

## Oracle Closes in on Trial With HPE Over Pirated Patches

Following a summary judgment ruling from U.S. District Judge Jon Tigar, Oracle and HPE are heading to a familiar place—a potentially multimillion-dollar jury trial in a San Francisco Bay Area courtroom.

**By Scott Graham**

Oracle Corp. and Hewlett-Packard Enterprise are heading to a familiar place—a potentially multimillion-dollar jury trial in a San Francisco Bay Area courtroom.

With some prodding from the Ninth Circuit, U.S. District Judge Jon Tigar cleared *Oracle America v. Hewlett Packard Enterprise* for a November trial in a 30-page order made public Monday. Tigar found there is a material dispute as to whether HPE was willfully blind to its customer support partner, TERiX Computer Co., providing clients of the two companies with copyrighted software patches to Oracle's Solaris enterprise operating software.

"Oracle has pointed to several joint HPE/Terix customers—including Comcast and Sybase—who HPE knew did not pay for Oracle support but who contracted with HPE and Terix with the understanding that they would receive Oracle patches," Tigar wrote.

Prior to facing Google before Judge William Alsup, Oracle won \$1.3 billion in what was at the time Silicon Valley's Trial of the Century. HP loomed in the background of that case, as Oracle chief Larry Ellison claimed that then-HP CEO Leo Apotheker had overseen the infringement during his previous

job running SAP. HP refused to disclose Apotheker's whereabouts during the trial.

HP then sued Oracle in Santa Clara County Superior Court for breaching its contract to provide software for HP's Itanium-based servers. That resulted in a \$3 billion verdict for HPE in 2016.

Oracle has already forced Terix in a separate suit to pay a \$58 million settlement and to agree to stop providing customers with updates, fixes, patches and other proprietary support materials for Solaris. Oracle then turned its attention to HPE, but Tigar turned away most of Oracle's claims on summary judgment. Last year the Ninth Circuit agreed with Tigar that some of Oracle's claims were time-barred. But the appellate court ordered him to take a second look at many others.

Now Tigar has granted Oracle summary judgment that HPE's express license defense is not applicable. Nor is fair use available to HPE.

Tigar also denied HPE summary judgment on contributory liability and vicarious liability. HPE's involvement in its customers' software service inquiries, and its role in directing specific service requests to Terix, "is comparable to the role



**Christopher Yates (left) and Sarah Ray with Latham & Watkins.**

Courtesy photos

of Napster or a swap meet operator and supports the 'control' element of Oracle's vicarious liability claim," Tigar wrote.

The judge also denied HPE summary judgment on Oracle's California law claims of intentional interference with contractual relations and with economic advantage and for unfair competition.

Oracle is represented by a Latham & Watkins team led by partners Christopher Yates, Sarah Ray and Gregory Garre (who argued the Ninth Circuit appeal), and associates Charles Dameron, Britt Lovejoy, Elana Nightingale Dawson and Caroline Esser. Oracle GC Dorian Daley and Associate GCs Deborah Miller and Peggy Bruggman also have entered appearances.

HPE is represented by Gibson Dunn & Crutcher.