and there is absolutely no basis for forcing Oracle to invest its resources in  
23 a dying platform so that HP can continue to profit from support agreements with unsuspecting  
24 Itanium customers until *HP* decides to tell them the truth. If this baseless litigation has any  
25 positive value at all, it will be as a vehicle for uncovering the true state of affairs so that no one  
26 has to wonder what self-interest and “spin” is driving anyone’s public statements. Denying HP’s  
27 motion and ordering the public filing of all redacted documents is the first step in ensuring that  
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1 this lawsuit will not be a means of suppressing truths—truths that may be unwelcome to HP, but  
2 which it can no longer keep from the marketplace.

3 **II. BACKGROUND**

4 **A. The Oracle/HP Relationship**

5 Oracle and HP had a good relationship for many years, one based on a natural  
6 alignment of their individual self-interests. Oracle sold software, and not computers. HP sold  
7 computers (among other things), and very little software. The Oracle-HP relationship was  
8 complementary, the management teams respected and trusted one another, and therefore the two  
9 companies worked together voluntarily and harmoniously, without contractual obligations except  
10 in the unusual case. Of course they each had different objectives—Oracle wanted to sell more  
11 software and HP wanted to sell more computers—but they had enough in common to invest in  
12 their relationship freely, with the occasional binding commitment to be sure, but mostly just from  
13 a foundation of aligned self-interest. Relationships of this type are common in Silicon Valley and  
14 in industry generally, and are often colloquially referred to as “partnerships.” HP CEO Léo  
15 Apotheker has aptly called the Oracle-HP relationship “co-opetition.” But by any name, these  
16 are not partnerships in any legal sense, nor do they create contractual obligations. Partnership in  
17 this “co-opetition” sense is just two companies pursuing complementary self-interests.

18 Times change, conditions change, and when they do, previously aligned interests  
19 can diverge. Less than three years ago the press was reporting that “Oracle dealt a blow ... to its  
20 longtime ally Sun Microsystems by ‘entering the hardware business’ in tandem with Hewlett-  
21 Packard.”<sup>1</sup> But then, not six months later, Oracle announced it was buying Sun, thereby  
22 becoming one of HP’s principal competitors in the market for computer servers. The acquisition  
23 of Sun, completed in January 2010, was manifestly procompetitive, as it breathed new life into a  
24 once-great but then struggling hardware business. But it was not lost on anyone that it would  
25 forever transform the so-called Oracle-HP partnership. Oracle and HP no longer had the

26 <sup>1</sup> Ashlee Vance, *Oracle Embraces H.P. in ‘Hardware’ Push*, N.Y. TIMES, Sept. 25, 2008,  
27 available at <http://bits.blogs.nytimes.com/2008/09/25/oracle-embraces-a-new-hardware-partner/>. Oracle and HP had announced a joint hardware/software product.

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1 overwhelmingly complementary interests of software and hardware companies, respectively, that  
2 made the “partnership” work. Furthermore, as principal competitors, Oracle and HP *could not be*  
3 “partners” to the extent they were before, if only to comply with antitrust laws.

4 HP understood this—and wasted no time transitioning to a competitive  
5 relationship with Oracle. On July 16, 2009, on the very day Sun’s shareholders voted to approve  
6 the Oracle merger, HP launched its “Sun Complete Care” program (later renamed “SunSet  
7 Complete Care”) that targeted Sun’s server customers and attempted to induce them to switch to  
8 HP servers, in part with allegations that Oracle was not a stable and proven hardware vendor.  
9 HP’s press release contained cynical and misleading claims about the relative costs of running  
10 Oracle’s database software on Sun SPARC systems and HP Integrity systems, which were true  
11 only because HP customers received preferential pricing that was obviously never going to  
12 survive Oracle’s entry into the server business. It wasn’t a very honest or “partnerly” thing to  
13 say, but so be it. The relationship had changed. Since the Sun acquisition, Oracle and HP have  
14 fired innumerable competitive salvos at one another, as competitors always do.

15 Then HP underwent a series of management changes that could not have done  
16 more damage to its “partnership” with Oracle if that had been HP’s explicit goal. It began in  
17 2010, when factions within HP’s Board of Directors engineered the removal of Mark Hurd as  
18 HP’s Chief Executive Officer. Mr. Hurd was one of HP’s most effective CEOs. HP’s stock price  
19 doubled during his five-year tenure and HP became the world’s leading technology company by  
20 revenue under his leadership. Mr. Hurd was also an outstanding ambassador to Oracle, highly  
21 respected by Oracle’s management. But when a baseless harassment claim was made against Mr.  
22 Hurd—a claim HP itself determined was baseless—the HP Board panicked over the potential  
23 public relations implications and somehow managed to destroy their relationship with their own  
24 CEO. It was an historically inept display of “crisis management,” *creating* a crisis out of a  
25 specious harassment claim that was no threat to HP or its shareholders until the HP Board made it  
26 one. When Mr. Hurd was pushed out, Oracle’s CEO Larry Ellison made no secret of his  
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1 displeasure at the decision, stating: “In losing Mark Hurd, the H.P. board failed to act in the best  
2 interest of H.P.’s employees, shareholders, customers and partners....”<sup>2</sup>

3           A month later, Oracle was able to convince Mr. Hurd to join Oracle’s management  
4 team. HP’s reaction was swift and about as far from any notion of “partnership” as one could  
5 get: it filed a meritless lawsuit alleging that Mr. Hurd would “inevitably” violate his  
6 confidentiality obligations to HP and reveal all manner of secret information to Oracle. In light  
7 of this case, it is noteworthy that in the *Hurd* complaint HP never once referred to Oracle as a  
8 “partner,” instead painting it as a bitter “competitor” and citing as a basis for the complaint the  
9 fact that Mr. Hurd knew of HP’s “highly confidential competitive internal analysis of Oracle.”  
10 Of course, none of this matters under California employment law. California law rejects the  
11 “inevitable disclosure” doctrine and has some of the strongest policies against employment  
12 restraints of any state in the nation. This utterly baseless litigation damaged HP’s relationship  
13 with Oracle, too, as Oracle stated:

14           “Oracle has long viewed HP as an important partner,” said Oracle  
15 CEO Larry Ellison. “By filing this vindictive lawsuit against Oracle  
16 and Mark Hurd, the HP board is acting with utter disregard for that  
17 partnership, our joint customers, and their own shareholders and  
18 employees. The HP Board is making it virtually impossible for  
19 Oracle and HP to continue to cooperate and work together in the IT  
20 marketplace.”<sup>3</sup>

21           The *Hurd* litigation was settled so that Hurd could focus on his new Oracle  
22 responsibilities, in part with a public reaffirmation of the Oracle-HP “partnership” as it existed  
23 before the lawsuit. But the settlement neither could nor did reverse the vastly changed incentives  
24 that the parties had as a result of their new competitive relationship. The settlement, moreover,  
25 was quickly followed by another huge blow to any notion of an Oracle-HP “partnership.”

26 <sup>2</sup> Ashlee Vance, *Oracle Chief Faults H.P. Board for Forcing Hurd Out*, N.Y. TIMES, Aug. 9,  
27 2010, available at <http://www.nytimes.com/2010/08/10/technology/10hewlett.html>.

28 <sup>3</sup> *Oracle Responds to HP Lawsuit*, Oracle Press Release, Sept. 7, 2010, available at  
<http://www.oracle.com/us/corporate/press/170699>.

1                   On September 30, 2010, just ten days after publicly reaffirming its “partnership”  
2 with Oracle, HP announced that it was appointing Léo Apotheker as its new CEO. Mr.  
3 Apotheker had previously been the CEO of Oracle’s biggest applications software competitor,  
4 SAP AG. But more importantly—as HP had to know—Mr. Apotheker had held that position  
5 during the widespread theft of Oracle’s intellectual property by an SAP subsidiary called  
6 TomorrowNow. This is the theft that resulted in a \$1.3 billion jury verdict against SAP in  
7 November 2010. HP knew that hiring Mr. Apotheker would destroy any notion of partnership  
8 with Oracle; indeed the *Wall Street Journal* reported on Mr. Apotheker’s hiring by saying that he  
9 offered “a characteristic that seems to be highly valued at H-P these days—a dislike of Oracle.”<sup>4</sup>  
10 Furthermore, the most common strategic explanation for Mr. Apotheker’s hiring was that he was  
11 a software expert who would help HP expand its business into more direct competition with  
12 Oracle. HP was entitled to hire whomever it wanted (even though it earlier alleged that Oracle  
13 could not). However, short of burning an Oracle flag in public, HP could not have done more to  
14 destroy any so-called “partnership” with Oracle than it did by hiring Léo Apotheker.<sup>5</sup>

15                   In all events, the “partnership” as it existed prior to Hurd’s move to Oracle  
16 involved a combination of voluntary and non-contractual elements and where appropriate clear  
17 and binding contract commitments. That is, when Oracle and HP needed an enforceable legal  
18 agreement, they wrote detailed, explicit contracts. Most notably, Oracle and HP *actually have* an  
19 Itanium porting agreement—albeit one HP nowhere mentions in its complaint. Executed in 2006  
20 and amended in 2007, the “Agreement for Porting the Oracle E-Business Suite to the HP-UX on  
21 Itanium Platform” reflects a commercial arrangement in which HP paid Oracle millions of dollars  
22 in porting and maintenance fees to port some but not all of Oracle’s *applications software only* to  
23 the HP-UX on Itanium platform. The agreement says absolutely nothing about Oracle porting

24 \_\_\_\_\_  
25 <sup>4</sup> Jennifer Valentino-DeVries, *Is Leo Apotheker a Good Fit as H-P’s New CEO?*, WALL ST. J.,  
26 Sept. 30, 2010, available at <http://blogs.wsj.com/digits/2010/09/30/is-leo-apotheker-a-good-fit-as-h-ps-new-ceo/>.

27 <sup>5</sup> But there was more. HP named a disgruntled former Oracle executive, Ray Lane, as its new  
28 non-executive chairman at the same time it announced Apotheker’s hiring, a move that was  
also widely viewed as a shot at Oracle.

1 the Oracle *database* or any other software products to the HP-UX on Itanium platform, let alone  
2 that Oracle must do so for as long as HP wants. That express agreement is also, by its own terms,  
3 no longer in force, even as to the applications software it covered. Oracle and HP also previously  
4 had an agreement to port the Oracle database to HP’s OpenVMS operating system, again for  
5 millions of dollars in consideration and on precise terms and conditions. “Partnership” or not,  
6 that’s how enforceable obligations are negotiated and memorialized. That HP does not bring this  
7 suit on the basis of any of those actual, detailed agreements—but rather on the equivalent of a  
8 paper napkin—speaks volumes.

9 **B. The Hurd Settlement**

10 HP signaled its desire to settle the *Hurd* action almost immediately after it was  
11 filed. It knew it had no chance of winning the case. At first HP’s proposed settlement terms  
12 were trivial. Essentially it wanted Mr. Hurd temporarily walled-off from certain customers (as  
13 HP later revealed) and [REDACTED]. Inexplicably, HP also wanted  
14 a [REDACTED]  
15 [REDACTED]. HP also asked Oracle to reaffirm the prior  
16 “partnership”—the one Oracle had said was “virtually impossible for Oracle and HP to continue”  
17 in light of the action against Mr. Hurd. Oracle understood that as requiring no more than a press  
18 release and a few similar public displays of affection, and on that basis only, agreed.

19 Then HP asked for substantially every commitment it claims in this litigation—  
20 and more. Out of the blue the following proposed contractual language arrived:

21 Oracle will continue to support all ongoing versions of HP-UX  
22 with Oracle’s relevant database, middleware and application  
23 products with the availability, marketing and pricing in competitive  
24 terms that Oracle has provided HP for the past five years. Oracle  
25 will continue to provide access to the Java technology and tools  
26 such that HP can continue to support its operating systems (e.g.,  
27 HP-UX, OpenVMS, Nonstop) in a manner similar to the way it  
28 does today. Oracle agrees to continue to provide Solaris for HP’s  
x86 platforms in a manner similar to what it provides HP today.  
Oracle agrees to continue to purchase HP server hardware for  
internal use at a rate similar to what Oracle purchases today.

1           This brazen proposal was obviously beyond the scope of the *Hurd* litigation or any  
2 conceivable legal interest that HP could connect to Oracle’s hiring of Mr. Hurd. It was also a  
3 non-starter from a business perspective, and Oracle’s Co-President Safra Catz spoke to HP’s Ann  
4 Livermore about this twice and unequivocally rejected the request. This rejection was confirmed  
5 by Oracle’s legal counsel, who removed the requested language from the draft settlement  
6 agreement. The final settlement contains no language like this, but rather only a lightly modified  
7 version of the “let’s get back to business” commitment Oracle had first drafted. The key  
8 language:

9 A large rectangular area of the document is completely redacted with black ink, obscuring several lines of text.

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12  
13  
14 The parties were correcting for how the Hurd hiring and litigation damaged the “partnership,”  
15 and nothing else. They did not alter their historic practice of entering into enforceable contracts  
16 supported by adequate consideration when one or the other wanted enforceable legal obligations,  
17 and they certainly did not agree to pretend that the Sun acquisition and the changes it brought  
18 about never happened. Importantly, and obviously, Oracle also did not change its decades old  
19 practice of retaining complete discretion to make decisions about its own development roadmap.  
20 Their September 20, 2010 joint press release said as much—and substantially performed on the  
21 actual, minimal agreement—by weakly reaffirming “HP and Oracle’s commitment to delivering  
22 the best products and solutions to their more than 140,000 shared customers.” Furthermore,  
23 Cathie Lesjak, HP’s CFO and interim CEO, publicly explained at the time of the settlement that  
24 Oracle and HP would simply go back to the idea of partnership based on mutual self-interest:

25           I think, at the end of the day, business will prevail. And, ultimately, we  
26 will go back to being good partners—and competitors where we’ve  
27 been competitors and partners where we’ve been partners, because I  
28

1 believe that HP is important to Oracle, and Oracle is an important  
2 partner of ours.<sup>6</sup>

3 **C. Itanium and Oracle's Support of Itanium Customers**

4 As noted earlier, HP's line of high-end enterprise servers, called Integrity, utilizes  
5 Itanium microprocessors made by Intel. Itanium was supposed to be cutting-edge technology  
6 offering superior performance when it was released in 2001, but it has turned out to be a  
7 spectacular disappointment, earning the moniker "Itanic."<sup>7</sup> It is a very low volume product as a  
8 result, and every year the disparity between the small Itanium installed base and the huge number  
9 of servers based on Intel x86 chips, such as Xeon, grows. Today, the performance advantage  
10 over older x86 chips that was the only reason to buy Itanium-based systems is long-gone.  
11 Indeed, two months ago when Intel announced its latest Xeon microprocessor, the Intel executive  
12 who oversees both the Xeon and Itanium lines explicitly said that Xeon processors could handle  
13 any load in the world and as a result there was no longer any hardware-driven reason to use  
14 Itanium systems.<sup>8</sup>

15 HP doesn't want to acknowledge this reality because of its own massive  
16 investments in Itanium technologies and the fact that the thousands of customers with HP  
17 Integrity systems are securely locked-in to HP products and services, particularly annual support  
18 agreements. But the rest of the industry is moving on. IBM announced that it would no longer  
19 use Itanium processors in its servers in February 2005, Dell also dropped Itanium-based servers  
20 in September 2005, Red Hat announced it would no longer support Itanium in its future versions  
21 of Enterprise Linux in December 2009, and Microsoft announced it would no longer support  
22

23 <sup>6</sup> Ethan Bauley, *Cathie Lesjak remarks at Citi Technology Conference: R&D, 3PAR, Mark Hurd, Oracle, and more*, Data Central, the official HP corporate blog, Sept. 11, 2010, available at <http://h30507.www3.hp.com/t5/Data-Central/Cathie-Lesjak-remarks-at-Citi-Technology-Conference-R-amp-D-3PAR/ba-p/82391>.

25 <sup>7</sup> Ashlee Vance, *Ten Years After First Delay, Intel's Itanium Is Still Late*, N.Y. TIMES BITS BLOG, Feb. 9, 2009, available at <http://bits.blogs.nytimes.com/2009/02/09/ten-years-after-first-delay-intels-itanium-is-still-late/>.

27 <sup>8</sup> Don Clark, *Intel Boosts Key Chip Line*, WALL ST. J., April 6, 2011, available at <http://online.wsj.com/article/SB10001424052748704587004576244941676883766.html>.

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1 Itanium in future versions of Windows Server, SQL Server and Visual Studio in April 2010.  
2 Even Intel released, in October 2010, a new version of its C++ Compiler *that was no longer*  
3 *compatible with Itanium.*

4 Earlier this year, Oracle spoke to senior executives at Intel about Itanium's status  
5 and its implications for Oracle's support efforts. The context was a discussion about the  
6 incredible performance of Oracle's Exadata Database Machine, a database "appliance" consisting  
7 in part of two database servers running Intel's Xeon chips. This performance convinced Oracle  
8 CEO Larry Ellison that Xeon systems could do anything Itanium systems could do (as Intel  
9 publicly stated the following month), and therefore he advised a senior Intel executive that Oracle  
10 felt it was time to focus its software development on Xeon systems and not on Itanium systems  
11 any longer. The response was that Oracle's proposed change in plans was exactly the right thing  
12 to do and consistent with Intel's own plans. Ellison concluded—correctly—that even though  
13 Intel had not announced a formal end-of-life for Itanium, probably because HP did not want Intel  
14 to do so, Itanium's end-of-life had to be no more than a few years away. Otherwise the Intel  
15 executives would have made at least *some* argument for continued Oracle support.

16 In part as result of this conversation and in part due to the many other indications  
17 of Itanium's impending obsolescence, Oracle decided to discontinue all *new* software  
18 *development* on the Intel Itanium platform. That does not mean, as HP suggests, that Oracle will  
19 drop its Itanium-running customers like a hot rock. All existing versions of Oracle software for  
20 the Itanium platform will continue to be supported for years to come. This includes providing  
21 "bug fixes." HP's allegations that Oracle is refusing to fix bugs on existing products are baseless.

22 On March 22, 2011, Oracle issued a press release notifying users of its plans:

23 After multiple conversations with Intel senior management Oracle has  
24 decided to discontinue all software development on the Intel Itanium  
25 microprocessor. Intel management made it clear that their strategic  
26 focus is on their x86 microprocessor and that Itanium was nearing the  
27 end of its life. Both Microsoft and RedHat have already stopped  
28 developing software for Itanium. HP CEO Leo Apotheker made no  
mention of Itanium in his long and detailed presentation on the future  
strategic direction of HP. Oracle will continue to provide customers  
with support for existing versions of Oracle software products that

1 already run on Itanium.<sup>9</sup>  
2 HP responded by denying that Itanium’s end-of-life was near and falsely accusing  
3 Oracle of putting governments and companies “at risk” and costing them “hundreds of millions  
4 of dollars of productivity.”<sup>10</sup> Oracle replied as follows:

5 Just the opposite is true. Oracle has an obligation to give our customers  
6 adequate advanced notice when Oracle discontinues development on  
7 any software product or hardware platform so our customers have the  
8 information they need to plan and manage their businesses. HP is well  
9 aware that Intel’s future direction is focused on X86 and that plans to  
10 replace Itanium with X86 are already in place. HP is knowingly  
11 withholding this information from our joint Itanium customers. While  
12 new versions of Oracle software will not run on Itanium, we will  
13 support existing Oracle/Itanium customers on existing Oracle products.  
14 In fact, Oracle is the last of the major software companies to stop  
15 development on Itanium.<sup>11</sup>

16 HP redoubled its PR efforts, setting up website hubs and facilitating “testimonials”  
17 against Oracle’s decision, and encouraging industry participants to criticize Oracle until it  
18 changed its mind. When this did not work, a desperate HP sent Oracle an aggressive demand  
19 letter, claiming without any justification that Oracle had somehow *contractually obligated itself*  
20 to develop Oracle software forevermore on Itanium, *and* at constant levels of pricing, advertising  
21 and marketing. Even before Oracle received the letter, HP had publicized it and briefed reporters  
22 about its content.<sup>12</sup> One week later, HP filed this lawsuit.

23 The heart of HP’s case is that the two sentences in the Hurd settlement agreement  
24 are an enforceable and never-ending software porting agreement. And it does not stop there. HP

25 <sup>9</sup> *Oracle Stops All Software Development For Intel Itanium Microprocessor*, Oracle Press  
26 Release, March 22, 2011, available at <http://www.oracle.com/us/corporate/press/346696>.

27 <sup>10</sup> See Ethan Bauley, *HP comment on Oracle support for Itanium Processors*, Data Central, the  
28 official HP corporate blog March 23, 2011, available at  
<http://h30507.www3.hp.com/t5/Data-Central/HP-comment-on-Oracle-support-for-Itanium-Processors/ba-p/89675>.

<sup>11</sup> *Oracle Issues Statement*, Oracle Press Release, March 23, 2011, available at  
<http://www.oracle.com/us/corporate/press/349278>.

<sup>12</sup> Ben Worthen, *H-P Escalates Fight With Oracle Over Itanium*, WALL ST. J., June 8, 2011  
available at <http://online.wsj.com/article/SB10001424052702304392704576373583331260422.html?K>.

1 also alleges that Oracle also (i) lied to customers about Itanium, and what HP knew about it; (ii)  
2 sold its Sun servers below cost or provided them for free, in violation of California state unfair  
3 practices laws; and (iii) lied to Oracle customers with Itanium systems about providing support  
4 and bug-fixes for current versions of Oracle's software.

5 **III. HP HAS COMPLETELY FAILED TO MEET THE STRICT STANDARD**  
6 **REQUIRED TO SEAL RECORDS**

7 The present motion to seal exemplifies HP's overall strategy of keeping  
8 information hidden, relying on innuendo and shadow instead of the light of day, as well as HP's  
9 abuse of the judicial process. Both the Legislature and the courts of this state have long  
10 recognized the broad public right to access civil litigation proceedings and records. *See, e.g.,*  
11 *NBC Subsidiary (KNBC-TV) v. Superior Court*, 20 Cal. 4th 1178, 1208 (1999) (extending  
12 California's "long-standing" open-court policy to civil proceedings); Cal. Code Civ. Proc § 124;  
13 Cal. R. Ct. 2.550. In furtherance of this paramount public interest, civil court records may be  
14 filed under seal "only if [the court] expressly finds facts that establish: (1) There exists an  
15 overriding interest that overcomes the right of public access to the record; (2) The overriding  
16 interest supports sealing the record; (3) A substantial probability exists that the overriding interest  
17 will be prejudiced if the record is not sealed; (4) The proposed sealing is narrowly tailored; and  
18 (5) No less restrictive means exist to achieve the overriding interest." Cal. R. Ct. 2.550(d)  
19 (emphasis added).

20 HP addresses none of these criteria adequately in its motion to seal. Most  
21 importantly, HP does not identify any legitimate "overriding interest" it has in keeping the  
22 information at issue sealed, much less that such an "overriding interest" would be prejudiced  
23 absent sealing. Instead, HP argues only that because the parties contractually agreed to keep the  
24 terms of the Hurd settlement agreement confidential, the Court should automatically seal the  
25 records.

26 This would not be sufficient even if it were true. Judicial opinions interpreting  
27 Rule 2.550(d), including those cited in HP's motion, have across the board refused to "permit  
28 sealing of court documents merely upon the agreement of the parties without a specific showing



1 of serious injury.” *Universal City Studios, Inc. v. Superior Court*, 110 Cal. App. 4th 1273, 1281-  
2 82 (2003); *see also Huffly Corp. v. Superior Court*, 112 Cal. App. 4th 97, 107 (2003) (echoing  
3 *Universal City Studios’s* finding that “a settlement agreement which had a confidentiality  
4 provision could not be sealed unless there was a showing of serious injury which would result  
5 from public disclosure”). In all Rule 2.550 cases, including those in which the parties want or  
6 have contracted for confidentiality, the “serious injury” showing must be made. HP does not  
7 even try to make such a showing.

8           Furthermore, the factual premise of HP’s argument is not true. The Hurd  
9 settlement agreement contains a confidentiality provision, but that provision has a crystal clear  
10 exception for “litigation between the Parties ... to enforce the terms of this Agreement.” *See*  
11 *Mot. to Seal* at 3. That ostensibly is the lawsuit HP has filed. HP therefore has no contractual  
12 basis whatsoever for trying to hide the terms of the agreement from public scrutiny. The motion  
13 to seal thus fails under *both* the proper legal standard *and* the legally insufficient contract-based  
14 argument that HP relies on.

15           The motion also fails because between the redacted complaint HP filed, HP’s own  
16 public statements about this matter, and the stealth PR campaign that HP is waging to sell its  
17 story, HP has waived any arguable confidentiality interest it might have had. HP filed and  
18 publicized a redacted version of its complaint that alleges Oracle made “contractual commitments  
19 and promises,” “promises of continuing support to customers” and a “commitment of long-term  
20 support.” (Cmplt. ¶¶ 3, 6, 7). It has told reporters that “Oracle’s (ORCL) decision in March to  
21 stop developing software for Intel’s (INTC) Itanium chips is in violation of ‘legally-binding  
22 commitments’ Oracle has made to Hewlett-Packard....”<sup>13</sup> HP told the *Wall Street Journal* about  
23 the fact of its June 8 demand letter and its claims of a legally binding commitment before Oracle  
24  
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26 <sup>13</sup> Chris Kanaracus, *HP: Oracle is Legally Bound to Reverse Itanium Decision*, CIO, June 8,  
27 2011, available at [www.cio.com/article/683795/HP\\_Oracle\\_is\\_Legally\\_Bound\\_to\\_Reverse\\_Itanium\\_Decision](http://www.cio.com/article/683795/HP_Oracle_is_Legally_Bound_to_Reverse_Itanium_Decision).  
28

1 had even received the letter itself.<sup>14</sup> Not surprisingly, courts refuse to keep information under  
2 seal in such circumstances. In *Universal City Studios*, for example, the court refused to keep  
3 under seal sensitive financial data because the moving party had voluntarily disclosed that same  
4 information. *Universal City Studios, Inc.*, 110 Cal. App. 4th at 1286. Similarly, in *H.B. Fuller*  
5 *Co. v. Doe*, the court concluded that a party had no substantial interest in sealing information  
6 already in the public domain. 151 Cal. App. 4th 879, 899 (2007); see also *In re Providian Credit*  
7 *Card Cases*, 96 Cal. App. 4th 292, 304-05 (2002).

8 That HP does not even minimally meet Rule 2.550(d)'s requirements is cause  
9 enough to deny its motion to seal. The larger point, however, is that HP should not be allowed to  
10 abuse the seal to hide the truth underlying this case. At the end of the day this case is all about  
11 how Oracle told the truth and HP is doing everything possible to suppress it. It is the last case in  
12 which anything should be sealed unnecessarily, but especially the core facts about what contracts  
13 HP and Oracle actually have, and what HP's and Intel's Itanium plans actually are. Putting the  
14 truth on the public record won't hurt anyone. Hiding it has and most certainly will.

15 The motion to seal should be denied.

16  
17 Dated: June 29, 2011

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26 <sup>14</sup> Ben Worthen, *H-P Escalates Fight With Oracle Over Itanium*, WALL ST. J., June 8, 2011,  
27 available at [http://online.wsj.com/article/SB100014240527023043927045763735833312](http://online.wsj.com/article/SB10001424052702304392704576373583331260422.html?K)  
28 60422.html?K.