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7  
8 **UNITED STATES DISTRICT COURT**  
9 **NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION**

10  
11 ORACLE INTERNATIONAL  
CORPORATION, a California corporation  
12 and ORACLE AMERICA, INC., a Delaware  
corporation  
13  
Plaintiffs,  
14  
v.  
15  
COGENT COMMUNICATIONS, INC., a  
16 Delaware corporation  
17  
Defendant.

Case No. 5:16-cv-04828-LHK  
**DEFENDANT COGENT  
COMMUNICATIONS, INC.’S NOTICE  
OF MOTION AND MOTION TO  
DISMISS OR, ALTERNATIVELY, FOR A  
MORE DEFINITE STATEMENT**  
**[FRCP 12(b)(6) and 12(e)]**  
Date: January 26, 2017  
Time: 1:30 p.m.  
Crtrm.: 8

18  
19 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD HEREIN:  
20 PLEASE TAKE NOTICE that on January 26, 2017 at 1:30 p.m., or as soon thereafter as  
21 the matter may be heard before the Honorable Lucy H. Koh, United States District Judge, in  
22 Courtroom 8 of the United States Courthouse, located at 280 South 1<sup>st</sup> Street, San Jose, California,  
23 Defendant Cogent Communications, Inc. (“Cogent”) will and hereby does move the Court,  
24 pursuant to Rule 12(b)(6) and Rule 12(e) of the Federal Rules of Civil Procedure, to dismiss  
25 Plaintiffs Oracle International Corporation and Oracle America, Inc.’s (collectively referred to  
26 hereafter as “Oracle”) Complaint for Copyright Infringement, Breach of License Agreement and  
27 Breach of Maintenance Agreements (the “Complaint”) and each and every claim for relief therein

1 or, in the alternative, to order that Oracle plead a more definite statement.

2 This motion is made on the grounds that the First, Second and Third Claims for Relief of  
3 the Complaint fail to state a claim upon which relief can be granted in that Oracle has not attached  
4 a copy of the contracts upon which the claims are based to the Complaint or plead the essential  
5 terms of the contracts. Further, the Complaint is so vague and indefinite as to the terms of the  
6 alleged contracts and the copyrights allegedly infringed that Cogent cannot reasonably formulate a  
7 response thereto.

8 This motion is based on this Notice of Motion and the Memorandum of Points and  
9 Authorities filed concurrently herewith, the Complaint and all other pleadings filed herein, and on  
10 such additional papers and argument as may be presented to the Court in connection with the  
11 Motion.

12 DATED: October 13, 2016

FULMER WARE LLP

13  
14 By:           /s/ Pamela K. Fulmer            
          Pamela K. Fulmer  
15 Attorneys for COGENT COMMUNICATIONS,  
16 INC.  
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**MEMORANDUM OF POINTS AND AUTHORITIES****I. INTRODUCTION**

Oracle Corporation and its subsidiaries, including Plaintiffs Oracle International Corporation and Oracle America, Inc., are notorious around the globe for their predatory audit practices. Essentially, Oracle and its related entities utilize the limited audit rights granted to them under their software license agreements as a tool to improperly drive further sales of Oracle software products. Oracle software auditors, part of what is known as the License Management Services (“LMS”) team, descend on their customers like locusts claiming falsely, in many instances, that the customer is out of compliance with the license agreement. Maintaining positions that have no basis in the contract, Oracle claims that the customer is underlicensed, often to the tune of millions of dollars. Taking a page out of their well-worn playbook, Plaintiffs Oracle International Corporation and Oracle America, Inc. (collectively “Oracle” or “Plaintiffs”), demanded an audit of Defendant Cogent Communications, Inc. (“Cogent” or “Defendant”) in August 2014. (Plaintiffs’ Complaint for Copyright Infringement, Breach of License Agreement and Breach of Maintenance Agreements (the “Complaint”), ¶19). Oracle took the position that it was entitled to audit Cogent, as it had purchased Siebel Systems, Inc. (“Siebel”) and its affiliate companies, thereby acquiring Siebel’s intellectual property rights. (Complaint, ¶¶11-12). Without providing a copy of any license agreement or other contractual support, Oracle asserted baldly in or around April 2015 that Cogent owed millions of dollars in licensing fees and back support. (Complaint, ¶¶21 and 25). Rather than pay Oracle’s unreasonable demands, Cogent decided to move out of the Siebel software entirely and to a different provider. (Complaint, ¶26).

Now well over a year after the “audit” was concluded, Oracle has filed the instant lawsuit, which alleges claims for copyright infringement, breach of license agreement and breach of maintenance agreements. Each of these claims is premised upon license and maintenance agreements purportedly entered into by Siebel and Cogent, copies of which Oracle does not appear to have.

No license agreement or maintenance agreements are attached to the Complaint, and

1 Oracle fails to quote any of the agreements or plead the actual terms of the purported contracts.  
2 What little Oracle does plead about the terms of the license agreement is on “information and  
3 belief” -- a dead giveaway that Oracle is not in possession of the license agreement which serves  
4 as the underlying basis for all of Plaintiffs’ claims. The Complaint leaves Cogent guessing as to  
5 whether the missing license and maintenance agreements actually exist and, if so, the specific  
6 terms contained therein. As discussed in greater detail below, this does not suffice under either  
7 California law applicable to state law contract claims or federal pleading standards. Although  
8 pleading on information and belief is appropriate when pleading fraud or other claims where the  
9 information is uniquely not in the possession of the Plaintiff, it is inappropriate here where  
10 Plaintiffs assert breach of contract claims, matters Plaintiffs are presumed to have knowledge of.

11 With regard to the copyright infringement claim, as Oracle has not sufficiently articulated  
12 the specific terms of any license agreement that Cogent purportedly has breached, it, in turn,  
13 cannot allege that Cogent exceeded the scope of its license giving rise to a copyright infringement.  
14 Further, Oracle has failed to adequately plead the existence of a valid and registered copyright,  
15 which is a prerequisite for bringing such a suit. Indeed, the Complaint alleges no copyright  
16 registration numbers, nor does it attach certificates of registration. Oracle has failed to even allege  
17 the number or specifically identify the copyrights at issue, referring only to “Oracle’s Siebel  
18 software, including but not limited to the Licensed Mid-Market Edition Software and the  
19 Unlicensed Enterprise Software (collectively, the “Copyrighted Works”).” (Complaint, ¶30). At a  
20 minimum, Oracle should be required to file a more definite statement as to the specific terms of  
21 the license agreement and the exact copyrights it claims that has Cogent infringed.

22 Based on the above-described deficiencies in Oracle’s Complaint, Cogent respectfully  
23 requests that the Court grant its Motion to Dismiss the First, Second and Third Claims for Relief  
24 pursuant to Federal Rule of Civil Procedure (“FRCP”), Rule 12(b)(6) or, in the alternative,  
25 pursuant to FRCP, Rule 12(e), order Oracle to plead a more definite statement.

## 26 **II. SUMMARY OF RELEVANT ALLEGATIONS**

27 Oracle claims that approximately 16 years ago Siebel, through its authorized reseller  
28

1 BroadPoint Technologies, entered into a license agreement with Cogent (the “License  
2 Agreement”). (Complaint, ¶ 14). According to the Complaint, non-party Oracle Corporation, the  
3 parent of Plaintiffs here, acquired Siebel in January 2006. (Complaint, ¶11). Oracle further  
4 alleges that Seibel assigned to Oracle Corporation all of the privileges and obligations of  
5 agreements between its licensees and authorized resellers. (Complaint, ¶12). Without  
6 explanation, Plaintiffs next allege that Plaintiff Oracle America Corporation “became the  
7 exclusive owner of all copyrights at issue in this action” and that “via certain intercompany  
8 agreements, Oracle America now stands in the shoes of Siebel”. *Ibid.*

9 Plaintiffs did not attach a copy of the purported License Agreement to the Complaint,<sup>1</sup>  
10 which contains only a conclusory allegation that “[o]n information and belief, the License  
11 Agreement provided Cogent with a non-exclusive license to, among other things, use the Licensed  
12 Mid-Market Edition Software for 60 named users.” (Complaint, ¶15). The Complaint also alleges  
13 that Cogent and Siebel entered into a Maintenance Agreement for certain software included under  
14 the License Agreement in November 2004, which was renewed annually through 2014. The  
15 Maintenance Agreements are likewise not attached to the Complaint as exhibits nor are their terms  
16 specifically pled. (Complaint, ¶17).

17 Nonetheless, Oracle premises its copyright infringement and breach of contract claims  
18 against Cogent on the missing License and Maintenance Agreements. (Complaint, ¶¶30, 34-38  
19 and 40-44).

20 While Oracle alleges that it owns copyrights in “all of its software, including Siebel  
21 software” and that Cogent made unauthorized copies and use of certain of Oracle’s Siebel  
22 software, the Complaint does not identify any copyright registrations or attach any copyright  
23 certificates. (Complaint, ¶¶29-31).

### 24 III. APPLICABLE LEGAL STANDARDS

25 “[A] complaint must contain sufficient factual matter, accepted as true, to state a claim for  
26 \_\_\_\_\_

27 <sup>1</sup> Defense counsel has previously requested a copy of the License Agreement and Maintenance  
28 Agreements referenced in the Complaint. Oracle’s attorney, however, has failed to provide these documents.

1 relief that is plausible on its face.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal quotation  
 2 omitted). The court accepts factual allegations as true, but is not bound to accept bare legal  
 3 conclusions. *Id.* at 678-679. *See also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)  
 4 (“a plaintiff’s obligation to provide the ‘grounds’ of his ‘entitlement to relief’ requires more than  
 5 labels and conclusions, and a formulaic recitation of the elements of a cause of action will not  
 6 do.”) (internal citations omitted).

7 Moreover, where a complaint “is so vague or ambiguous that the party cannot reasonably  
 8 prepare a response,” an order for a more definite statement under FRCP, Rule 12(e) is appropriate.  
 9 Although [m]otions for a more definite statement are viewed with disfavor and are rarely  
 10 granted[,]” *Optovue Corp. v. Carl Zeiss Meditec, Inc.*, No. C 07-3010 CW, 2007 U.S. Dist.  
 11 LEXIS 65647, at \*7 (N.D. Cal. Aug. 20, 2007)(quoting *Sagan v. Apple Computer, Inc.*, 874 F.  
 12 Supp. 1072, 1077 (1994)), “[a] Rule 12(e) motion may be granted, ... where the complaint is so  
 13 general that ambiguity arises in determining the nature of the claim or the parties against whom it  
 14 is being made.” *Id.* at \*8); *see also Adobe Sys. Inc. v. Software Speedy*, No. C-14-2152 EMC,  
 15 2014 U.S. Dist. LEXIS 173670, at \*16-17 (N.D. Cal. Dec. 16, 2014) (granting Rule 12(e) motion  
 16 to clarify “general allegation that Defendants have infringed . . . copyrights”). A court may order  
 17 a more definite statement even where a claim is stated; the detail required in a more definite  
 18 statement is left to the discretion of the court, and not defined by the elements of the cause of  
 19 action. *See McHenry v. Renne*, 84 F.3d 1172, 1179 (9th Cir. 1996).

#### 20 **IV. LEGAL ARGUMENT**

##### 21 **A. Plaintiffs Contract Based Claims Fail**

22 Oracle has failed to adequately plead either of its claims for breach of contract, and these  
 23 claims should be either dismissed outright or this Court should order Oracle to provide a more  
 24 definite statement.

##### 25 **1. Oracle Fails To Plead A Claim For Relief For Breach Of License** 26 **Agreement**

27 Under California law, to plead a claim for breach of contract, the Complaint’s allegations  
 28 must include (1) the existence and terms of a contract; (2) plaintiff’s performance or excuse for

1 nonperformance; (3) defendant’s breach; and (4) resulting damage to plaintiff. *FPI Development,*  
 2 *Inc. v. Nakashima*, 231 Cal. App. 3d 367, 383 (1991); *see also Harris v. Rudin, Richman & Appel,*  
 3 *74 Cal. App.4<sup>th</sup> 299, 307 (1999).* If the contract is in writing, then its terms must be set out  
 4 verbatim in the body of the complaint or a copy of the written instrument must be attached and  
 5 incorporated by reference. *Otworth v. Southern Pacific Transportation Co.*, 166 Cal. App. 3d 452,  
 6 459 (1985). Although federal courts apply their own procedural rules, which generally require  
 7 only notice pleading, many federal district courts within California have followed the *Otworth*  
 8 decision. *See, e.g., McAfee v. Francis*, No. 5:11-CV-00821-LHK, 2011 U.S. Dist. LEXIS 83878,  
 9 at \*5-6 (N.D. Cal. Aug. 1, 2011) (where no copies of the agreements are attached to the complaint,  
 10 nor the essential terms of the agreement, other than the amount, pled, plaintiffs fail to state breach  
 11 of contract claims); *Park-Kim v. Daikin Indus.*, No. 2:15-cv-09523-CAS(KKX), 2016 U.S. Dist.  
 12 LEXIS 104248, at \*44 (C.D. Cal. Aug. 3, 2016) (plaintiffs failed to sufficiently identify an  
 13 enforceable warranty or the terms of a warranty allegedly breached where they did not attach a  
 14 copy to the complaint or set out the terms verbatim); *Walters v. Fid. Mortg. Of Cal., Inc.*, 730 F.  
 15 Supp. 2d 1185, 1199-1200 (E.D. Cal. 2010)(same). Even federal district courts in California  
 16 which have not required that the plaintiff attach the contract or recite the contract’s terms  
 17 verbatim, still require that “[t]he complaint must identify the specific provision of the contract  
 18 allegedly breached by the defendant.” *Misha Consulting Group, Inc. v. Core Educ. & Consulting*  
 19 *Solutions, Inc.*, No. C-13-04262-RMW, 2013 U.S. Dist. LEXIS 163952, at \*3-4 (N.D. Cal. Nov.  
 20 15, 2013) (citing *Donohue v. Apple, Inc.* 871 F. Supp. 2d 913, 930 (N.D. Cal. 2012). “[M]ere  
 21 legal conclusions that a contract existed . . . will be insufficient to survive a motion to dismiss.”  
 22 *Garibaldi v. Bank of Am. Corp.*, No. C 13-02223 SI, 2014 U.S. Dist. LEXIS 5930, at \*8 (N.D.  
 23 Cal. Jan. 15, 2014).

24 In this instance, Oracle has not adequately pled the first element—the existence and terms  
 25 of the contract. While Oracle alleges that Cogent entered into the License Agreement with Siebel,  
 26 through BroadPoint Technologies, the terms of the purported license are not set out verbatim in  
 27 the body of the Complaint nor is the alleged agreement attached as an exhibit. (Complaint, ¶¶14-  
 28

1 15, 34). Instead, Oracle alleges the terms of the contract generally and on information and  
 2 belief—a red flag that Oracle does not know the precise terms of the purported license agreement.  
 3 Although pleading on information and belief is allowed in narrow circumstances where the facts  
 4 are not in the possession of the Plaintiff such as in cases of fraud, Plaintiffs are presumed to know  
 5 matters contained in a written contract that they have brought suit on. *See* Federal Civil Procedure  
 6 Before Trial, ¶8:648, (The Rutter Group California Practice Guide), (“[m]atters which the plaintiff  
 7 has reason to know should not be pleaded on information and belief: e.g., facts of which plaintiff  
 8 has actual knowledge...”). Presumably, Oracle is in the best position to produce the alleged  
 9 License Agreement serving as the basis of its claims if, in fact, it exists, or to at least quote from  
 10 the contract the exact terms that it contends have been breached by Cogent. After all, Oracle  
 11 apparently conducted a software audit based on the License Agreement, and informed Cogent that  
 12 it owed millions of dollars in license fees and back support. Conversely, if no such agreement  
 13 exists, then Cogent’s Motion to Dismiss as to the Second Claim for Relief should be granted  
 14 without leave to amend.

15 **2. Oracle Fails to Plead A Claim For Relief For Breach Of Maintenance**  
 16 **Agreements**

17 For the same reason that Oracle’s breach of License Agreement claim must fail, so too  
 18 must its Third Claim for Relief for Breach of Maintenance Agreements. Oracle has failed to  
 19 attach any of the referenced Maintenance Agreements as exhibits to the Complaint, plead the  
 20 relevant terms contained therein verbatim or identify with specificity the provisions allegedly  
 21 breached. *See Otworth*, 166 Cal. App. 3d at 459; *McAfee*, 2011 U.S. Dist. LEXIS 83878, at \*5-6.  
 22 Further, the allegations of a breach asserted in the Third Claim for Relief are nothing more than  
 23 legal conclusions. That is, Oracle alleges that “Cogent breached the terms of the Maintenance  
 24 Agreements by obtaining support from Oracle America for the Unlicensed Enterprise Software, to  
 25 which Cogent did not have a valid license.” (Complaint, ¶43). However, this is not based on fact  
 26 if Oracle does not have a copy of the License Agreement and is only guessing at its terms. Oracle  
 27 alleges that “Cogent further breached the terms of the Maintenance Agreements by obtaining  
 28 support for the Licensed Mid-Market Edition Software for a number of users in excess of the 60



1 named users authorized in the License Agreement and Maintenance Agreements.” (Complaint,  
 2 ¶43). Again, the specific terms of the License Agreement have not been pled in the Complaint,  
 3 except in a conclusory manner which cannot serve as a basis for stating a claim for breach of  
 4 contract.

5 **B. Oracle Fails To Plead A Claim For Relief For Copyright Infringement**

6 To state a claim for copyright infringement based on breach of a license agreement, a  
 7 complaint must allege facts to demonstrate “(1) the copying must exceed the scope of the  
 8 defendant’s license and (2) the copyright owner’s complaint must be grounded in an exclusive  
 9 right of copyright (e.g., unlawful reproduction or distribution).” *MDY Indus., LLC v. Blizzard*  
 10 *Entm’t, Inc.*, 629 F.3d 928, 940 (9th Cir. 2010).

11 **1. Oracle Fails To Adequately Plead The Scope Of Cogent’s License Agreement**

12 Oracle’s recitation that Cogent has “reproduced, displayed, and distributed unauthorized  
 13 copies of Oracle’s Siebel software . . . [and] [s]uch unauthorized copies and use exceed the  
 14 permissible license terms and therefore constitute unlawful reproductions of Oracle’s Copyrighted  
 15 Works” is nothing more than a conclusory allegation. (Complaint, ¶30). As Plaintiffs have not  
 16 attached the License Agreement to the Complaint, they have the burden to at least quote its  
 17 relevant provisions, including the scope of the license, without improperly relying upon  
 18 allegations based on “information and belief”. Either Plaintiffs have the License Agreement or  
 19 they do not, and if they have it, they should plead it and not force Cogent to guess as to its terms.  
 20 Accordingly, the first requisite element for pleading a claim for copyright infringement cannot be  
 21 met, and the First Claim for Relief should be dismissed with prejudice on this basis.

22 **2. Oracle Fails To Identify The Copyrights At Issue**

23 Moreover, unlike in other copyright infringement cases brought by Oracle, Oracle fails to  
 24 even refer to, much less identify any specific copyright registrations in the body of the Complaint  
 25 or in an attached schedule. *See e.g., Oracle Am., Inc. v. Hewlett Packard Enter. Co.*, No. 16-cv-  
 26 01393-JST, 2016 U.S. Dist. LEXIS 96122 (N.D. Cal. July 15, 2016)(finding Oracle complaint  
 27 listing 14 Oracle copyrights registrations sufficient to state a claim). This is surprising as Oracle  
 28

1 knows how to identify the specific copyright registrations that they are suing on, as Oracle has  
 2 done routinely in cases for copyright infringement against companies such as Hewlett Packard,  
 3 Google and Rimini Street. (*See* Cogent’s Request for Judicial Notice in Support of Motion to  
 4 Dismiss or, Alternatively, for a More Definite Statement, Exhs.1, 2 and 3). There simply is no  
 5 way for Cogent or the Court to determine from the face of the Complaint what copyrights are at  
 6 issue. This is especially true here where Oracle claims to have acquired the relevant copyrights  
 7 from Siebel, which only adds to the confusion.

8 **3. At A Minimum, Oracle Must Plead A More Definite Statement As To**  
 9 **Its Copyright Infringement Claim**

10 The case law is clear that “[m]erely listing a plurality of [copyrights] which a [rights]  
 11 holder has acquired . . . is not enough to put a party on notice of [] infringement[.]” *Adobe*, 2014  
 12 U.S. Dist. LEXIS 173670, at \*15. For example, in *Adobe*, plaintiffs alleged defendants were  
 13 violating the copyright in the “Adobe Acrobat X” product by selling unlicensed copies. *Id.* at \*3-  
 14 4. Plaintiffs there attached a “non-exhaustive” list of copyright registrations to the complaint. *Id.*  
 15 at \*16. The court held plaintiffs failed to put defendants on notice of which copyrights were  
 16 allegedly infringed and ordered the plaintiffs to file a more definite statement. *Id.* at \*16-17.  
 17 Here, Plaintiffs have failed to itemize *any* copyrights, which is woefully inadequate.

18 Numerous other courts have similarly required copyright plaintiffs to give defendants  
 19 notice in the complaint of which copyrights are allegedly infringed. *See, e.g., Chestang v. Yahoo*  
 20 *Inc.*, No. 2:11-cv-00989-MCE-KN, 2011 U.S. Dist. LEXIS 110908, at\*7 (E.D. Cal. Sept. 28,  
 21 2011) (“Plaintiff must, at a minimum, identify the copyrighted material at issue with specificity  
 22 sufficient to put defendant on notice of what he claims was infringed.”); *Reinicke v. Creative*  
 23 *Empire, LLC*, No. 12cv1405-GPC(KSC), 2013 U.S. Dist. LEXIS 9793, at \*16 (S.D. Cal. Jan. 24,  
 24 2013) (registration of work, including “when it was registered” must be alleged in the complaint).

25 Oracle fails to identify a single copyright registration in its Complaint, attaches no  
 26 copyright certificates and makes only a vague reference to a large portfolio. Such allegations fall  
 27 well below recognized pleading requirements. *Adobe*, 2014 U.S. LEXIS 173670, at \*15-17.

28 Accordingly, the Court should, at the very least, grant Cogent’s motion for a more definite

1 statement and require that Oracle specifically allege which copyrights are at issue.

2 **V. CONCLUSION**

3 For the foregoing reasons, Cogent respectfully requests that this Court dismiss Oracle’s  
4 Complaint in its entirety without leave to amend or, in the alternative, grant Cogent’s motion for a  
5 more definite statement.

7 DATED: October 13, 2016

FULMER WARE LLP

9 By:           /s/ Pamela K. Fulmer            
          Pamela K. Fulmer

11 Attorneys for COGENT COMMUNICATIONS,  
12 INC.