ORACLE

ORACLE CLOUD SERVICES AGREEMENT

This Oracle Cloud Services Agreement (this "Agreement") is between Oracle America, inc. ("Oracle") and the individual or entity that has executed this Agreement as identified in the signature block below ("You"). This Agreement sets forth the terms and conditions that govern orders placed by You for Services under this Agreement.

1. AGREEMENT DEFINITIONS

- 1.1. "Ancillary Software" means any software agent or tool that Oracle makes available to You for download for purposes of facilitating Your access to, operation of, and/or use with, the Services Environment.
- 1.2. "Auto Renew" or "Auto Renewal" is the process by which the Services Period of certain Cloud Services under an order is automatically extended for an additional Services Period unless such Services are otherwise terminated in accordance with the terms of the order or this Agreement. The Service Specifications incorporated into Your order define which Cloud Services are eligible for Auto Renewal as well as any terms applicable to any such renewal.
- 1.3. "Cloud Services" means, collectively, the Oracle cloud services (e.g., Oracle software as a service offerings and related Oracle Programs) listed in Your order and defined in the Service Specifications. The term "Cloud Services" does not include Professional Services.
- 1.4. "Data Center Region" refers to the geographic region in which the Services Environment is physically located. The Data Center Region applicable to the Cloud Services is set forth in Your order.

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FULMER WARE

California Copyright and IP Litigation Attorneys Located in the San Francisco Bay Area

FULMER WARE BLOG POST

MAKING THE RECORD

by Pam Fulmer

When responding to any software audit, companies must look to the terms of the license agreement that governs the relationship between the parties. As a threshold matter, it is vitally important to keep all of the actual contractual documents and Order forms together in one place for ease of reference. Also emails and other written communications between the licensor's audit team and the business being audited should be retained as well. The licensor is making a written record and demanding documents and other information, and may be doing so in a way so as to cast the company being audited in a negative light in the event of later litigation.

We have also found that although the licensor's audit teams tend to rely on writings as they attempt to make a record of non-cooperation and non-compliance by the licensee, the licensor's sales teams, which the licensor may be concurrently deploying, will often use the phone and leave voicemail messages, so as not to create a paper trail, which can later be used against the licensor. We recommend that such voicemail messages be transcribed, and if possible an audio recording of the voicemail preserved for use as evidence later on should litigation be initiated.

For example, in the first public filing against Oracle relating to the VMware virtualization issue in the *Mars vs. Oracle* case, Mars was able to make use of the written record to support its position that Oracle was in breach of the license agreement and exceeded its audit rights. Care must be taken in any discussions with the licensor, to view every communication to the licensor, with a lens as to how a Judge or jury might view the communication in the event of litigation.

The public filings in the Mars vs. Oracle case also amply demonstrate how a licensor (here Oracle) may attempt to use its audit rights to obtain documents and other information that it might not be entitled to under the license agreement. Licensees may want to weigh whether and to what extent to grant the licensor access to their confidential and proprietary information. Often audit clauses require that the audit be reasonable, and even if it does not, courts are likely to read such a requirement into the contract. Therefore, be careful and proceed cautiously before turning over all information demanded by a licensor. Make sure to read and understand your legal rights and consult with skilled technical and legal experts to prepare an appropriate audit response strategy.



California Counsel

Assisting client to make a winning record to best protect your company in disputes over the interpretation of various provisions in the Oracle software license.



San Francisco, California

Located in the San Francisco Bay Area with a combined total of 50 years of experience litigating cases in local courts.