

# EXHIBIT 1

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL. )  
 )  
 PLAINTIFFS, ) NO. C 07-01658 PJH  
 )  
 VS. )  
 )  
 SAP AG, ET AL., ) PAGES 1 - 296  
 )  
 DEFENDANTS. ) OAKLAND, CALIFORNIA  
 ) MONDAY, NOVEMBER 1, 2010  
 \_\_\_\_\_ )

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS: BINGHAM MUCCUTCHEN LLP  
THREE EMBARCADERO CENTER  
SAN FRANCISCO, CALIFORNIA 94111-4607  
BY: ZACHARY J. ALINDER,  
HOLLY A. HOUSE,  
GEOFFREY M. HOWARD,  
DONN P. PICKETT, ATTORNEYS AT LAW  
  
BOIES, SCHILLER & FLEXNER LLP  
1999 HARRISON STREET, SUITE 900  
OAKLAND, CALIFORNIA 94612  
BY: STEVEN C. HOLTZMAN, ATTORNEY AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY: RAYNEE H. MERCADO, CSR NO. 8258

RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

TEXT REMOVED - NOT RELEVANT TO MOTION

7 GOOD MORNING, MR. GULLIVER.

8 PROSPECTIVE JUROR: GOOD MORNING.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

7                   ALL RIGHT. YOU USE BUSINESS SOFTWARE AT WORK. AND  
8 YOU'RE INVOLVED IN RETAIL SALES, CORRECT?  
9                   PROSPECTIVE JUROR: YES.  
10                  THE COURT: AT BEST BUY.  
11                  PROSPECTIVE JUROR: YES.

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23

NUMBER SEVEN WILL BE MR. GULLIVER

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TEXT REMOVED - NOT RELEVANT TO MOTION

14                   THERE'S TWO OTHER FUNDAMENTAL ISSUES HERE AS WELL.  
15           YOUR HONOR GAVE US GUIDANCE ON THURSDAY THAT THERE WOULD BE  
16           EVIDENCE RELATING TO CONTRIBUTORY INFRINGEMENT ADMISSIBLE FOR  
17           CONTEXT TO SOME EXTENT AND AS IT RELATES TO DAMAGES. THIS IS A  
18           PRESENTATION THAT HAS LITERALLY NOTHING ABOUT WHAT TOMORROWNOW  
19           DID AND ONLY WHAT SAP DID.

20                   AND THAT IS A PROBLEM THAT WE HAVE, AS WE DISCUSSED  
21           WITH YOUR HONOR ON THURSDAY, 401 TO 403.

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5 (DOCUMENT DISPLAYED ON SCREEN.)

6 THE COURT: WHAT IS THIS?

7 MR. PICKETT: IT'S A SUMMARY OF THE LEGAL -- IT IS A  
8 SUMMARY OF THE CASES THAT SUPPORT OUR POSITION WITH RESPECT TO  
9 SAP'S KNOWLEDGE OF ILLEGAL INFRINGEMENT AS IT RELATES TO  
10 DAMAGES AND WHY IT IS ADMISSIBLE.

11 THEY ARE OBJECTING, YOUR HONOR, TO -- BASICALLY WE  
12 ARE SAYING THAT IF YOU TOOK SOMETHING KNOWING IT WAS ILLEGAL,  
13 THAT SHOWS IT HAD SOME VALUE. BECAUSE IF YOU KNEW IT WAS  
14 ILLEGAL, UNLESS IT HAD VALUE, YOU WOULDN'T GO TO THOSE STEPS.

15 IT'S KIND OF A COMMON SENSE APPROACH IN THE FIRST  
16 INSTANCE AS TO WHY THAT GOES TO DAMAGE. REMEMBER, WE ARE  
17 GETTING INTO THE VALUE OF USE, WHAT A WILLING SELLER, WILLING  
18 BUYER WOULD REASONABLY AGREE TO.

19 SO IF YOU TAKE SOMETHING ILLEGAL KNOWING IT'S  
20 ILLEGAL, GO TO THOSE LENGTHS THAT ESTABLISHES THAT YOU FELT IT  
21 HAD VALUE, AND THAT'S EXACTLY WHAT THE CASES SAY, INCLUDING THE  
22 SEMINAL GEORGIA-PACIFIC CASE.

TEXT REMOVED - NOT RELEVANT TO MOTION

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14 MR. PICKETT: THIS IS SIMPLY A LITTLE SUMMARY FOR  
15 YOUR HONOR ABOUT WHAT WE THINK THE RELEVANCE OF THIS  
16 CONTRIBUTORY INFRINGEMENT -- BASICALLY THE KNOWLEDGE OF SAP  
17 THAT THEY KNOWINGLY INFRINGED, WHICH, YES, THEY HAVE NOW SAID  
18 THEY ARE CONTRIBUTORILY LIABLE FOR.

19 SO IT GOES TO -- IT'S REALLY THEIR KNOWLEDGE OF THE  
20 INFRINGEMENT AND THE RISK OF LIABILITY. THERE'S A CATEGORY OF  
21 EVIDENCE THAT SHOWS THEY KNEW EXACTLY WHAT THEY WERE DOING AND  
22 THEY KNEW EXACTLY THERE WAS A RISK OF THIS LAWSUIT. THERE IS  
23 ALSO EVIDENCE THAT THEY WERE WILLING TO TAKE A RISK; THAT THEY  
24 HAD ESSENTIALLY A GAMBLE, IF YOU WILL.

25 WE CAN TAKE THIS RISK AND THE REASON THEY WERE

1 WILLING TO DO THAT IS BECAUSE IT WAS WORTH A LOT. YOU WOULDN'T  
2 TAKE A RISK, A KNOWING RISK OF ILLEGAL ACTIVITY UNLESS YOU  
3 THOUGHT IT WAS WORTH A LOT.

4 AND THEN THIRDLY STEPS THEY TOOK TO TRY AND SHIELD,  
5 PROTECT AGAINST THE RISK THAT THEY TOOK, WHAT THEY CALL A  
6 LIABILITY SHIELD.

7 SO THERE'S SORT OF A COMMON SENSE POINT THAT IF YOU  
8 ARE GOING TO GO IN AND TAKE SOMETHING ILLEGALLY WITH KNOWLEDGE,  
9 THEN IT HAS -- IT SHOWS A VALUE, A HIGHER VALUE THAN IF YOU  
10 TOOK IT LEGALLY, FOR EXAMPLE.

11 SO THE CASES ABSOLUTELY FOLLOW THAT POINT ALL THE  
12 WAY DOWN THE ROAD, INCLUDING THE SEMINAL GEORGIA-PACIFIC CASE  
13 WHERE IT SAYS THAT A WILLINGNESS QUOTE "TO ASSUME SUBSTANTIAL  
14 RISKS AND COSTS IN ORDER TO INFRINGE INDICATES THE INFRINGER  
15 WOULD HAVE BEEN WILLING TO PAY A SUBSTANTIAL ROYALTY."

16 AND THEN OTHER CASES GEORGIA-PACIFIC, THE GYROMAT  
17 CASE, AND PENTECH CASE. THE FACT THAT AN INFRINGER WOULD RISK  
18 EXPENSE OF LAWSUIT IMPLIES THAT THE PRODUCT IS VALUABLE.  
19 THAT'S WHY SOME OF THIS EVIDENCE IS DIRECTLY RELEVANT. IF  
20 THIS --

21 THE COURT: I HAVE ALREADY RULED ON THIS. YOU ARE  
22 GOING TO BE PERMITTED TO PUT ON SOME OF THIS EVIDENCE. WHAT I  
23 WANT TO KNOW IS THE EXTENT OF THE EVIDENCE AND THE SCOPE OF THE  
24 EVIDENCE.

25 MR. PICKETT: RIGHT. I WAS JUST GETTING TO THAT.

1                   YOU'VE ALSO TOLD US THAT IT'S ADMISSIBLE FOR CONTEXT  
2    AND THAT THIS WILL BE ALLOWED UNLESS IT EXCEEDS SOME KIND OF  
3    BOUNDS.

TEXT REMOVED - NOT RELEVANT TO MOTION

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3 THE SECOND POINT IS EXACTLY WHAT YOUR HONOR  
4 FORESHADOWED IN OUR CONFERENCE LAST WEEK, THAT PLAINTIFFS WOULD  
5 TAKE THIS TOO FAR. IT MAY BE THAT YOUR HONOR NEEDS TO SEE THE  
6 OPENING AND SEE WHAT THEY DO TO UNDERSTAND THIS, TO APPRECIATE  
7 IT. OF THESE 81 SLIDES, 79 OF THEM RELATE TO SAP STATE OF  
8 MIND, WHEN SAP STATE OF MIND IS NOT A DISPUTED ISSUE IN THIS  
9 CASE.

10 SO IT MAY JUST BE THAT WE ARE ALERTING YOUR HONOR TO  
11 A VERY SIGNIFICANT ISSUE HERE BECAUSE THEY WILL BE TAKING THIS  
12 TOO FAR.

13 THIRDLY, THEIR PRESENTATION OF IT FOR AN OPENING  
14 STATEMENT IS EXTRAORDINARILY ARGUMENTATIVE. THEY ARE GOING TO  
15 SAY THAT SAP'S CHOICE TO STEAL, WHEN WHAT WE HAVE STIPULATED TO  
16 IS COPYRIGHT INFRINGEMENT, AN ACTION THAT HAS NO INTENT ELEMENT  
17 AT ALL REQUIRED, OR IT CAN BE PROVEN WITHOUT PROVING INTENT AS  
18 YOUR HONOR DETERMINED ON SUMMARY JUDGMENT.

19 SO WHAT SAP STIPULATED TO WAS THAT VICARIOUS  
20 LIABILITY OWNERSHIP CONTROL; NO STATE OF MIND. IT STIPULATED  
21 TO CONTRIBUTORY LIABILITY. UNDER YOUR HONOR'S RULING ON  
22 SUMMARY JUDGMENT, THEY SHOULD HAVE KNOWN, THEY DIDN'T STOP IT.  
23 THIS IS NOT A CASE OF INTENTIONAL CONDUCT AS FAR AS SAP GOES.  
24 THERE'S ACTUALLY NO DISPUTES IN THIS CASE FOR TRIAL ABOUT  
25 INTENT.

1                   THIS ENTIRE PRESENTATION CHARACTERIZING IT AS  
2    STEALING, THE CHOICE TO VIOLATE THE LAW, ALL OF THAT TALKS  
3    ABOUT AN ISSUE THAT IS NO LONGER IN DISPUTE.    THAT'S  
4    FUNDAMENTALLY OUR ISSUE.    IT DOES IT IN A HIGHLY ARGUABLE WAY.  
5    IT MIGHT BE APPROPRIATE FOR CLOSING IF THERE'S EVIDENCE, IT'S  
6    NOT APPROPRIATE FOR OPENING.

TEXT REMOVED - NOT RELEVANT TO MOTION

## STATEMENT OF COURT

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1                   MY ONLY CONCERN IN THIS IS THE USE OF THE WORD  
2     "THEFT".   THIS IS NOT A THEFT CASE.   THIS IS AN INFRINGEMENT  
3     CASE.   THE WORDS ARE TERMS OF ART.   AND I AGREE THAT THAT'S  
4     MORE ARGUMENTATIVE THAN ACCURATE.

5                   SO, I AM GOING TO -- I DON'T WANT YOU TO USE THE  
6     WORD "THEFT" THROUGHOUT THE COURSE OF THE OPENING STATEMENT.

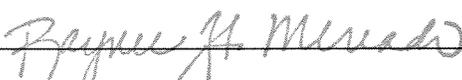
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CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE, USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, MONDAY, NOVEMBER 1, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTERS' CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.

  
\_\_\_\_\_  
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR

\_\_\_\_\_  
DIANE E. SKILLMAN, CSR, RPR, FCRR

TUESDAY, NOVEMBER 2, 2010

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

|                            |   |                           |
|----------------------------|---|---------------------------|
| ORACLE CORPORATION, ET AL. | ) |                           |
|                            | ) | NO. C 07-01658 PJH        |
| PLAINTIFFS,                | ) |                           |
|                            | ) | JURY TRIAL                |
| VS.                        | ) | VOLUME 2                  |
|                            | ) |                           |
| SAP AG, ET AL.,            | ) | PAGES 297 - 479           |
|                            | ) |                           |
| DEFENDANTS.                | ) | OAKLAND, CALIFORNIA       |
| _____                      | ) | TUESDAY, NOVEMBER 2, 2010 |

(PAGES 297 THROUGH 312 ARE UNDER SEAL AND BOUND SEPARATELY)

TRANSCRIPT OF PROCEEDINGS

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FOR PLAINTIFFS:

BINGHAM MUCCUTCHEN LLP  
THREE EMBARCADERO CENTER  
SAN FRANCISCO, CALIFORNIA 94111-4607

BY: ZACHARY J. ALINDER,  
HOLLY A. HOUSE,  
GEOFFREY M. HOWARD,  
DONN P. PICKETT, ATTORNEYS AT LAW

BOIES, SCHILLER & FLEXNER LLP  
1999 HARRISON STREET, SUITE 900  
OAKLAND, CALIFORNIA 94612

BY: STEVEN C. HOLTZMAN, ATTORNEY AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY: RAYNEE H. MERCADO, CSR NO. 8258

RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

TEXT REMOVED - NOT RELEVANT TO MOTION

20 (DEMONSTRATIVE PUBLISHED TO JURY.)

21 MR. HOWARD: WE TALKED ABOUT THE MAINTENANCE SUPPORT  
22 FEES THAT CUSTOMERS PAY. AND I TOLD YOU THAT MAINTENANCE WAS  
23 IMPORTANT BECAUSE THAT'S HOW ORACLE DEVELOPS THE SUPPORT FOR THE  
24 PRODUCTS AND BUILDS THE NEXT VERSION OF THE SOFTWARE. AND IT'S  
25 NOT A SMALL NUMBER. ORACLE INVESTS BILLIONS OF DOLLARS EVERY

## ORACLE'S OPENING STATEMENT

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1 YEAR INTO ITS PRODUCTS, BILLIONS OF DOLLARS EVERY YEAR INTO  
2 DEVELOPING ITS SOFTWARE. AND YOU CAN SEE THAT IT INCREASES THAT  
3 AMOUNT, \$3.3 BILLION THIS YEAR, \$4 BILLION IN THE NEXT FISCAL  
4 YEAR.

TEXT REMOVED - NOT RELEVANT TO MOTION

1                   AND WE HAVE TO CONSIDER -- WE HAVE TO CONSIDER ALSO  
2           IN TAKING ACCOUNT OF VALUE -- YOU HAVE TO CONSIDER THE RISK THAT  
3           THE -- SAP BOARD OF DIRECTORS -- THE EVIDENCE WILL SHOW THE RISK  
4           THAT THEY KNEW THAT THEY WERE TAKING, THE RISK OF KNOWINGLY  
5           INFRINGING ORACLE'S COPYRIGHTS.

6                   FOR A COMPANY LIKE SAP, TO TAKE THE RISK OF BEING  
7           HERE IN COURT TODAY, HAVING NOW ADMITTED COPYRIGHT INFRINGEMENT,  
8           THINK THE EVIDENCE WILL SHOW THAT THAT THING, THAT IP MUST HAVE  
9           BEEN VERY VALUABLE TO THEM.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

8                   MR. HOWARD:   NOW, THE RISK OF BEING CAUGHT, THE RISK  
9   OF SITTING HERE HAVING TO HAVE ADMITTED COPYRIGHT INFRINGEMENT  
10   DOES SHOW THAT THIS WAS VERY VALUABLE AT THE TIME.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

15 MR. HOWARD: SAP DOESN'T WANT TO PAY THE FAIR MARKET  
16 VALUE AS IT WAS AT THE TIME WHEN IT DID NOT CHOOSE TO NEGOTIATE.  
17 SAP HAS SAID THAT IT EXPECTED TO HARM ORACLE AS MUCH AS IT  
18 EXPECTED -- IT FAILED TO HARM ORACLE AS MUCH AS IT EXPECTED, SO  
19 THE DAMAGES SHOULD ONLY BE MEASURED BY ORACLE'S LOST PROFITS.

20 IF YOU HEAR THAT, IF YOU HEAR THAT ARGUMENT, ASK  
21 YOURSELF, DOES WHAT SAP FAILED TO DO HAVE ANYTHING TO DO WITH  
22 THE VALUE OF THE SOFTWARE? NO, IT -- THE EVIDENCE WILL SHOW  
23 THAT THAT HAS NOTHING TO DO WITH THE VALUE OF THE SOFTWARE.

24 ASK YOURSELF WHAT DID SAP SAY AT THE TIME IN ITS OWN  
25 DOCUMENTS ABOUT THE VALUE THAT IT PUT ON TOMORROWNOW? I'VE

## ORACLE'S OPENING STATEMENT

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1 SHOWN YOU SOME OF THOSE DOCUMENTS. IT VALUED THIS SOFTWARE --  
2 IT VALUED THIS COMPANY IN WAYS UNRELATED TO WHAT IT MAY TELL YOU  
3 NOW IS THE RIGHT WAY TO VALUE IT.

4 DO ORACLE'S LOST PROFITS REPRESENT FULL VALUE? SURE,  
5 THERE ARE SOME LOST PROFITS. ARE THEY THE FULL VALUE OF THE  
6 SOFTWARE AT THE TIME GIVEN THE FACTORS THAT WE'VE LOOKED AT?

7 AND I THINK THE DOCUMENTS -- IF YOU READ THE  
8 DOCUMENTS THAT ARE WRITTEN AT THE TIME, THE EVIDENCE WILL SHOW  
9 THAT, NO, THE LOST PROFITS NOW HAVE NOTHING TO DO WITH WHAT WAS  
10 WRITTEN AT THE TIME AS THE EXPECTED VALUE.

11 AND FINALLY, DOES ORACLE RECEIVE THE FULL VALUE OF  
12 ITS COPYRIGHTED SOFTWARE IF IT DOESN'T EVER HAVE THE CHANCE TO  
13 SIT AT THE TABLE, TO LOOK SOMEBODY IN THE EYE, AND TO NEGOTIATE  
14 A LICENSE THE WAY COMPETITORS DO WHEN THEY COMPETE FAIRLY.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

20 Q. WERE THERE OTHER INDICATIONS BEYOND WHAT YOU HAVE JUST  
21 DESCRIBED THAT TOMORROWNOW WAS DOWNLOADING FROM ORACLE?

22 A. YES. THERE WAS, I GUESS, SUSPICIOUS BEHAVIOR, IF YOU  
23 WILL, WITH OUR KNOWLEDGE DOCUMENTS AND SOLUTIONS.

24 Q. LET ME ASK YOU TO LOOK IN YOUR WITNESS BINDER AT TAB 2.  
25 AND THAT'S PLAINTIFFS' TRIAL EXHIBIT 545-4.

1 (EXHIBIT DISPLAYED ON SCREEN.)

2 DOES THAT -- FIRST OF ALL, TELL US WHAT THAT IS.

3 A. SURE. THIS IS A SCREEN. ONCE YOU LOG IN TO CUSTOMER  
4 CONNECTION. THIS IS ACTUALLY A SEARCH RESULT SCREEN.

5 SO IF I SEARCH FOR A SOLUTION THAT I MIGHT NEED,  
6 THIS IS THE RESULT SCREEN THAT SHOWS UP. IT'S KIND OF HARD FOR  
7 YOU ALL TO SEE, BUT IF -- ON THE TOP OF THE SCREEN, YOU WILL  
8 SEE TWO BOXES, A SMALL BOX THAT SAYS "YES", AND A LONGER BOX  
9 THAT SAYS, "NO CONTINUE TO SEARCH."

10 OH. THANK YOU.

11 Q. LET ME ASK: IS THAT -- THE "YES" AND THE "NO", IS THAT  
12 THE WAY THAT THE SITE, FAIR AND ACCURATE DEPICTION OF THE WAY  
13 CUSTOMER CONNECTION LOOKED IN ABOUT 2005?

14 A. YES, IT IS.

15 Q. WHAT'S THE POINT OF THE YES AND NO?

16 A. SO THE YES AND NO, WE USE THAT INFORMATION TO UNDERSTAND  
17 IF OUR DOCUMENTS WERE VALUABLE. AND IF OUR -- IF THE DOCUMENT  
18 SOLVED THE CUSTOMER'S QUESTION THAT THEY WERE ASKING OR WHAT  
19 THEIR ISSUE WAS.

20 SO MOST OF THE TIME WE SEE, "YES" ATTACH TO OUR  
21 RESEARCH WHEN WE DO RESEARCH TO MAKE SURE THAT THIS IS VALID  
22 INFORMATION THAT WE ARE GIVING OUT THERE.

23 THE SUSPICIOUS BEHAVIOR THAT WE SAW WAS ACTUALLY ALL  
24 NO CLICKS. AND THERE WERE THOUSANDS OF NO CLICKS. AND THE NO  
25 CLICKS WERE SECONDS APART, SUBSECONDS APART IN SOME CASES, SO

1 WE KNEW THAT THERE WAS OBVIOUSLY SUSPICIOUS BEHAVIOR AND WE  
2 ALSO KNEW THAT THERE WAS SOME SORT OF AUTOMATED TOOL IN PLACE  
3 AS WELL.

4 Q. WERE YOU ABLE TO DETERMINE WHERE THE AUTOMATED NO CLICKS  
5 WERE COMING FROM?

6 A. THE SAME INFORMATION WAS SENT TO OUR GLOBAL INFORMATION  
7 SECURITY TEAM AND THEY FOUND THE SAME INFORMATION. ALL OF THE  
8 INFORMATION WAS DOWNLOADED TO THE TOMORROWNOW IP ADDRESS IN  
9 BRYAN, TEXAS.

10 Q. WAS THE DATA THAT YOU WOULD BE LOOKING AT IN THE -- IN  
11 LOOKING AT THE YESES AND THE NOS, WAS THAT DATA USABLE WHEN  
12 THERE WERE THOUSANDS OF NO CLICKS IN IT?

13 A. NO. ACTUALLY IT CORRUPTED OUR ABILITY TO ANALYZE THE  
14 BENEFITS OF ANY OF THESE DOCUMENTS.

15 IF YOU CAN IMAGINE WE WERE USED TO SEEING YES CLICKS  
16 OR, YOU KNOW, AND A FEW NOS. SO FOR THE NOS THAT WE SAW, WE  
17 WOULD MAKE ADJUSTMENTS. BUT WHEN YOU HAVE THOUSANDS OF NO  
18 CLICKS, WE WEREN'T ABLE TO USE THE INFORMATION AT ALL.

TEXT REMOVED - NOT RELEVANT TO MOTION

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4 Q. HOW MANY CUSTOMERS DOES ORACLE HAVE FOR ITS PRODUCTS?

5 A. WE HAVE 370,000 CUSTOMERS AROUND THE WORLD.

6 Q. WE HAVE BEEN TALKING ABOUT DIFFERENT TYPES OF SOFTWARE.

7 WHAT KIND OF RESOURCES ARE REQUIRED TO DEVELOP THE  
8 ENTERPRISE APPLICATION SOFTWARE SUCH AS PEOPLESOFT OR J.D.?

9 A. VERY SUBSTANTIAL, MASSIVE. ORACLE'S RESEARCH AND  
10 DEVELOPMENT BUDGET FOR THIS FISCAL YEAR IS \$4 BILLION. WE ARE  
11 SPENDING \$4 BILLION BUILDING NEW PRODUCTS AND MAKING OUR  
12 EXISTING PRODUCTS BETTER.

13 Q. IF YOU JUST HAD THAT AMOUNT OF MONEY, COULD YOU JUST, IN A  
14 SHORT AMOUNT OF TIME, BUILD AN ENTERPRISE APPLICATION PRODUCT?

15 A. ABSOLUTELY NOT. THE PROCESS OF BUILDING AN ENTERPRISE  
16 SUITE OF APPLICATIONS IS LONG AND ARDUOUS. NO MATTER HOW MUCH  
17 MONEY YOU TRY TO THROW AT THE PROBLEM, NO MATTER HOW MANY  
18 PEOPLE YOU TRY TO HIRE AND BUILD THE APPLICATIONS, YOU COULD  
19 NOT DO IT IN A SHORT AMOUNT OF TIME.

20 AND THE REASON IS THAT THERE IS JUST A HUGE AMOUNT  
21 OF VERY SPECIALIZED KNOWLEDGE REQUIRED TO UNDERSTAND ALL OF THE  
22 REQUIREMENTS FOR THOUSANDS AND THOUSANDS OF CUSTOMERS AROUND  
23 THE WORLD OPERATING IN LOTS OF DIFFERENT LEGAL JURISDICTIONS,  
24 RIGHT, TO UNDERSTAND ALL OF THOSE REQUIREMENTS AND BUILD A CODE  
25 THAT'S -- THAT WILL ACTUALLY MEET THEIR REQUIREMENTS.

1 I MEAN, IT REALLY IS A PROCESS OF TRIAL AND ERROR.  
2 YOU TRY A SOLUTION, YOU TRY A CERTAIN SET OF FUNCTIONALITY,  
3 RIGHT, YOU GIVE IT TO CUSTOMERS, AND CUSTOMERS GIVE YOU  
4 FEEDBACK. SOMETIMES THE FEEDBACK IS GOOD, SOMETIMES THE  
5 FEEDBACK IS BAD. THIS DOESN'T WORK FOR ME. THIS DOESN'T  
6 SATISFY MY REQUIREMENTS. THEREFORE, YOU NEED TO TRY AGAIN.

7 YOU NEED TO CHANGE THE WAY THE APPLICATION WORKS.  
8 YOU NEED TO ADD SOME MORE FUNCTIONALITY. IT TAKES A LONG TIME  
9 NO MATTER HOW MUCH MONEY YOU PUT AT IT, IT TAKES A LONG TIME TO  
10 BUILD OUT A COMPLETE VIABLE SOLUTION FOR CUSTOMERS IN THE  
11 APPLICATION SPACE.

12 Q. YOU KNOW, YOU MENTIONED A \$4 BILLION RESEARCH AND  
13 DEVELOPMENT BUDGET. THAT'S A LOT OF MONEY. WHERE DOES ORACLE  
14 GET THAT MONEY TO DEVELOP AND CREATE ITS PRODUCTS?

15 A. SO, AS I MENTIONED, WE HAVE 370,000 CUSTOMERS AROUND THE  
16 WORLD. NOW, THOSE CUSTOMERS, OF COURSE, HAVE PAID US MONEY TO  
17 HAVE THE RIGHT TO USE THAT SOFTWARE, BUT THEY ALSO SUBSCRIBE TO  
18 SUPPORT. SO THEY PAY US FOR SUPPORT.

19 THEY PAY US AN ANNUAL FEE IN ORDER TO BE ABLE TO ASK  
20 US QUESTIONS, REPORT PROBLEMS, AND MOST IMPORTANTLY GET UPDATES  
21 TO THAT SOFTWARE. SO GET FIXES TO BUGS, GET NEW FUNCTIONALITY,  
22 YOU KNOW, GET INFORMATION FROM US ABOUT HOW TO USE THE SOFTWARE  
23 MORE EFFECTIVELY.

24 Q. DO YOU HAVE PERSONAL EXPERIENCE WITH THE TYPE OF EFFORT  
25 REQUIRED TO DEVELOP ENTERPRISE APPLICATION SOFTWARE?

1 A. YES. YES. I WAS A FOUNDING MEMBER OF ORACLE'S  
2 APPLICATION'S DIVISION. SO WHILE IT IS NOT DEPICTED ON THIS  
3 SCREEN, WE HAVE ANOTHER FAMILY OF PRODUCTS CALLED THE E  
4 BUSINESS SUITE.

5 SO I WAS ONE OF THE VERY FIRST EMPLOYEES THAT ORACLE  
6 HIRED TO ACTUALLY BUILD APPLICATIONS. SO WHAT I DID, I BUILT  
7 OUT TECHNOLOGY PIECES WHICH WERE THEN USED BY THE REST OF THE  
8 PROGRAMMERS TO BUILD OUT THE E BUSINESS SUITE.

9 I CAN TELL YOU, IT'S A VERY -- IT WAS A VERY  
10 DIFFICULT AND CHALLENGING PROCESS. I MEAN, WE HAD FOLKS ON  
11 STAFF WHO UNDERSTOOD THE BUSINESS PROBLEMS. THEY UNDERSTOOD  
12 GENERALLY WHAT THE FUNCTIONALITY NEEDED TO BE, BUT WE WERE  
13 LITERALLY STARTING WITH BLANK PIECES OF PAPER AND EMPTY  
14 SCREENS.

15 AND IT WAS A LOT OF WORK THAT STARTED OFF WITH TENS  
16 OF PEOPLE, THEN HUNDREDS OF PEOPLE, THEN THOUSANDS OF PEOPLE TO  
17 BE ABLE TO BUILD OUT THE E BUSINESS SUITE.

18 AND, YOU KNOW, AS I SAID BEFORE, IT WAS VERY  
19 ITERATIVE. I MEAN, IT WAS A PROCESS WHEREBY WE BUILT  
20 FUNCTIONALITY. WE TRIED IT OUT. WE GAVE IT TO CUSTOMERS.  
21 THEY SAID, THIS DOESN'T WORK FOR US. SO THAT MEANT WE HAD TO  
22 THROW SOME CODE AWAY AND START AGAIN.

23 THE GOOD NEWS IS THROUGH THAT ITERATION, WE WERE  
24 ABLE TO BUILD UP VERY COMPELLING OFFERING FOR CUSTOMERS, YOU  
25 KNOW, SOMETHING THAT HELPED THEM VERY MUCH. BUT THE BAD NEWS

1 IS IT TOOK A LONG TIME.

TEXT REMOVED - NOT RELEVANT TO MOTION

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6 Q. DOES ORACLE LICENSE ITS SOFTWARE?

7 A. WE DO LICENSE OUR SOFTWARE.

8 Q. AND HOW DOES THAT -- WHAT FORM DOES THAT LICENSE TAKE?

9 A. IT DEPENDS ON THE PRODUCT.

10 SO, FOR EXAMPLE, A CUSTOMER WHO WISHES TO USE THE  
11 ORACLE DATABASE, PURCHASES FROM ORACLE A LICENSE USUALLY TO RUN  
12 THE COMPUTER ON SOME NUMBER OF PROCESSORS. SO IF I HAVE GOT 20  
13 COMPUTERS IN MY COMPANY AND I WANT TO RUN THE ORACLE DATABASE  
14 ON THOSE 20 COMPUTERS, I BUY FROM ORACLE THE RIGHT TO USE THE  
15 DATABASE ON THOSE 20 COMPUTERS.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

23 Q. AS THE PERSON IN CHARGE OF ORACLE'S SECURITY, WAS THERE A  
24 TIME AT WHICH WRONGFUL CONDUCT BY SAP OR TOMORROWNOW CAME TO  
25 YOUR ATTENTION?

1 A. YES. ABSOLUTELY.

2 SO, I THINK IT WAS NOVEMBER OF 2006, SOMEONE WHO  
3 WORKED FOR ME WHO ACTUALLY REPORTED TO ME IN CHARGE OF THE  
4 INFORMATION SECURITY TEAM TOLD ME THAT WE HAD BEEN EXPERIENCING  
5 A VERY LARGE NUMBER OF DOWNLOADS, EXCESSIVELY LARGE NUMBER OF  
6 DOWNLOADS FROM AN IP ADDRESS. AN IP ADDRESS IS A COMPUTER  
7 INTERNET ADDRESS. THAT COMPUTER INTERNET ADDRESS BELONGED TO A  
8 SUBSIDIARY OF SAP.

9 Q. WHAT DID YOU DO NEXT?

10 A. I DID TWO THINGS. FIRST I NOTIFIED OUR CEO LARRY ELLISON.  
11 I ALSO INSTRUCTED THE INFORMATION SECURITY TEAM TO BEGIN  
12 INVESTIGATING.

13 Q. EXPLAIN WHAT YOU DID AND WHAT YOU CONCLUDED AS A RESULT OF  
14 THAT INVESTIGATION?

15 A. WELL, WE ANALYZED ALL THE PIECES OF EVIDENCE THAT WE COULD  
16 FIND, THE LOG FILES, ET CETERA THAT OUR SUPPORT SYSTEMS CREATE  
17 AND WHAT WE FOUND WAS THAT, YOU KNOW, SAP SUBSIDIARY HAD  
18 DOWNLOADED JUST MASSIVE AMOUNTS OF SUPPORT MATERIALS IN A WAY  
19 WHICH CLEARLY THEY WERE USING -- THEY WERE USING THINGS LIKE  
20 FAKE NAMES AND FAKE PHONE NUMBERS, THEY WERE USING LOGIN  
21 CREDENTIALS OF CUSTOMERS WHO HAD LEFT OR WERE ABOUT TO LEAVE  
22 ORACLE SUPPORT. THEY WERE, I MEAN, JUST DOWNLOADING SO MUCH  
23 DATA PER CREDENTIAL THAT THERE'S NO WAY IT COULD POSSIBLY  
24 CORRESPOND TO A HUMAN BEING ACTUALLY DOING THE DOWNLOADING. IT  
25 HAD TO BE SOME SORT OF AUTOMATIC SCRAPING TOOL.

1 Q. WHAT DID THE USE OF AN AUTOMATED TOOL SUGGEST TO YOU?

2 A. WELL, IT SUGGESTED TO ME SINCE, YOU KNOW, WE DIDN'T  
3 PRODUCE ONE OURSELVES, IT SUGGESTED TO ME THAT THEY HAD REVERSE  
4 ENGINEERED THE LEGITIMATE WAY THAT WE PROVIDE IT TO OUR  
5 CUSTOMER TO ACTUALLY GET ACCESS TO THE SUPPORT MATERIALS.

6 Q. OTHER THAN CLICKING FASTER THAN A HUMAN COULD, WAS THERE  
7 ANYTHING ELSE DISTINCTIVE ABOUT THE DOWNLOADING YOU WERE  
8 INVESTIGATING?

9 A. YES. AS I MENTIONED FOR A GIVEN CREDENTIAL THAT THEY USED  
10 TO LOG INTO OUR SUPPORT SITE, THEY WERE DOWNLOADING DOCUMENTS  
11 THAT THE CUSTOMER WHO ACTUALLY WAS ISSUED THAT CREDENTIAL DID  
12 NOT HAVE THE RIGHT TO GET. THEY WERE DOWNLOADING DOCUMENTS  
13 INDISCRIMINATELY. TRYING TO GRAB EVERY SINGLE THING THEY  
14 COULD.

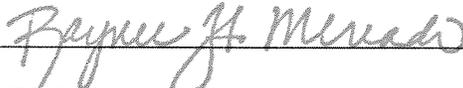
15 THEY WERE -- THEY WERE, IN FACT, BECAUSE THEY HAD  
16 BUILT THE SCRAPING TOOL, THEY ACTUALLY WERE GETTING DOCUMENTS  
17 THAT NO CUSTOMER HAD A RIGHT TO GET. THEY WERE DOWNLOADING  
18 DOCUMENTS THAT WERE INTERNAL FOR ORACLE ONLY. RIGHT? AND IT  
19 WAS JUST AN OVERWHELMING LOAD ON OUR SUPPORT SYSTEMS.

TEXT REMOVED - NOT RELEVANT TO MOTION

CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, TUESDAY, NOVEMBER 2, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR



DIANE E. SKILLMAN, CSR, RPR, FCRR

WEDNESDAY, NOVEMBER 3, 2010

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL. ) JURY TRIAL  
)  
PLAINTIFFS, ) NO. C 07-01658 PJH  
)  
VS. )  
)  
SAP AG, ET AL., ) PAGES 480 - 640  
)  
DEFENDANTS. ) OAKLAND, CALIFORNIA  
\_\_\_\_\_ ) THURSDAY, NOVEMBER 4, 2010

(PAGES 485 THROUGH 491 ARE UNDER SEAL AND BOUND SEPARATELY)

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

BINGHAM MUCCUTCHEN LLP  
THREE EMBARCADERO CENTER  
SAN FRANCISCO, CALIFORNIA 94111-4607  
BY: ZACHARY J. ALINDER,  
HOLLY A. HOUSE,  
GEOFFREY M. HOWARD,  
DONN P. PICKETT, ATTORNEYS AT LAW

BOIES, SCHILLER & FLEXNER LLP  
1999 HARRISON STREET, SUITE 900  
OAKLAND, CALIFORNIA 94612  
BY: STEVEN C. HOLTZMAN, ATTORNEY AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY: RAYNEE H. MERCADO, CSR NO. 8258

RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

TEXT REMOVED - NOT RELEVANT TO MOTION

15           MR. LANIER: TWO SMALL ISSUES, YOUR HONOR. AND WE'D  
16     LIKE TO PROCEED, IF IT'S AGREEABLE WITH THE COURT, BY JUST  
17     GIVING YOUR HONOR A BENCH BRIEF ON TWO DIFFERENT ISSUES THAT ARE  
18     RECURRING AND WILL PROBABLY AFFECT THE LENGTH OF TRIAL AS WELL.  
19     YOUR HONOR CAN CONSIDER THEM AT YOUR LEISURE, AND THEY CAN READ  
20     WHAT WE HAVE TO SAY.

21           JUST TO IDENTIFY THE TWO ISSUES, THEY ARE WE CONTINUE  
22     TO BELIEVE THAT A LOT OF EVIDENCE IS BEING OFFERED THAT'S  
23     ALLEGEDLY FOR DAMAGES THAT REALLY GOES ONLY TO CONTRIBUTORY  
24     INFRINGEMENT. YOU MAY RECALL SOME OF OUR ARGUMENT FROM EARLIER  
25     IN THE WEEK WHERE, IN FACT, THEY POINTED TO THE GEORGIA PACIFIC

1 FACTORS AS THE REASON WHY IT COMES IN.

2 IN FACT, LAST NIGHT, THEY WITHDREW THEIR GEORGIA  
3 PACIFIC INSTRUCTION. SO WE REALLY DO THINK WE'RE AT A POINT  
4 WHERE, WHILE SOME EVIDENCE WILL COME IN FOR CONTEXT WHICH IS WHY  
5 WE'RE NOT JUMPING UP AND DOWN RIGHT NOW FOR A HARD-AND-FAST  
6 RULE, THAT WE WOULD LIKE THE COURT TO GIVE SOME THOUGHT TO THAT  
7 AS THE EVIDENCE COMES IN AS TO WHETHER OR NOT WE NEED TO GET  
8 SOME CLEAR GUIDANCE AS TO WHEN WE'RE GOING PAST WHAT'S REALLY  
9 RELEVANT TO DAMAGES.

10 WE HAVE A BENCH BRIEF ON THAT WE'LL GIVE TO THEM AND  
11 GIVE TO YOUR HONOR. THE RELATED ISSUE ALSO IS THIS ONGOING  
12 ISSUE ABOUT GOOD-WILL EVIDENCE. WE'VE TALKED ABOUT A BACK DOOR.  
13 THERE'S A SIDE DOOR. THERE'S A TRAP DOOR. IT KEEPS TRYING TO  
14 SNEAK ITS WAY IN IN A VARIETY OF WAYS. AND WE'D LIKE TO PRESENT  
15 THAT ISSUE TO YOUR HONOR AS WELL.

16 AGAIN, WE'LL GIVE YOU BRIEFS NOW, AND YOU CAN LET US  
17 KNOW WHAT YOU THINK WHEN YOU HAVE A MOMENT.

18 THE COURT: OKAY.

19 I ASSUME YOU WILL WANT TO RESPOND IN WRITING, SO YOU  
20 CAN SUBMIT A BRIEF, IF YOU CAN, TOMORROW, AND I'LL LOOK AT THEM  
21 OVER THE WEEKEND.

22 MR. PICKETT: WE WILL.

23 THE COURT: WITH REGARD TO THE FIRST ISSUE, THOUGH,  
24 IT IS CLEAR FROM THE REVIEW -- MY REVIEW OF THE DEPOSITION  
25 TRANSCRIPTS THAT THE EVIDENCE IS LIKELY TO BE CUMULATIVE ON THAT

1 QUESTION.

2 SO -- AND THAT ACCOUNTS FOR SOME OF THE RULINGS ON  
3 SOME OF THE DEPOSITION EXCERPTS. I'VE ALREADY TOLD YOU IT CAN  
4 COME IN FOR CONTEXT. IT CAN COME IN ON THE QUESTION OF WHETHER  
5 OR NOT THEY KNEW IT, THAT THEY WILLINGLY TOOK THE RISK OF A  
6 LAWSUIT, AND THAT THEIR -- THE -- THE STEPS THEY TOOK TO PROTECT  
7 THAT.

8 MR. PICKETT: I SENSE --

9 THE COURT: I MEAN, I -- I DON'T MEAN TO SAY I BOUGHT  
10 THE ARGUMENT, BUT I WAS PERSUADED THE -- BY YOUR ARGUMENT THAT,  
11 INDEED, IT'S RELEVANT. BUT AT SOME POINT, IT BECOMES CUMULATIVE  
12 PARTICULARLY GIVEN THAT LIABILITY'S NO LONGER AT ISSUE IN THE  
13 CASE.

14 SO I'M NOT GOING TO ALLOW YOU TO JUST HAMMER ON IT  
15 OVER AND OVER AGAIN. I UNDERSTAND YOU NEED TO ESTABLISH THE  
16 DATES OF KNOWLEDGE AND THE TIME FRAME. BUT IT DOESN'T SEEM TO  
17 ME LIKE YOU NEED FOUR BOARD MEMBERS, I THINK IS WHAT YOU  
18 REFERRED TO THE OTHER DAY, TO DO THAT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

8 Q. LET'S TALK ABOUT THE DAMAGES FOR SAP'S INFRINGEMENT OF  
9 PEOPLESOFT SOFTWARE FIRST, AND THEN WE'LL TURN TO SIEBEL.

10 FIRST, PEOPLESOFT -- AND I WANT YOU TO ASSUME THAT ON  
11 JANUARY 19, 2005, SAP WOULD HAVE TO PAY THE FAIR VALUE FOR WHAT  
12 IT -- WHAT IT TOOK, WHAT IT INFRINGED, AND SO WOULD HAVE  
13 NEGOTIATED A LICENSE WITH ORACLE THAT ALLOWED THEM TO DO WHAT  
14 THEY DID. DO YOU UNDERSTAND THAT ASSUMPTION?

15 A. I UNDERSTAND.

16 Q. ALL RIGHT. NOW, HOW WOULD SELLING A LICENSE LIKE THAT TO  
17 ORACLE AFFECT YOU IN YOUR POSITION AS PRESIDENT OF ORACLE BACK  
18 THEN?

19 MR. LANIER: OBJECTION, YOUR HONOR. CALLS FOR  
20 SPECULATION.

21 THE COURT: OVERRULED.

22 BY MR. PICKETT:

23 Q. GO AHEAD. YOU CAN GO AHEAD, MR. PHILLIPS.

24 A. OKAY. WELL, AS THE PERSON RESPONSIBLE FOR MAKING SURE WE  
25 HIT A NUMBER EVERY QUARTER, EVERY 90 DAYS, I WOULD HAVE BEEN

1 TERRIFIED IF MY LARGEST COMPETITOR NOW HAD THE EXACT SAME  
2 PRODUCT I HAD AND THIS COMPETITOR IS THREE TIMES MY SIZE AND CAN  
3 GO IN AND SELL THE SAME THING, SUPPORT THE EXACT SAME CUSTOMERS.  
4 WHAT'S MY DIFFERENTIATION?

5 SO IT WOULD HAVE BEEN -- YEAH, IT WOULD HAVE JUST  
6 BEEN UNTHINKABLE AT THE TIME.

TEXT REMOVED - NOT RELEVANT TO MOTION

20 Q. NOW, THE -- THE ACQUISITION OF ORACLE'S ACQUISITION OF  
21 PEOPLESOFT, HOW MUCH DID YOU PAY FOR PEOPLESOFT?

22 A. I PAID JUST OVER 11 BILLION.

23 Q. AND HOW WOULD ORACLE'S PAYMENT OF \$11 BILLION FOR PEOPLESOFT  
24 FIGURE INTO YOUR THINKING ENTERING INTO A NEGOTIATION FOR THIS  
25 LICENSE, IF YOU'D BEEN APPROACHED FOR A LICENSE?

1 A. WELL, I GUESS I THINK OF IT IN SIMPLE TERMS. IF I PAID FOR  
2 SOMETHING ONE DAY FOR 11 BILLION AND MY COMPETITOR WANTS IT THE  
3 NEXT DAY, WHICH -- THEY WOULD HAVE TO PAY CLOSE TO WHAT I PAID  
4 FOR IT. I HAD TO PAY FOR IT UP FRONT 11 BILLION. I EXPECT THEM  
5 TO PAY BILLIONS TO HAVE ACCESS TO IT AS WELL.

6 SO I'D BE THINKING THAT I HAVE A FIDUCIARY DUTY TO MY  
7 SHAREHOLDERS, TO THE BOARD OF DIRECTORS, TO THE EMPLOYEES, TO  
8 EVERYONE. I CAN'T SPEND 11 BILLION AND THEN NOT GET ANYTHING  
9 BACK FOR THAT THE NEXT DAY. SO I MEAN, I COULD SEE FROM SAP'S  
10 STANDPOINT, IF YOU CAN GET ORACLE TO BUY SOMETHING FOR  
11 11 BILLION AND GIVE IT TO YOU FOR A LOT LESS THAN THAT, SURE.  
12 THAT'D BE A GREAT DEAL, BUT I CAN'T SEE WHY ORACLE WOULD DO  
13 THAT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

17 Q. AND HOW MANY OF THOSE 10,000 CUSTOMERS DID YOU EXPECT TO  
18 KEEP WHEN YOU ACQUIRED PEOPLESOFT?

19 A. WELL, THE VAST MAJORITY OF THEM, UPPER 90 PERCENT RANGE  
20 NORMALLY SHOULD BE STAYING WITH YOU BECAUSE OF THE -- THE ISSUES  
21 I DESCRIBED EARLIER. IT'S VERY EXPENSIVE TO MOVE. IT DOESN'T  
22 MAKE BUSINESS SENSE TO SWITCH ACCOUNTING SYSTEMS FOR NO REASON.  
23 AS LONG AS YOU'RE STILL IN BUSINESS AND PROVIDING REASONABLY  
24 GOOD SERVICE, THEY STAY WITH YOU.

25 AND SO WE EXPECTED -- OTHER THAN THE ONES THAT GO OUT

TEXT REMOVED - NOT RELEVANT TO MOTION

21 Q. NOW, LET ME ASK YOU TO GO BACK TO THE ASSUMPTION. LET'S SAY  
22 YOU HAD TO SELL A LICENSE TO SAP IN JANUARY 2005 TO ALLOW THEM  
23 ACCESS TO THE PEOPLESOFT SOFTWARE, THE -- FOR MAINTENANCE.  
24 HOW WOULD THAT AFFECT THE REASONS THAT YOU'D GIVEN  
25 THE FINANCIAL ANALYSTS AND THE INVESTORS? HOW WOULD THAT

1 REQUIREMENT TO GIVE A LICENSE TO SAP AFFECT THOSE REASONS?

2 A. WELL, I MEAN, THAT WOULD DESTROY THIS ENTIRE PRESENTATION.

3 IT WOULD MAKE NO SENSE, BECAUSE IF YOU ARE GIVING THE THING YOU

4 JUST BOUGHT FOR \$11 BILLION AWAY TO YOUR LARGEST COMPETITOR,

5 NONE OF THESE THINGS APPLIED ANYMORE. BECAUSE YOUR CUSTOMER

6 BASE IS -- THE SCALE I TALKED ABOUT, YOUR COMPETITOR'S NOW

7 GETTING THOSE CUSTOMERS BECAUSE THEY CAN HAVE ACCESS TO THEM

8 JUST AS EASILY AS YOU CAN.

9 THE LARGER R & D BUDGET, IF YOU DON'T HAVE THE

10 CUSTOMERS, YOU CAN'T FUND THE R & D, 'CAUSE NOW SAP HAS THOSE

11 CUSTOMERS. AND IF SAP GETS THOSE CUSTOMERS, THAT WHOLE IDEA

12 ABOUT HAVING A -- YOU KNOW, STRONGER COMPETITIVE POSITION BEING

13 SAFER, THAT'S OUT OF THE WINDOW BECAUSE ACTUALLY HELPED SAP,

14 THEY GOT MORE CUSTOMERS.

15 AND SO ALL THESE THINGS KIND OF NO LONGER APPLIED.

16 THE HIGH-MARGIN REVENUE, ALL THOSE CUSTOMERS THAT, YOU KNOW, WE

17 ASSUMED THAT WE WOULD BE KEEPING, IF THEY'RE GOING TO SOMEONE

18 ELSE -- NOT JUST SOMEONE ELSE, OUR LARGEST COMPETITOR, IT

19 ACTUALLY MAKES THE SITUATION WORSE. BECAUSE THE THING WE WERE

20 TRYING TO SOLVE FOR WAS THEM HAVING MORE CUSTOMERS THAN US.

21 NOW IF THOSE CUSTOMERS -- IN ADDITION TO THEIR OWN

22 CUSTOMERS, THEY GET PEOPLESOFT CUSTOMERS, WE'RE IN A WORSE

23 POSITION THAN WHEN WE STARTED. SO NONE OF THESE THINGS APPLY

24 ANYMORE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

16 Q. IS THERE A CONNECTION -- IF YOU'RE NEGOTIATING WITH SAP  
17 JANUARY 2005, IS THERE A CONNECTION BETWEEN THE NUMBER OF  
18 CUSTOMERS, 40 PERCENT OF THAT 10,000, THAT YOU WOULD EXPECT TO  
19 LOSE OVER TO SAP AND THE PRICE OF THE LICENSE THAT YOU'D BE  
20 NEGOTIATING WITH SAP?

21 IS THERE A CONNECTION BETWEEN TWO?

22 A. WELL, OF COURSE. YEAH, I GUESS YOU'D HAVE TO HAVE SOME  
23 BASIS FOR COMING UP WITH A LICENSE. BUT CERTAINLY THE FACT THAT  
24 THAT MANY CUSTOMERS WERE AT RISK AND YOU JUST PAID \$11 BILLION  
25 TO GET THOSE CUSTOMERS, YOU'D HAVE TO HAVE A VERY GOOD REASON --

## DIRECT EXAMINATION OF CHARLES PHILLIPS

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1 A BIG NUMBER TO GO BACK TO YOUR BOARD OF DIRECTORS AND SAY THE  
2 THING I JUST GOT YOU TO FUND FOR \$11 BILLION, I WANT TO GIVE IT  
3 TO MY LARGEST COMPETITOR FOR "X." IT BETTER BE A BIG NUMBER  
4 CLOSE TO WHAT YOU PAID FOR IT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

18                    THAT'S TYPICALLY THE WAY YOU WOULD DO IT.

19            Q.    NOW, LET'S GET BACK TO "X."    YOU WERE TALKING ABOUT WHAT'S  
20            GOING TO BE THE PRICE FOR THIS LICENSE, AND THERE'S A  
21            NEGOTIATION, OF COURSE.

22                    SAP'S LAWYER TOLD THE JURY TUESDAY IN THE --  
23            YESTERDAY IN THE TRIAL SENSE, BUT TUESDAY IN THE REAL SENSE --  
24            IN HIS OPENING STATEMENT THAT THE EVIDENCE WILL SHOW THAT ORACLE  
25            WOULD HAVE ASKED FOR \$2 BILLION IN THE NEGOTIATION.



1 VIDEO.

2 (EXHIBIT PUBLISHED TO JURY.)

3 BY MR. PICKETT:

4 Q. NOW, THIS IS AN SAP DOCUMENT, NOT AN ORACLE DOCUMENT. BUT  
5 HAVE YOU SEEN SIMILAR DOCUMENTS LIKE THIS IN CONNECTION WITH  
6 ACQUISITIONS?

7 A. SURE. I MEAN, THEY HAVE VARIOUS FORMATS, BUT THE IDEA HERE  
8 IS IF YOU WANT TO SPONSOR AN ACQUISITION OR ANY PROJECT THAT  
9 REQUIRES THE COMPANY SPENDING MILLIONS OF DOLLARS, YOU'RE GOING  
10 TO HAVE TO PUT TOGETHER A JUSTIFICATION IN SAYING, "IF YOU SPEND  
11 THIS, THIS IS THE AMOUNT OF MONEY WE'RE GOING TO MAKE," AND THE  
12 NUMBERS HAVE TO ADD UP.

13 IF IT'S ENOUGH MONEY, THEN OKAY. WE MAY APPROVE IT.  
14 IF THE NUMBER'S NOT BIG ENOUGH, THEN YOU PROBABLY WON'T GET IT  
15 APPROVED. BUT TYPICALLY, THIS IS WHAT YOU WOULD PRESENT TO YOUR  
16 MANAGEMENT TEAM AND EVENTUALLY TO YOUR BOARD OF DIRECTORS AS THE  
17 REASON I WANT TO BUY THIS COMPANY OR DO WHATEVER.

18 Q. I WANT YOU TO ASSUME THAT IN JANUARY 2005 WHEN ORACLE AND  
19 SAP CAME TOGETHER AT THE NEGOTIATION TABLE FOR THIS LICENSE,  
20 ASSUME THAT SAP THOUGHT THAT IN THE FIRST THREE YEARS WITH THIS  
21 TOMORROWNOW BUSINESS OPPORTUNITY, IT WOULD MAKE \$897,693,000,  
22 THAT THAT WAS THEIR PROJECTION.

23 WHAT IMPACT WOULD THAT HAVE ON THE NEGOTIATION FOR  
24 THE LICENSE?

25 MR. LANIER: OBJECTION, YOUR HONOR. HE'S ASKING TO

1 SPECULATE ABOUT SAP'S STATE OF MIND, AND HE'S GETTING TO THE  
2 TOPIC WE DISCUSSED.

3 THE COURT: YEAH. AS FRAMED.

4 REFRAME THE QUESTION. ARE YOU ASKING FOR SAP'S STATE  
5 OF MIND, OR FOR ORACLE'S?

6 MR. PICKETT: HAD HE KNOWN -- WELL, THERE'S TWO  
7 POINTS, YOUR HONOR. FIRST, THERE'S THE OPEN-BOOK CONCEPT IN  
8 WHICH UNDER THE HYPOTHETICAL LICENSE, BOTH SIDES ARE ASSUMED TO  
9 KNOW EACH OTHER'S INFORMATION. THAT'S FROM GEORGIA PACIFIC  
10 ITSELF.

11 SECONDLY, THE QUESTIONS DIRECTED TO SOME -- PUT IT  
12 GENERALLY, IF SOMEONE KNEW OR ESTIMATED THEY HADN'T -- WERE  
13 GOING TO MAKE 900 MILLION IN THE FIRST THREE YEARS, WHAT IMPACT  
14 WOULD IT HAVE ON THE NEGOTIATIONS FROM -- FROM THEIR STANDPOINT,  
15 FROM ORACLE'S STANDPOINT?

16 MR. LANIER: THIS IS THE SUBJECT ON WHICH THEY'VE  
17 OFFERED EXPERT OPINION ACTUALLY AS WELL, SO IT'S NOT ONLY --

18 (SIMULTANEOUS COLLOQUY.)

19 MR. PICKETT: YOUR HONOR --

20 THE COURT: EXCUSE ME.

21 WE'VE HAD MOTIONS IN LIMINE WITH REGARD TO THIS  
22 PARTICULAR WITNESS ABOUT THIS -- ABOUT THIS INTEREST, AND I  
23 THINK I OVERRULED YOUR OBJECTION ON THAT. SO I'LL OVERRULE IT.  
24 BY MR. PICKETT:

25 Q. ALL RIGHT. SO WHAT IMPACT WOULD IT HAVE, MR. PHILLIPS?

1 A. WELL, IT'S HARD TO FIND, YOU KNOW, NEARLY 900 MILLION OF  
2 REVENUE IN THIS INDUSTRY NO MATTER HOW SMART YOU ARE, HOW MANY  
3 RESOURCES YOU HAVE. SO THAT'S A BIG NUMBER.

4 SO THE IMPACT WOULD BE, IF THAT'S REALLY WHAT THEY'RE  
5 GOING TO GET OUT OF THIS, WHICH IS A HUGE NUMBER, YOU'D PAY  
6 MULTIPLES OF THIS TO GET THAT. I MEAN, THAT'S VALUABLE REVENUE.  
7 AND IT'S INCREASING, SO IT'S NOT ONLY A BIG NUMBER BUT IT'S  
8 GROWING, AND -- WHICH WOULD ALSO IMPACT THE -- THE AMOUNT YOU  
9 WOULD PAY FOR IT BECAUSE IT'S GOING TO GROW OVER TIME OVER MANY  
10 YEARS.

11 Q. AND WHEN YOU SAY A MULTIPLE, WHAT DO YOU MEAN?

12 A. IN OTHER WORDS, IT'S NOT JUST THE 900 MILLION YOU WOULD PAY  
13 BECAUSE THAT'S SO VALUABLE IN TERMS OF REVENUE AND THE  
14 PROFITABILITY OF THAT REVENUE. YOU'D PAY MULTIPLE TIMES THAT,  
15 NOT JUST EXACTLY THIS REVENUE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

13 Q. NOW, I WANT YOU TO ASSUME NOW A SECOND NEGOTIATION, ONLY  
14 THIS TIME IT'S FOR SAP AND TOMORROWNOW TO GAIN ACCESS TO THE  
15 SIEBEL SOFTWARE STARTING IN SEPTEMBER 2006 WHEN THEY STARTED TO  
16 SERVICE SIEBEL CUSTOMERS.

17 HOW WOULD YOU VALUE A LICENSE, HOW WOULD YOU APPROACH  
18 THE NEGOTIATIONS FOR A LICENSE FOR THE SIEBEL SOFTWARE?

19 A. WELL, MUCH THE SAME WAY AS -- AS WE DISCUSSED EARLIER WITH  
20 PEOPLESOFT. IF I JUST PAID 6 BILLION AND I'M NOW GOING TO GIVE  
21 SAP, OF ALL PEOPLE, ACCESS TO THE CODE AND TO THOSE CUSTOMERS  
22 AND LOSE THOSE CUSTOMERS, I'D HAVE TO GET PAID A GOOD CHUNK OF  
23 THAT UPFRONT TO JUSTIFY DOING THAT TO MY BOARD.

24 Q. WHAT WAS THE --

25 SORRY, GO AHEAD.

1 A. OTHERWISE, WHY WOULD I DO THAT? IT WOULD JUST -- IT'S  
2 ALMOST -- DOESN'T MAKE MUCH SENSE.

3 Q. WHAT WAS THE SIEBEL CUSTOMER BASE THAT YOU ACQUIRED IN THE  
4 ACQUISITION?

5 A. IF I REMEMBER RIGHT, IT WAS AROUND 4,000 CUSTOMERS OR SO.

6 Q. AND IN THAT NEGOTIATION, WHAT WOULD YOU RECOMMEND ORACLE'S  
7 POSITION BE IN THE NEGOTIATION FOR THE LICENSE FOR SIEBEL?

8 A. THE NUMBER, OPENING NUMBER FOR ME WOULD HAVE A "B" ON IT IN  
9 BILLIONS IF I JUST PAID 6 BILLION AND I'M ABOUT TO GIVE THOSE  
10 CUSTOMERS AWAY TO MY LARGEST COMPETITOR.

11 I KNOW THERE'S VARIOUS WAYS OF ANALYZING THIS, AND  
12 THERE MAY BE OTHER MODELS. BUT FOR ME, IT'S JUST PRETTY SIMPLE.  
13 I JUST PAID 6 BILLION, AND MY BIGGEST COMPETITOR WANTS WHAT I  
14 JUST BOUGHT. I CAN'T GIVE IT TO HIM FOR NOTHING.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

2 Q. NOW, THERE'S OTHER WAYS TO CATCH UP BESIDES BUYING A  
3 COMPANY, RIGHT?

4 A. DEPENDS. AND SOMETIMES THERE'S NOT. IF THE MARKET IS MORE  
5 MATURE AND PEOPLE HAVE ALREADY MADE DECISIONS, WHICH IS THE KEY  
6 THING IN THAT PARTICULAR -- THE APPLICATIONS MARKET, THEY HAD  
7 ALREADY MADE DECISIONS ON WHICH APPLICATION THEY WANT TO RUN FOR  
8 FINANCIALS, FOR HR, ET CETERA, THEY CAN'T SWITCH, AT LEAST NOT  
9 WITHOUT GREAT COST.

10 AND TO MY POINT I MADE EARLIER, IT DOESN'T MATTER IF  
11 YOU COME OUT WITH A NEW PRODUCT. THE SWITCHING COSTS ARE TOO  
12 HIGH TO JUSTIFY A CUSTOMER JUST FOR WHATEVER REASON WANTING TO  
13 SWITCH ON DAY ONE FOR -- TOMORROW TO ANOTHER PRODUCT. THEY  
14 DON'T DO THAT. IT DOESN'T MAKE BUSINESS SENSE.

15 SO I WOULD SAY NO, THERE PROBABLY AREN'T OTHER WAYS  
16 TO CATCH UP IN A MORE MATURE MARKET.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

17 Q. OKAY. NOW, JUST AGAIN STAYING ON THIS PEOPLESOFT  
18 ACQUISITION, COMING AWAY FROM WHAT MIGHT HAPPEN TO WHAT ACTUALLY  
19 HAPPENED, WE'VE HEARD YOU PAID \$11 BILLION. AND YOU BOUGHT THE  
20 ENTIRE COMPANY, RIGHT?

21 A. YES.

22 Q. AND I ASK BECAUSE SOMETIMES WHEN A COMPANY BUYS SOMETHING  
23 FROM ANOTHER COMPANY, YOU MIGHT BUY JUST SOME ASSETS, RIGHT? I  
24 MIGHT BUY THIS PIECE OF THE BUSINESS OR THIS LINE OF SOFTWARE,  
25 RIGHT?

1 A. THAT'S POSSIBLE.

2 Q. BUT WHEN YOU BOUGHT PEOPLESOFT, YOU BOUGHT THE WHOLE  
3 COMPANY, LOCK, STOCK, AND BARREL, RIGHT?

4 A. THAT'S CORRECT.

5 Q. NOW, PEOPLESOFT HAD -- OBVIOUSLY, IT HAD SOME SOFTWARE.

6 THAT'S WHAT WE'RE TALKING ABOUT. HAD BUILDINGS. I GUESS

7 PEOPLESOFT PEOPLE MAY HAVE SAT DOWN WHEN THEY WORKED. THEY

8 MIGHT HAVE CHAIRS AND DESKS, ALL THOSE SORTS OF THINGS, RIGHT?

9 A. THAT'S TRUE.

10 Q. HAD -- HAD THE RIGHT TO LEASE PROPERTY. IT HAD ADVERTISING.

11 IT HAD ALL SORTS OF THINGS. AND YOU BOUGHT ALL OF THAT, RIGHT?

12 A. YES.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

11 WE'VE TALKED ABOUT CUSTOMERS WHO PICKED OTHER  
12 MAINTENANCE SUPPORT, AND THERE'S THIS OTHER BUCKET OF CUSTOMERS  
13 I'VE HEARD ABOUT WHO MIGHT SWITCH THEIR UNDERLYING ERP SOFTWARE.  
14 LET'S TALK ABOUT THEM FOR A MINUTE.

15 I THINK I HEARD YOU TELL MR. PICKETT -- I JUST WANT  
16 TO MAKE SURE -- THAT CUSTOMERS USUALLY NEED A PRETTY GOOD REASON  
17 TO SWITCH THAT ERP, RIGHT?

18 A. THAT'S CORRECT.

19 Q. AND, IN FACT, THAT'S BECAUSE THEY'VE ALREADY INVESTED A LOT  
20 TO GET THAT PRODUCT IN THERE AND GET IT WORKING RIGHT, CORRECT?

21 A. THAT'S CORRECT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

16 Q. OKAY. SO, ALMOST DONE. JUST A COUPLE OF BASIC CONCEPTS I  
17 WANT TO MAKE SURE WE ARE STRAIGHT ON.

18 THE -- YOU TALKED ABOUT THIS LICENSE SITUATION,  
19 AGAIN, THIS ASSUMED LICENSE SITUATION. AND YOU WERE TALKING  
20 ABOUT THEM HAVING OUR I -- I WANT TO MAKE SURE I UNDERSTAND.  
21 THIS LICENSE SCENARIO THAT WE ARE TALKING ABOUT, ORACLE  
22 ACTUALLY WOULDN'T BE GIVING AWAY IT'S IP FOREVER AND NOT HAVE  
23 IT; IT WOULD HAVE IT AND SAP WOULD ALSO GET IT, RIGHT?

24 A. WELL, YES. BUT THAT'S A HUGE THING. YES.

25 Q. ALL RIGHT. BUT I JUST WANT TO MAKE SURE I UNDERSTAND.

## CROSS EXAMINATION OF CHARLES PHILLIPS

1                   ORACLE STILL HAS IT; IN YOUR SCENARIO, SAP WOULD  
2 ALSO GET IT, TOO, RIGHT?

3 A.     YEAH.   THEY WOULD BOTH HAVE IT.   ONE'S A LOT LARGER THAN  
4 THE OTHER.   AND THE CUSTOMER CAN GO TO EITHER ONE OF US.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

13 Q. YOU MENTIONED THAT YOU HAD A MEETING WITH SOME TOMORROWNOW  
14 PEOPLE?

15 A. I DID.

16 Q. AFTER THAT MEETING, DID YOU HAVE IN YOUR OWN MIND AN  
17 ASSESSMENT OF THE SIZE OF THE BUSINESS OPPORTUNITY THAT BUYING  
18 TOMORROWNOW PRESENTED?

19 A. I HAD A GENERAL ASSESSMENT OF THE BUSINESS AT THAT POINT  
20 IN TIME.

21 Q. WHAT WAS THAT GENERAL ASSESSMENT?

22 A. IT WAS A LIMITED OR A NICHE BUSINESS.

23 Q. WHAT DO YOU MEAN BY "A NICHE"?

24 A. RELATIVELY SMALL, APPEALING TO SOME SUBSEGMENT OF  
25 CUSTOMERS.

1 Q. LET'S EXPLORE THAT A LITTLE.

2 ANOTHER DOCUMENT YOU SAW WAS PLAINTIFFS' EXHIBIT 7.  
3 THAT SHOULD BE IN TAB 6 OF THE BINDER THEY GAVE YOU.

4 A. I HAVE GOT THAT ONE.

5 (EXHIBIT DISPLAYED ON SCREEN.)

6 Q. LET'S GO TO THE FIRST PAGE OF THE DOCUMENT. AND DOWN  
7 THERE IN THE STRENGTHS AND OPPORTUNITIES SECTION, IF YOU CAN  
8 JUST GRAB THAT AND MAKE IT A LITTLE BIGGER. ABOUT TWO-THIRDS  
9 OF THE WAY DOWN THE PAGE. THERE YOU GO. MAYBE HIGHLIGHT THE  
10 FIRST BULLET BECAUSE IT'S FAR AWAY FROM ME AND I AM SURE FOR  
11 OTHERS.

12 BY MR. LANIER:

13 Q. IT SAYS:

14 "THE 'NO FRILLS' MODEL MAKES SENSE FOR A SEGMENT  
15 OF CUSTOMERS PROVIDED TOMORROWNOW CAN MANAGE TO  
16 CONTINUE TO OPERATE AS STRUCTURED TODAY. IT CAN  
17 BE A PROFITABLE NICHE BUSINESS. UNCLEAR IF IT'S  
18 5 PERCENT NICHE OR BIGGER."

19 DO YOU SEE THAT?

20 A. I DO.

21 Q. JUST MAKE SURE I UNDERSTAND A COUPLE OF THINGS THERE.

22 NO FRILLS IS IN QUOTES. WHAT DID YOU MEAN BY "NO  
23 FRILLS"?

24 A. THE TOMORROWNOW SERVICE OFFERING WAS VERY BASIC. IT  
25 REALLY ONLY SUPPORTED A CUSTOMER TO KEEP A SYSTEM RUNNING AND

1 KEEP IT IN COMPLIANCE. IF A CUSTOMER GENERALLY WANTED TO DO  
2 MORE OR HAVE MORE CAPABILITIES OR HAD A PROBLEM, TOMORROWNOW  
3 WASN'T OBLIGATED TO NECESSARILY CORRECT THE PROBLEM.

4 THAT WAS CONTRASTED TO THE MORE FULL SERVICE MODEL  
5 OFFERED IN THE ENTERPRISE SOFTWARE MARKET TYPICALLY. SO THEY  
6 HAD A MUCH MORE BASIC OFFERING THAN WAS TYPICAL IN THE SOFTWARE  
7 MARKET.

8 Q. NEXT THING YOU SAY IS:

9 "IT MAKES SENSE FOR A SEGMENT OF CUSTOMERS."

10 DID YOU HAVE A SEGMENT OF CUSTOMERS IN MIND?

11 A. I THOUGHT THAT ONLY SOME CUSTOMERS WOULD CONSIDER THIS TO  
12 BE APPEALING. BECAUSE IT WAS LIMITED, IT ONLY DID A FEW THINGS  
13 THAT I ONLY THOUGHT SOME CUSTOMERS MIGHT EVEN CONSIDER IT.

14 Q. DID YOU HAVE ANY SENSE IN YOUR MIND AFTER YOUR MEETINGS  
15 WITH TOMORROWNOW OR MEETING WITH TOMORROWNOW ABOUT HOW -- HOW  
16 MANY CUSTOMERS MIGHT BE INTERESTED IN THIS?

17 A. MY BEST ESTIMATE WAS THAT ROUGHLY 5 PERCENT OF THE  
18 PEOPLESOFT ENTERPRISE CUSTOMERS MIGHT FIND THIS APPEALING.

19 Q. YOU SAID "PEOPLESOFT ENTERPRISE CUSTOMERS". WHAT DID YOU  
20 MEAN BY THAT?

21 A. THOSE WERE THE TRADITIONAL PEOPLESOFT CUSTOMERS. THE  
22 PRODUCT WAS CALLED ENTERPRISE. PEOPLE SOUGHT OTHER CUSTOMERS  
23 THROUGH AN ACQUISITION OF J.D. EDWARDS AND I DIDN'T THINK THAT  
24 THEY WOULD FIND IT APPEALING.

TEXT REMOVED - NOT RELEVANT TO MOTION

CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, THURSDAY, NOVEMBER 4, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR



DIANE E. SKILLMAN, CSR, RPR, FCRR

FRIDAY, NOVEMBER 5, 2010

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL. ) JURY TRIAL  
)  
PLAINTIFFS, ) NO. C 07-01658 PJH  
)  
VS. )  
)  
SAP AG, ET AL., ) PAGES 641 - 753  
)  
DEFENDANTS. ) OAKLAND, CALIFORNIA  
\_\_\_\_\_ ) FRIDAY, NOVEMBER 5, 2010

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS: BINGHAM MUCCUTCHEN LLP  
THREE EMBARCADERO CENTER  
SAN FRANCISCO, CALIFORNIA 94111-4607  
BY: ZACHARY J. ALINDER,  
HOLLY A. HOUSE,  
GEOFFREY M. HOWARD,  
DONN P. PICKETT, ATTORNEYS AT LAW  
  
BOIES, SCHILLER & FLEXNER LLP  
1999 HARRISON STREET, SUITE 900  
OAKLAND, CALIFORNIA 94612  
BY: STEVEN C. HOLTZMAN, ATTORNEY AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY: RAYNEE H. MERCADO, CSR NO. 8258

RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

TEXT REMOVED - NOT RELEVANT TO MOTION

7           ONE SMALL ISSUE AS WELL, 'CAUSE WE DON'T WANT TO KEEP  
8     INTERRUPTING THE PROCEEDINGS. YOUR HONOR KNOWS THAT WE OBJECT  
9     TO WHAT WE SEE AS SPECULATION ON THE PART OF THE PLAINTIFF'S  
10    WITNESSES ABOUT WHAT THEY WOULD HAVE ASKED FOR IN THE  
11    HYPOTHETICAL LICENSE NEGOTIATION. AGAIN, THAT'S A SUBJECT ON  
12    WHICH WE'VE MOVED, BUT WE DON'T WANT TO KEEP JUMPING UP AND  
13    OBJECTING EVERY TIME.

14           CAN WE HAVE A STANDING OBJECTION ON THAT? OTHERWISE,  
15    WE WILL HAVE TO. AND BY THAT SAME TOKEN, WE WILL BE ASKING SOME  
16    OF OUR WITNESSES SIMILAR QUESTIONS, AND WE WANT TO MAKE IT CLEAR  
17    WE'RE NOT WAIVING OUR OBJECTION. BUT IF THAT EVIDENCE IS  
18    ALLOWED IN, WE'LL RESPOND.

19           THE COURT: YOUR RESPONSE?

20           MR. HOWARD: YOUR HONOR, TAKES TWO SECONDS. WE  
21    DON'T -- IS IT TO EVERYTHING? IS THE STANDING OBJECTION TO  
22    EVERYTHING WE PUT IN? HOW DO WE KNOW WHAT IT'S TO?

23           MR. LANIER: SPECIFICALLY, THE STANDING OBJECTION  
24    WOULD BE TO THEIR -- WHAT WE CHARACTERIZE AS THEIR SPECULATION  
25    ABOUT WHAT THEY WOULD HAVE DEMANDED IN ANY HYPOTHETICAL LICENSE

1 NEGOTIATION.

2 MR. HOWARD: I DON'T KNOW WHAT THAT MEANS ON AN  
3 EXHIBIT-BY-EXHIBIT BASIS, YOUR HONOR.

4 THE COURT: I DON'T EITHER.

5 MR. LANIER: IT'S THE TESTIMONY, "I WOULD HAVE ASKED  
6 FOR X." FOR EXAMPLE, MR. PHILLIPS' TESTIMONY YESTERDAY WE  
7 OBJECTED TO, WHAT WOULD YOU HAVE ASKED FOR, AND HE GAVE HIS  
8 WELL-REPORTED LARGE AMOUNT.

9 MR. HOWARD: I THINK WE SHOULD TAKE IT ON A  
10 QUESTION-BY-QUESTION BASIS, YOUR HONOR.

11 THE COURT: YEAH, IT'S A LITTLE FUZZY IN TERMS OF  
12 WHAT YOU MEAN. YOU CAN, IN A VERY KIND OF UNOBTRUSIVE WAY,  
13 JUST, "WE OBJECT TO THIS LINE OF QUESTIONING." THAT WILL BE  
14 NOTED. WE WON'T NEED TO HAVE ANY FURTHER DISCUSSION ON IT.

15 MR. LANIER: THAT'S FINE, YOUR HONOR. WE'LL DO THAT,

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

18 THE CLERK: PLEASE BE SEATED. PLEASE STATE YOUR FULL  
19 NAME AND SPELL YOUR LAST NAME FOR THE RECORD. AND SPEAK CLEARLY  
20 INTO THE MICROPHONE.

21 THE WITNESS: RICHARD ALLISON. LAST NAME,  
22 A-L-L-I-S-O-N.

23 DIRECT EXAMINATION

24 BY MS. HOUSE:

25 Q. AND, MR. ALLISON, WHAT IS YOUR CURRENT POSITION AT ORACLE?

1 A. SENIOR VICE-PRESIDENT OF GLOBAL PRACTICES.

2 Q. HOW LONG HAVE YOU BEEN WORKING AT ORACLE?

3 A. SEVENTEEN YEARS LAST MONTH.

4 Q. OVER THE YEARS AT ORACLE, HAVE YOU HAD ANY RESPONSIBILITY  
5 FOR ORACLE'S CUSTOMER LICENSE TERMS?

6 A. I HAVE. ACTUALLY, WHEN I STARTED (SIC) THE COMPANY, I WAS  
7 ORIGINALLY DRAFTING THE CONTRACTS AND CURRENTLY MANAGE THE GROUP  
8 THAT CREATES ALL THE STANDARDS FOR OUR CONTRACTS.

9 Q. DO YOU HAVE ANY RESPONSIBILITY FOR APPROVING CUSTOMER  
10 EXCEPTIONS TO STANDARD TERMS?

11 A. I DO. ONE OF OUR TEAMS I MANAGE ALSO HANDLES EXCEPTIONS TO  
12 STANDARD AGREEMENTS, DISCOUNTS, NON-STANDARD TERMS THAT GO TO  
13 THE C.E.O.'S AND PRESIDENT'S OFFICE.

14 Q. AND HOW ABOUT PRICING? DO YOU HAVE ANY RESPONSIBILITY FOR  
15 THE PRICING OF ORACLE'S STANDARD LICENSES?

16 A. I DO. I HAVE A PRICING ORGANIZATION THAT PRICES ALL THE  
17 LINES OF BUSINESS OF SOFTWARE, CONSULTING, EDUCATION, SUPPORT,  
18 HOSTING, ET CETERA.

TEXT REMOVED - NOT RELEVANT TO MOTION

23 NOW, LET'S SET THE STAGE FOR THE TYPES OF LICENSES  
24 THAT ORACLE DOESN'T ROUTINELY GRANT. HAS ORACLE EVER PROVIDED A  
25 LICENSE ALLOWING A COMPETITOR TO CREATE A MASTER LIBRARY OF

1 ORACLE SOFTWARE IN ORDER TO PROVIDE TECHNICAL SUPPORT TO ORACLE  
2 CUSTOMERS?

3 A. NEVER.

4 Q. AND HAS ORACLE EVER LICENSED A THIRD-PARTY SUPPORT PROVIDER  
5 TO USE SOFTWARE FOR WHICH ONE CUSTOMER IS LICENSED TO CREATE  
6 TECHNICAL SUPPORT MATERIALS TO SUPPORT OTHER CUSTOMERS?

7 A. NO.

8 Q. HAS ORACLE EVER ALLOWED A COMPETITOR TO MAKE A COPY OF ONE  
9 CUSTOMER'S SOFTWARE TO CREATE A GENERIC ENVIRONMENT TO USE TO  
10 PROVIDE TECHNICAL SUPPORT TO OTHER CUSTOMERS?

11 A. NO, WE'VE NOT.

12 Q. HOW DO YOU KNOW THIS?

13 A. THAT WOULD BE A PRETTY LARGE EXCEPTION TO OUR STANDARD  
14 PRACTICES, AND THAT WOULD BE ESCALATED TO MY OFFICE TO REVIEW.  
15 SO IF IT WAS GOING TO HAPPEN, I'D SEE IT.

16 Q. WOULD GRANTING A COMPETITOR SUCH A LICENSE MAKE BUSINESS  
17 SENSE?

18 A. NO, NOT AT ALL.

19 MR. McDONELL: OBJECT TO THE LINE.

20 THE COURT: EXCUSE ME?

21 MR. McDONELL: OBJECTION TO THIS LINE OF QUESTIONING  
22 PER THE DISCUSSION EARLIER.

23 THE COURT: I DON'T THINK SO. OVERRULED.

24 THE WITNESS: CAN YOU REPEAT THE QUESTION?  
25

1 BY MS. HOUSE:

2 Q. WOULD GRANTING A COMPETITOR SUCH A LICENSE MAKE BUSINESS  
3 SENSE?

4 A. NO.

5 Q. WHY NOT?

6 A. IT DOESN'T MAKE SENSE TO PROVIDE A LICENSE TO A COMPETITOR  
7 TO TRY TO TAKE YOUR CUSTOMERS AWAY FROM YOU -- TO USE YOUR OWN  
8 IP TO TAKE YOUR CUSTOMERS.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

8 Q. CAN YOU TELL THE JURY WHAT THIS IS?

9 A. YES. THIS IS ORACLE'S LICENSE AND SERVICES AGREEMENT. THIS  
10 IS WHAT WE USE TO LICENSE OUR SOFTWARE TO AN INDIVIDUAL  
11 CUSTOMER.

12 Q. AND CAN YOU TELL THE DATE OF THIS VERSION?

13 A. YES. IF YOU LOOK AT THE LOWER LEFT-HAND SIDE HAS A VERSION.  
14 THAT'S 12/23/04. THAT'D BE THE DATE OF THE AGREEMENT, THAT  
15 VERSION OF THE AGREEMENT.

16 Q. SO THIS VERSION WOULD BE IN PLACE AT THE TIME OF  
17 JANUARY 19TH, 2005, WHEN SAP HAD ACQUIRED TOMORROWNOW; IS THAT  
18 RIGHT?

19 A. CORRECT.

20 Q. IS THERE ANYTHING SPECIFICALLY IN THE LANGUAGE HERE THAT YOU  
21 THINK IS RELEVANT TO WHETHER OR NOT A SINGLE LICENSE TO  
22 TOMORROWNOW TO DO WHAT IT DID IS -- IS AVAILABLE UNDER THE  
23 STANDARD TERMS?

24 A. YES. IF YOU LOOK AT THE "RIGHTS GRANTED" SECTION, SECTION  
25 C, THE HIGHLIGHTED LANGUAGE, "UPON OUR ACCEPTANCE OF THE ORDER,

1 YOU HAVE THE LIMITED USE, RIGHT TO --"

2 Q. SLOW DOWN.

3 A. "-- LIMITED RIGHT TO USE THE PROGRAMS AND RECEIVE ANY  
4 SERVICES ORDERED SOLELY FOR YOUR INTERNAL BUSINESS OPERATIONS."

5 Q. AND COULD YOU GIVE SOME REAL-WORLD EXAMPLES OF WHAT'S  
6 ALLOWED INTERNAL USE?

7 A. SURE. AN EXAMPLE WOULD BE A CUSTOMER'S ACCOUNTING SYSTEM.  
8 SO YOU RUN GENERAL LEDGER, PAYABLES, AND UNDER THAT APPLICATION,  
9 YOU'LL HAVE A DATABASE THAT STORES THE INFORMATION. SO IF A  
10 CUSTOMER'S RUNNING THEIR ACCOUNTING SYSTEM, THAT'D BE THEIR  
11 INTERNAL USE AND FOR THEIR BENEFIT.

12 Q. WHY DOES ORACLE HAVE THIS RESTRICTION OF UNUSE (SIC) BEYOND  
13 THE COMPANY'S INTERNAL OPERATIONS?

14 A. WELL, THAT'S HOW WE VALUE AND PRICE OUR SOFTWARE. IT'S  
15 BASED ON A LICENSE TO AN INDIVIDUAL CUSTOMER AND A LICENSE TO  
16 THEM FOR THEIR INTERNAL USE.

17 IF THEY'RE GOING TO BE ABLE TO USE IT TO PROVIDE  
18 SERVICES OR BENEFIT TO ANOTHER THIRD PARTY, AGAIN, THAT WOULD  
19 TAKE AWAY OUR ABILITY TO BE ABLE TO SELL SOFTWARE TO THOSE OTHER  
20 THIRD PARTIES.

21 Q. NOW, IS RESTRICTING AN END-USER TO ONLY INTERNAL USE, IS  
22 THAT AN UNUSUAL PROVISION IN YOUR EXPERIENCE?

23 A. NO, NOT AT ALL. WE'VE BEEN THROUGH MANY ACQUISITIONS IN THE  
24 LAST FIVE, SIX YEARS, AND THEY'RE SOFTWARE COMPANIES LIKE  
25 OURSELVES. AND I GET THE OPPORTUNITY TO REVIEW THEIR MASTER

1 AGREEMENTS AS WE START TO INTEGRATE THEM INTO OUR COMPANY, AND  
2 ALL OF THEM HAVE INTERNAL-USE RESTRICTIONS IN THEIR AGREEMENT.  
3 SO IT'S REALLY AN INDUSTRY STANDARD THAT ALL SOFTWARE COMPANIES  
4 USE.

5 Q. THANK YOU.

6 NOW, CAN YOU EXPLAIN TO THE JURY HOW USING ORACLE'S  
7 DATABASE TO PROVIDE EXTERNAL SUPPORT TO ITS CUSTOMERS GAVE  
8 TOMORROWNOW DIFFERENT BENEFITS FROM THE KIND OF TYPICAL BENEFITS  
9 OF THE SINGLE END-USER OF YOUR STANDARD LICENSE?

10 A. SURE. TYPICAL END-USER, AGAIN, GETS THE BENEFIT FROM  
11 RUNNING THEIR OPERATIONS AND THEIR BUSINESS.

12 THIS GAVE TOMORROWNOW THE OPPORTUNITY TO KIND OF  
13 COMMODITIZE THE USE OF THAT DATABASE AND TO CHARGE PEOPLE FOR  
14 THE USE, BASICALLY, AND THE SERVICES THEY PROVIDE USING THAT  
15 SYSTEM, WHICH IS DIFFERENT THAN RUNNING YOUR OWN BUSINESS AND  
16 HAS GREATER VALUE.

17 Q. SO IF A SINGLE DATABASE LICENSE DOESN'T COVER TOMORROWNOW'S  
18 USE OF ORACLE'S DATABASE TO SUPPORT MULTIPLE CUSTOMERS, WHAT DO  
19 YOU BELIEVE IS THE APPROPRIATE LICENSING APPROACH?

20 A. WELL, AGAIN --

21 MR. McDONELL: SAME OBJECTION, YOUR HONOR.

22 THE COURT: ALL RIGHT. SAME RULING.

23 THE WITNESS: I THINK THE BENEFIT IS, AGAIN, TO THE  
24 INDIVIDUAL CUSTOMERS WHO ARE RECEIVING THE VALUE OF THE  
25 SERVICES. AND SO, AGAIN, I THINK A LICENSE FOR EACH OF THE

1 CUSTOMERS THAT RECEIVE THE BENEFIT --

2 THE COURT: SLOW DOWN.

3 THE WITNESS: SURE.

4 BY MS. HOUSE:

5 Q. TRY AGAIN.

6 A. I THINK THE PROPER WAY TO LICENSE A SOFTWARE BE BASED ON THE  
7 VALUE, WHO'S RECEIVING VALUE FOR IT, AND THAT WOULD BE THE  
8 PEOPLE THEY'RE PROVIDING SERVICES TO. SO IT WOULD BE EACH OF  
9 THE INDIVIDUAL CUSTOMERS THAT ARE RECEIVING THE BENEFIT OF THAT  
10 SERVICE.

11 Q. OKAY. NOW, LET'S TALK ABOUT THE PRICING FOR THESE  
12 INDIVIDUAL DATABASE LICENSES. ASSUMING THE FAIR APPROACH IS TO  
13 CHARGE TOMORROWNOW A DATABASE LICENSE FOR EVERY CUSTOMER IT  
14 SUPPORTED USING THE ORACLE DATABASE SOFTWARE IT INFRINGED THAT'S  
15 ON ITS SERVERS, WHAT WOULD YOU USE TO DETERMINE THE PRICE?

16 MR. McDONELL: SAME, YOUR HONOR.

17 THE COURT: ALL RIGHT. SAME RULING.

18 GO AHEAD.

19 THE WITNESS: WE HAVE A PUBLICLY AVAILABLE PRICE LIST  
20 FOR OUR DATABASE, AND SO WE'D USE THAT TO DETERMINE THE PRICING.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

4 Q. WE ALSO KNOW FROM INFORMATION THAT WAS PROVIDED BY  
5 DEFENDANTS WHAT SERVERS -- YOU KNOW, THE COMPUTERS -- WHAT  
6 COMPUTERS, THE SERVERS -- NOT THE ONE ON THE DESKTOP, BUT THE  
7 ACTUAL SERVERS -- WHAT SERVERS THE SOFTWARE WAS ON, THE ORACLE  
8 DATABASE SOFTWARE.

9 HOW IS THAT SERVER INFORMATION RELEVANT TO PRICING?

10 A. WELL, OUR PRICING IS BASED ON PROCESSORS WHICH ARE WITHIN  
11 THE SERVER, AND SO IT'S RELEVANT HOW LARGE THE SERVER IS, HOW  
12 MANY PROCESSORS IT IS THAT'S NEEDED TO RUN THEIR SYSTEM. SO WE  
13 USE THAT TO PRICE OUT THE SOFTWARE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

20 Q. NOW, A SINGLE DATABASE SOFTWARE INSTANCE CAN BE USED TO  
21 CREATE MANY DIFFERENT DATABASES; IS THAT RIGHT?

22 A. CORRECT. IT'S -- AGAIN, OUR -- OUR PRICING IS BASED ON THE  
23 SIZE OF THE SERVER, NOT THE NUMBER OF DATABASES ON THAT SERVER.

24 Q. RIGHT.

25 AND YOU MADE SOME ASSUMPTIONS ABOUT THE SIZE OF THE

1 SERVERS THAT TOMORROWNOW WAS USING IN THIS CASE; IS THAT RIGHT?

2 A. YEAH, I BELIEVE IT WASN'T AN ASSUMPTION. I BELIEVE THAT  
3 THEY PROVIDED THE SERVER INFORMATION WHERE THEY WERE ACTUALLY  
4 RUNNING THE SOFTWARE, AND THEY USED AVERAGE CONFIGURATION THAT  
5 WAS USED WITHIN THAT ENVIRONMENT.

6 Q. AND WHEN YOU SAY THEY USED AN AVERAGE CONFIGURATION, YOU'RE  
7 REFERRING TO YOU USED AN AVERAGE CONFIGURATION; ISN'T THAT  
8 RIGHT?

9 A. ALONG WITH THE EXPERT, I THINK WE LOOKED AT THE  
10 CONFIGURATION, 'CAUSE THERE WERE MULTIPLE SERVERS WHERE THE  
11 SOFTWARE WAS INSTALLED, DIFFERENT SIZES, AND IT LOOKED AT THE  
12 AVERAGE CONFIGURATION. DIDN'T TAKE THE LARGEST CONFIGURATION,  
13 DIDN'T TAKE THE SMALLEST, LOOKED AT THE AVERAGE.

14 Q. AND THERE WERE SOME SMALLER CONFIGURATIONS THAT YOU DIDN'T  
15 USE BECAUSE YOU BAKED THAT INTO THE AVERAGE, RIGHT?

16 A. CORRECT.

17 Q. NOW, WHAT YOU THEN DID IS YOU MADE THE ASSUMPTION THAT  
18 ORACLE WOULD LIKE TO CHARGE FOR THIS LICENSE ON A PER-CUSTOMER  
19 BASIS; IS THAT RIGHT?

20 A. CORRECT.

21 Q. AND WHAT YOU DID THERE IS YOU ASSUMED THAT TOMORROWNOW WAS  
22 GOING TO BE USING DATABASE SOFTWARE AND IT WAS GOING TO HAVE A  
23 NUMBER OF CUSTOMERS -- SO EVEN THOUGH TOMORROWNOW COULD -- COULD  
24 DO ALL OF THIS WORK ON A SINGLE DATABASE SOFTWARE INSTANCE, YOU  
25 WERE GOING TO CHARGE THEM MULTIPLE TIMES DEPENDING ON THE NUMBER

1 OF CUSTOMERS THAT THEY SERVICED, RIGHT?

2 A. CORRECT. THE AGREEMENT ONLY ALLOWS FOR INTERNAL USE AND SO

3 WE WANTED TO COUNT THE INTERNAL USE OF EACH PERSON THAT WAS

4 BENEFITING FROM THE SOFTWARE, SO WE COUNTED EACH CUSTOMER.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

5 Q. OKAY. AND THEN WHEN YOU MET WITH HIM, DID YOU TELL HIM THAT  
6 THERE WAS NO STANDARD LICENSE THAT ORACLE HAD AVAILABLE THAT  
7 TOMORROWNOW COULD HAVE USED?

8 A. YES. AGAIN, OUR AGREEMENT DOESN'T ALLOW FOR THIS TYPE OF  
9 USE, AND SO THERE -- WE DON'T HAVE AN EXAMPLE WHERE WE'VE  
10 LICENSED OUR IP TO A COMPETITOR TO PROVIDE SERVICES TO COMPETE  
11 WITH US.

12 Q. AND ONE OF THE REASONS YOU PRICED THIS THE WAY YOU SAY YOU  
13 WOULD HAVE PRICED IT IS BECAUSE IT WAS BEING LICENSED TO A  
14 COMPETITOR, RIGHT?

15 A. NO, BECAUSE IT'S -- IT'S SOFTWARE THAT'S BEING USED TO  
16 PROVIDE THE BENEFIT OF THE SERVICES TO MULTIPLE END-USERS, AND  
17 SO, AGAIN, IN MY EXAMPLE OF AN OUTSOURCER, WE CHARGE THEM FOR  
18 MULTIPLE CUSTOMER USES BECAUSE THEY'RE PROVIDING SERVICES TO  
19 MULTIPLE CUSTOMERS.

20 IT'S NOT SOLELY BECAUSE IT'S A COMPETITOR. UNIQUE --  
21 ABOUT A COMPETITOR IN THIS CASE IS, AGAIN, USING THE IP WHICH WE  
22 SPENT THE TIME AND THE MONEY TO DEVELOP TO THEN COMPETE WITH US  
23 FOR A CHEAPER SERVICE THAT REALLY COULDN'T BE DONE WITHOUT  
24 ACTUALLY INVESTING IN ALL THAT DEVELOPMENT WORK.

25 Q. SO MY QUESTION, MR. ALLISON, IS WHEN YOU MET WITH MR. MEYER,

## CROSS EXAMINATION OF RICHARD ALLISON

1 YOU TOLD HIM THAT THIS WAS A UNIQUE SITUATION; ISN'T THAT RIGHT?

2 A. YES, I DID.

3 Q. OKAY. AND YOU -- YOU KNOW HE'S GIVEN A DEPOSITION IN THIS  
4 CASE. ARE YOU AWARE OF THAT?

5 A. I AM.

6 Q. AND, YOU KNOW, HE -- HE NEVER GOT FROM YOU ANY REAL-WORLD  
7 TRANSACTION WHERE YOU GAVE HIM A LICENSE THAT WAS ACTUALLY  
8 SIGNED BY A CUSTOMER AND PAID FOR BY A CUSTOMER THAT YOU SAID  
9 WAS A COMPARABLE TRANSACTION FOR THIS PURPOSE; IS THAT RIGHT?

10 A. AGAIN, IT DOESN'T EXIST OTHER THAN THE EXAMPLE I MENTIONED  
11 OF OUTSOURCERS OR PEOPLE PROVIDING SERVICES FOR MULTIPLE  
12 CUSTOMERS.

13 Q. NOW, COUPLE OTHER THINGS REAL QUICKLY. YOU DO HAVE  
14 STANDARD-PRICED PRODUCTS; IS THAT RIGHT?

15 A. YES, WE DO.

16 Q. FOR EXAMPLE, THE STANDARD ENTERPRISE EDITION PRODUCT IS  
17 SOMETHING ORACLE SELLS ON ITS PRICE LIST; ISN'T THAT RIGHT?

18 A. CORRECT.

19 Q. AND YOU ALSO SELL THE STANDARD EDITION ALSO ON YOUR PRICE  
20 LIST; IS THAT RIGHT?

21 A. WE DO.

22 Q. AND THE ENTERPRISE EDITION WAS 40,000 PER LICENSE BACK IN  
23 THE TIME FRAME WE'RE TALKING ABOUT, CORRECT?

24 A. AT THAT TIME, IT WAS, YES.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

2 Q. SO IT'S A -- IT'S YOUR UNDERSTANDING THAT MR. MEYER, IN  
3 CONJUNCTION WITH YOU, IS -- IS SAYING THAT ON THE DAY WE'RE  
4 TALKING ABOUT HERE, WHICH IS, WHAT, 2005, WHEN YOU WERE LOOKING  
5 AT TOMORROWNOW -- IS THAT THE TIME FRAME?

6 A. CORRECT.

7 Q. THAT TOMORROWNOW ON THAT DATE WOULD HAVE TO HAVE BOUGHT A  
8 LICENSE FOR \$55 MILLION JUST TO HAVE A DATABASE SOFTWARE SO IT  
9 COULD DO ITS WORK, RIGHT?

10 A. WELL, THE INTERESTING PART OF ABOUT IT IS I WOULDN'T HAVE  
11 GIVEN THEM A LICENSE TO DO WHAT THEY'RE (SIC) DOING, SO THESE  
12 ARE ALL HYPOTHETICALS. AND IF I WAS TO GIVE THEM ONE, I WOULD  
13 CHARGE THEM ONE FOR EACH INSTANCE OF THE DATABASE FOR EACH  
14 CUSTOMER THEY WERE GOING TO SUPPORT, WHICH WOULD HAVE RESULTED  
15 IN THE \$55 MILLION WE'RE TALKING ABOUT, YES.

16 Q. \$55 MILLION.

17 AND YOU'RE AWARE THAT AT THAT TIME, TOMORROWNOW HAD  
18 JUST BEEN SOLD FOR A TOTAL OF \$10 MILLION.

19 A. ABSOLUTELY. AND THIS IS THE INTERESTING PART ABOUT IT, AND  
20 THIS IS -- YOU KNOW, SOMETIMES THINGS ARE TOO GOOD TO BE TRUE,  
21 AND THIS IS ABSOLUTELY A CASE OF THAT. YOU CAN'T PROVIDE THIS  
22 SERVICE WITHOUT HAVE -- SPENDING THE TIME AND MONEY TO INVEST  
23 AND DEVELOP THE PRODUCTS. AND SO HANDING OVER OUR IP, WHICH IS,  
24 FRANKLY, THE VALUE OF OUR ENTIRE COMPANY -- IN A SOFTWARE  
25 COMPANY, IT'S AN INTANGIBLE THING; IT'S OUR SOFTWARE; IT'S OUR

## CROSS EXAMINATION OF RICHARD ALLISON

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1 INTELLECTUAL PROPERTY -- HAS A VALUE OF BILLIONS OF DOLLARS.

2 SO \$50 MILLION TO BE ABLE TO SERVICE OR ACTUALLY TRY  
3 TO REPLACE OUR CUSTOMER BASE DOESN'T SEEM ANYTHING OTHER THAN  
4 REASONABLE.

5 Q. BUT LET ME GO BACK TO MY QUESTION. ARE YOU AWARE THAT WHAT  
6 YOU WERE SAYING AT THE TIME WAS THAT TOMORROWNOW WOULD HAVE TO  
7 HAVE BOUGHT A LICENSE FOR \$55 MILLION?

8 A. I DO IF I WAS GOING TO AGREE TO GIVE THEM A LICENSE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

2 Q. AND THAT'S WHAT YOU CHARGE THE LICENSE FOR.

3 A. THE HYPOTHETICAL LICENSE THAT I WOULDN'T HAVE GIVEN, YES.

4 Q. HYPOTHETICAL, WE ALL UNDERSTAND THAT IT NEVER WOULD HAVE  
5 BEEN GIVEN. AND WHAT YOU'RE TALKING ABOUT HERE IS WHAT YOU  
6 WOULD HAVE CHARGED HAD THERE BEEN AN AGREEMENT, RIGHT?

7 A. FOR ACCESS TO OUR INTELLECTUAL PROPERTY, YES.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

9                   IN JANUARY OF 2005, IF YOU HAD KNOWN THAT THE RESULT  
10 OF WHAT YOU WERE GOING TO BE DOING WAS GOING TO BE TOMORROWNOW  
11 AND SAP BEING FOUND LIABLE FOR COPYRIGHT INFRINGEMENT, YOU  
12 WOULD HAVE WANTED TO AVOID THAT BY BUYING A LICENSE, CORRECT,  
13 SIR?

14 A.    YOU SAID THROUGH A LICENSE?

15 Q.    YES.

16 A.    I UNDERSTOOD THE QUESTION.

17                   THE ANSWER IS NO BECAUSE IN THAT CASE WE EITHER  
18 WOULD HAVE CONSIDERED NOT TO BUY TOMORROWNOW OR WE WOULD HAVE  
19 INSISTED THAT TOMORROWNOW CHANGE THEIR OPERATING PROCEDURE IN  
20 ORDER NOT TO VIOLATE ANY COPYRIGHT INFRINGEMENT --

21                   THE INTERPRETER:   ANY COPYRIGHT.   SORRY.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

25 Q. IS IT FAIR TO SAY THAT YOU REMEMBER SOMETIME IN JANUARY OR

1 FEBRUARY OF 2005 SAP BOARD MEMBERS STATING CLEARLY THAT THE  
2 BUSINESS OPERATIONS AND PROCEDURES OF TOMORROWNOW HAD TO  
3 CHANGE, BUT YOU CAN'T REMEMBER WHETHER THAT WAS AT A BOARD  
4 MEETING OR IN DISCUSSIONS OUTSIDE OF BOARD MEETINGS OR PERHAPS  
5 BOTH.

6 IS THAT FAIR?

7 A. THIS IS CORRECT BECAUSE IF THEN RISK IS IDENTIFIED,  
8 EVERYTHING POSSIBLE IS DONE TO MITIGATE THE RISK.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

24 Q. NOW, YOU DON'T KNOW WHETHER ANYBODY EVER TOLD TOMORROWNOW  
25 TO TAKE ORACLE SOFTWARE OFF OF ITS COMPUTERS. FAIR?

1 A. THIS IS NOT CORRECT. I KNOW THAT THIS COMMUNICATION TOOK  
2 PLACE, HOWEVER, I DON'T KNOW WHO IT WAS.

3 Q. WHEN YOU SAY "THIS COMMUNICATION", YOU MEAN A  
4 COMMUNICATION TELLING TOMORROWNOW TO STOP INFRINGING ORACLE'S  
5 COPYRIGHTS? IS THAT WHAT YOU MEAN?

6 A. I USE THE WORD "COMMUNICATION" AS YOU HAD MENTIONED IT IN  
7 YOUR QUESTION.

8 Q. WITHOUT STOPPING RIGHT AT THE MOMENT TO PARSE THE WORD  
9 "COMMUNICATION", IS IT YOUR TESTIMONY THAT AT SOME POINT SAP  
10 COMMUNICATED TO TOMORROWNOW TO STOP INFRINGING ORACLE'S  
11 COPYRIGHTS?

12 A. THAT IS MY UNDERSTANDING. MY UNDERSTANDING IS THAT THIS  
13 WAS A PIECE OF INFORMATION GIVEN TO THE MANAGEMENT OF  
14 TOMORROWNOW, THAT THE OPERATING PROCEDURES HAVE TO BE CHANGED.

15 Q. I WANT TO JUST BE CLEAR. WHEN DO YOU THINK THAT THIS  
16 COMMUNICATION TOOK PLACE?

17 A. IN, AS FAR AS I REMEMBER, AT THE END OF THE FIRST QUARTER  
18 2005.

19 Q. END OF THE FIRST QUARTER OF 2005.

20 DOES THAT MEAN THAT AFTER THE FIRST QUARTER OF 2005,  
21 YOU ASSUMED THAT ORACLE SOFTWARE WAS NOT BEING USED ON  
22 TOMORROWNOW COMPUTERS?

23 A. YES, THAT WAS MY ASSUMPTION.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

7                   NOW, IN MID-2007, WHEN AFTER THE LAWSUIT WAS FILED  
8   AND AFTER YOU HAD COMPLETED YOUR INVESTIGATION AND AFTER YOU  
9   HAD FOUND OUT THAT TOMORROWNOW HAD CONTINUED TO INFRINGE  
10   ORACLE'S COPYRIGHTS, WHAT DID SAP DO TO MAKE SURE THAT THAT  
11   STOPPED IMMEDIATELY?

12   A.   FIRST OF ALL, WE TRANSFERRED THE MANAGEMENT OF TOMORROWNOW  
13   TO MARK WHITE WITH A CLEAR TASK TO IMMEDIATELY APPLY THE NEW  
14   OPERATING PROCEDURES.

15   Q.   AND THE NEW OPERATING PROCEDURES, YOU KEEP REFERRING TO  
16   OPERATING PROCEDURES.  WHAT WE ARE TALKING ABOUT HERE IS  
17   WHETHER TOMORROWNOW IS INFRINGING ORACLE'S COPYRIGHTS, CORRECT,  
18   SIR?

19   A.   THAT'S CORRECT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

3 Q. MR. BRANDT, THE SAP BOARD WAS INFORMED THAT THERE WAS  
4 SUBSTANTIAL LEGAL ISSUES WITH RESPECT TO TOMORROWNOW'S SERVICE  
5 DELIVERY PROCESSES, CORRECT?

6 A. AT WHAT TIME?

7 Q. IN JANUARY OF 2005 WHEN YOU DECIDED TO GO FORWARD.

8 A. TO ACQUIRE THE COMPANY?

9 Q. YES.

10 A. OKAY.

11 WE KNEW THAT A RISK EXISTED AND UNDERTOOK THE  
12 NECESSARY STEPS TO MITIGATE THE RISK.

13 Q. WELL, SIR, YOU SAY YOU TOOK THE NECESSARY STEPS. WE HAVE  
14 TALKED ABOUT THAT. BUT YOU KNEW THAT THERE WAS A SERIOUS LEGAL  
15 ISSUE GOING FORWARD AND YOU DECIDED TO ACQUIRE THE COMPANY  
16 ANYWAY, CORRECT?

17 A. WITH ALL DUE RESPECT, WE DID SEE THE LEGAL ISSUES  
18 INVOLVED. AND AT THE TIME OF THE DECISION OF THE ACQUISITION,  
19 AT THE TIME OF THE DECISION-MAKING, WE WERE READY TO ACCEPT THE  
20 RISK, HOWEVER, WITH THE DETERMINATION TO MITIGATE THE RISK.

21 Q. WELL, SIR, LET ME JUST ASK YOU TO LOOK AT TWO THINGS.

22 FIRST, EXHIBIT 19, WHICH IS THE BUSINESS CASE.

23 A. IS IT IN MY BINDER?

24 Q. TAB 4.

25 A. (ENGLISH) 19?

1 Q. IT IS EXHIBIT 19, BUT IT IS BEHIND TAB 4.

2 A. YES.

3 Q. AND THIS IS A DOCUMENT THAT YOU RECEIVED AROUND  
4 JANUARY 7TH OF 2005, CORRECT, SIR?

5 A. YES.

6 Q. AND IF WE GO TO THE NUMBERED PAGE 6, UNDER THREATS?

7 A. (ENGLISH) YES.

8 Q. THE FIRST THREAT IS:

9 "THE ACCESS RIGHTS TO THE PEOPLESOFT SOFTWARE IS  
10 VERY LIKELY TO BE CHALLENGED BY ORACLE AND PAST  
11 OPERATING ISSUES MAY BE A SERIOUS LIABILITY IF  
12 ORACLE CHALLENGES."

13 DO YOU SEE THAT?

14 A. (ENGLISH) YES.

15 Q. THAT IS WHAT YOU WERE TOLD AT THE TIME, CORRECT?

16 A. CORRECT.

17 Q. AND YOU BELIEVED THAT AT THE TIME, CORRECT?

18 A. YES.

19 Q. AND LET ME SHOW YOU YOUR DEPOSITION. AT PAGE 2000 -- 202,  
20 AND AT LINE, STARTING AT LINE 19 AND GOING TO LINE 6 ON THE  
21 NEXT PAGE.

22 DO YOU HAVE THAT?

23 A. (ENGLISH) WHERE IS THIS IN MY BINDER?

24 (WITNESS THROUGH INTERPRETER) WHERE IS IT IN MY  
25 BINDER?

1 Q. BEHIND THE TAB THAT SAYS "TRANSCRIPT".

2 A. (ENGLISH) YES.

3 Q. AND YOU SEE WHERE WE SAY THAT --

4 A. ON WHAT PAGE?

5 Q. PAGE 202, LINE 19. LET ME KNOW WHEN YOU HAVE IT.

6 (PAUSE IN THE PROCEEDINGS.)

7 A. ALL RIGHT.

8 Q. (READING)

9 "QUESTION: IN THE END, SAP WENT FORWARD WITH  
10 THE TOMORROWNOW ACQUISITION UNDERSTANDING THAT  
11 THERE WERE IN FACT POTENTIAL LEGAL ISSUES  
12 CONNECTED WITH TOMORROWNOW'S SERVICE DELIVERY  
13 PROCESS?"

14 AND YOUR ANSWER IS: "COULD BE, NOT WERE."

15 "QUESTION: MOVING FORWARD WITH THE  
16 UNDERSTANDING THAT THERE COULD BE SUBSTANTIAL  
17 LEGAL ISSUES WITH TOMORROWNOW'S SERVICE DELIVERY  
18 PROCESSES, CORRECT?

19 "ANSWER: YES."

20 AND YOU GAVE THAT TESTIMONY?

21 A. (ENGLISH) YEAH.

22 Q. AND THE SOLUTION WAS TO LEAVE THE TEXAS CORPORATION IN  
23 EXISTENCE AS A LIABILITY SHIELD, CORRECT?

24 A. NO, THAT WAS NOT THE SOLUTION.

25 Q. LET ME ASK YOU TO LOOK AT EXHIBIT 266. THAT IS BEHIND

1 TAB 17.

2 A. (ENGLISH) TAB 17?

3 Q. TAB 17.

4 (EXHIBIT DISPLAYED ON SCREEN.)

5 AND THIS IS A PRESENTATION TO A MEETING IN 2005 OF  
6 THE FINANCE AND INVESTMENT COMMITTEE, CORRECT, SIR?

7 (PLAINTIFFS' EXHIBIT 266 RECEIVED IN  
8 EVIDENCE)

9 THE WITNESS: YES.

10 BY MR. BOIES:

11 Q. AND YOU ATTENDED THIS MEETING, DID YOU NOT, SIR?

12 A. YES.

13 Q. AND IF YOU TURN TO THE FOURTH PAGE.

14 (EXHIBIT DISPLAYED ON SCREEN.)

15 WHERE IT IS LISTING THE ACQUISITIONS IN 2005?

16 A. YES, I SEE THE LIST.

17 Q. AND YOU SEE THE LIST FOR TOMORROWNOW?

18 MR. BOIES: MAYBE WE CAN BLOW THAT UP.

19 BY MR. BOIES:

20 Q. THIS IS A LIST OF THE EMPLOYEES AT TOMORROWNOW, CORRECT?

21 A. I SEE THE LINE TOMORROWNOW.

22 Q. AND IT SAYS THAT TOMORROWNOW HAS 30 EMPLOYEES. DO YOU SEE  
23 THAT?

24 A. I SEE IT.

25 Q. AND YOU KNEW THAT TOMORROWNOW WAS PROVIDING FIXES AND

1 PATCHES FOR PEOPLESOFT SOFTWARE, CORRECT?

2 A. YES.

3 Q. AND YOU KNEW THAT THAT COULDN'T HAPPEN WITHOUT PEOPLE  
4 DOING RESEARCH AND DEVELOPMENT WORK, CORRECT, SIR?

5 A. I DID NOT KNOW THAT.

6 Q. YOU DID NOT KNOW THAT?

7 A. (ENGLISH) NO.

8 Q. FIRST YOU HAD NO RESEARCH AND DEVELOPMENT PEOPLE, RIGHT?

9 A. THAT IS CORRECT, BUT THEY HAVE SERVICE EMPLOYEES.

10 Q. AND DID YOU THINK THE SERVICE EMPLOYEES WERE THE PEOPLE  
11 WHO WERE DOING THE SOFTWARE DEVELOPMENT, SIR? IS THAT YOUR  
12 TESTIMONY?

13 A. NO, THAT IS NOT WHAT I THOUGHT.

14 Q. OKAY. I DIDN'T THINK SO.

15 YOU KNOW THAT THE KIND OF WORK THAT'S REQUIRED TO  
16 PREPARE THE KIND OF SOFTWARE THAT YOU NEED TO DO MAINTENANCE  
17 AND SUPPORT WORK IS THE KIND OF WORK THAT REQUIRES SOME  
18 RESEARCH AND DEVELOPMENT PEOPLE, CORRECT?

19 A. I AM NOT AN EXPERT IN THE FIELD, HOWEVER, I BELIEVE IT IS  
20 POSSIBLE THAT THIS CAN ALSO BE DONE BY THE SERVICE EMPLOYEES.

21 Q. DID YOU EVER INQUIRE OF ANYBODY AS TO HOW IN THE WORLD  
22 PEOPLESOFT SUPPORT WAS BEING PREPARED AND PATCHES AND FIXES FOR  
23 COMPLICATED SOFTWARE WAS BEING PREPARED WITHOUT ANY R&D  
24 EMPLOYEES? DID YOU EVER ASK ANYBODY THAT, SIR?

25 A. NO.

1 Q. THERE CAME A POINT WHEN ORACLE ACQUIRED SIEBEL, CORRECT?

2 A. YES.

3 Q. AND SAP THEN AUTHORIZED TOMORROWNOW TO SERVICE SIEBEL  
4 APPLICATIONS, CORRECT?

5 A. THAT'S CORRECT.

6 Q. AND AT THAT TIME, TOMORROWNOW DIDN'T HAVE ANY PEOPLE AT  
7 ALL WHO HAD ANY EXPERIENCE WITH SIEBEL SOFTWARE, CORRECT?

8 A. THIS MAY BE TRUE.

9 Q. AND DID YOU HAVE ANY UNDERSTANDING AT ALL AS TO HOW  
10 TOMORROWNOW COULD SUPPORT SIEBEL CUSTOMERS INSTALLATIONS  
11 WITHOUT ANY PEOPLE WHO WERE EXPERT IN SIEBEL SOFTWARE WITHOUT  
12 SIMPLY INFRINGING THE COPYRIGHTS?

13 A. AT THAT TIME I WAS UNDER THE ASSUMPTION THAT THE OPERATION  
14 PROCEDURES HAD BEEN IMPLEMENTED AT TOMORROWNOW AND THAT WOULD  
15 HAVE MEANT THAT IT WOULD HAVE BEEN NECESSARY TO EMPLOY PEOPLE  
16 WHO HAD SIEBEL EXPERTISE.

17 Q. WERE ANY OF THOSE PEOPLE EVER EMPLOYED, SIR?

18 A. I DON'T KNOW.

19 Q. DID YOU EVER CHECK?

20 A. NO.

21 Q. DO YOU KNOW IF ANYONE ELSE FROM SAP EVER CHECKED?

22 A. I COULD NOT ANSWER THAT QUESTION. I DON'T KNOW.

23 Q. IT WOULD HAVE BEEN VERY EASY TO CHECK, WOULD IT NOT? YOU  
24 SIMPLY WOULD HAVE HAD TO CALL UP YOUR WHOLLY-OWNED SUBSIDIARY  
25 AND ASK THEM, CORRECT?

## DIRECT EXAMINATION OF WERNER BRANDT

Page 722

1 A. IT'S NOT THE TASK OF THE CFO TO MAKE THAT PHONE CALL.

2 Q. BUT IS IT THE TASK OF A MEMBER OF THE BOARD TO BE SURE  
3 SOMEBODY MAKES THE PHONE CALL?

4 A. I AGREE WITH THAT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

- 2 Q. AND YOU ARE NOT AWARE OF ANYONE AT SAP EVER TRYING TO  
3 LICENSE THE BASIC SOFTWARE OF A COMPETITOR TO USE TO COMPETE  
4 WITH THAT COMPETITOR FOR MAINTENANCE AND SUPPORT OF THAT  
5 COMPETITOR'S INSTALLATIONS, ARE YOU, SIR?  
6 A. THAT'S CORRECT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

23                   SECONDLY, MR. BRANDT JUST TODAY OPENED UP A BRAND  
24   NEW ISSUE FOR US.   THEY SAID IN THEIR OPENING "WE TOOK  
25   RESPONSIBILITY".   THEY STIPULATED TO INFRINGEMENT WHICH IS

1 SUPPOSED TO BE KNOWING OR HAD REASON TO KNOW INFRINGEMENT. AND  
2 NOW MR. BRANDT SAYS, WELL, I ASSUMED THAT WE TOLD THEM. I  
3 DIDN'T KNOW -- SAP DIDN'T KNOW ANYTHING.

4 HE HAS PUT IN ALL THIS OTHER EVIDENCE NOW THAT GOES  
5 TO WHETHER OR NOT SAP KNEW OR HAD REASON TO KNOW. SO, WE HAVE  
6 TO CLEAR UP THAT CONFUSION.

7 THE COURT: HE'S JUST ONE WITNESS, COUNSEL. HE'S  
8 ONE WITNESS. HE WAS THE CHIEF FINANCIAL OFFICER. AS LONG AS  
9 THE BOARD MEMBERS WHO ARE THE ONES WHO ARE CHARGED WITH THE  
10 KNOWLEDGE AND THE RESPONSIBILITY, NOT THE CFO, AS LONG AS THERE  
11 IS TESTIMONY, AND I DON'T BELIEVE THERE'S BEEN ANY TESTIMONY  
12 FROM ANY BOARD MEMBERS THAT THEY DIDN'T KNOW.

13 MR. PICKETT: HE IS A BOARD MEMBER, YOUR HONOR. HE  
14 WAS ON THE EXECUTIVE BOARD.

15 THE COURT: OF --

16 MR. PICKETT: OF SAP.

17 THE COURT: SAP, RIGHT?

18 MR. PICKETT: SAP AG.

19 MR. LANIER: SAP AG IS A GERMAN COMPANY. IT  
20 ACTUALLY HAS A DIFFERENT STRUCTURE THAN AN AMERICAN COMPANY.

21 THE IMPORTANT POINT IS THIS: FOR CONTRIBUTORY  
22 LIABILITY IT IS KNOWN OR SHOULD HAVE KNOWN. MR. BRANDT --

23 THE COURT: HAD REASON TO KNOW, I THINK IS THE  
24 STANDARD.

25 MR. LANIER: YES. MR. BRANDT IN NO WAY ATTEMPTED TO

1 RETRACT THAT STIPULATION OR ANYTHING ELSE. HE WAS BEING  
2 EXAMINED BY -- ON LEGAL TERMS. HE WAS IN NO WAY CHANGING THAT  
3 STIPULATION OR DISPUTING IT. OUR POSITION HAS BEEN VERY CLEAR.  
4 WE HAVE STIPULATED AND WE ARE NOT TRYING TO ARGUE OTHERWISE.  
5 AND THAT WAS UNDER QUESTIONING NOT FROM US, BUT FROM COUNSEL.

6 MR. PICKETT: BUT IT CAME BACK THEN -- TWO OTHER  
7 QUICK POINTS.

8 HE SAID -- HE WAS ASKED: WOULD YOU GET A LICENSE TO  
9 AVOID INFRINGEMENT?

10 HE SAID, NO, WE WOULD NOT HAVE BOUGHT TOMORROWNOW OR  
11 WE WOULD HAVE STOPPED THE INFRINGEMENT.

12 AND SO THEN HE GOES ON FOR A LONG TIME TO SAY, WELL,  
13 I DIDN'T -- I ASSUME THE INFRINGEMENT STOPPED. YEAH, WE TOLD  
14 THEM TO STOP THE INFRINGEMENT --

15 THE COURT: LET ME JUST STOP YOU FOR A MINUTE.

16 THERE HAS ALREADY BEEN A STIPULATION THAT THE --  
17 WHOEVER IS EMPOWERED TO MAKE THIS DECISION ON BEHALF OF SAP, I  
18 ASSUME IT'S THE BOARD, THAT THEY'VE STIPULATED TO CONTRIBUTORY  
19 LIABILITY.

20 DO YOU WANT TO -- THE DEFENDANTS TO TAKE THAT BACK  
21 SO THAT THIS CAN BE REOPENED? AS LONG AS THERE HAS BEEN A  
22 STIPULATION, IT HAS BEEN SHOWN TO THE JURY TIME AND TIME AGAIN,  
23 I AM NOT GOING TO ALLOW YOU TO REOPEN THIS LINE OF INQUIRY.  
24 REGARDLESS OF WHAT THIS PARTICULAR WITNESS SAID, THERE IS A  
25 STIPULATION THAT THE COMPANY IS RESPONSIBLE FOR LIABILITY.

1           AND PART OF IT I THINK WASN'T -- HAD TO DO WITH  
2           PERHAPS SOME LANGUAGE DEFICITS AS WELL, AS WELL AS THE WAY IN  
3           WHICH THE QUESTIONS ARE BEING ASKED.

4           MR. PICKETT: WE HAVE A LIMITED NUMBER OF BOARD  
5           MEMBERS THAT WE CAN BRING IN TO COURT. MOST OF THEM ARE ON  
6           TAPE. MR. APOTHEKER HAS BEEN AVOIDING SERVICE. WE CAN'T BRING  
7           HIM INTO COURT.

8           SO WE HAVE A BOARD MEMBER HERE LIVE. AND WHEN HE  
9           ONE COMES IN LIVE, HE DENIES THE ELEMENTS. NOT JUST WITH  
10          RESPECT TO KNOWLEDGE, HE NOW SAYS -- HE'S NOW PUT ON TESTIMONY  
11          HE MATERIALLY -- SAP, RATHER, DID NOT MATERIALLY CONTRIBUTE TO  
12          THE INFRINGEMENT. THAT'S WHAT THEY STIPULATED TO.

13          MR. LANIER COMES BACK ON ADVERSE CROSS, IF YOU WILL,  
14          AND REHABILITATES HIM, TRIES TO GET HIM TO GIVE ADDITIONAL  
15          TESTIMONY THAT UNDERCUTS THE STIPULATION. THAT, I THINK,  
16          EXPANDS THE TIME.

17          THE COURT: HOLD ON. EXPANDS THE TIME? I AM NOT  
18          CONCERNED SO MUCH ABOUT THE TIME. WHAT I AM CONCERNED ABOUT IS  
19          WHAT, INDEED, YOU PLAN ON DOING IN RESPONSE TO THAT.

20          YOU INDICATED IT OPENED UP THE DOOR TO SOMETHING.  
21          WHAT DID YOU MEAN BY THAT?

22          MR. PICKETT: I THINK IT TAKES A LITTLE TIME TO  
23          EXPLAIN TO THE JURY AND PUT IN EVIDENCE THAT SHOWS NOT ONLY  
24          THAT THEY STIPULATED TO IT, BUT MR. BRANDT, THE BOARD MEMBER  
25          THEY SEE LIVE HERE, WAS WRONG WHEN HE SUGGESTED THAT THEY

1 REALLY DIDN'T KNOW ANYTHING, IT WAS A -- SOMETHING THAT I  
2 ASSUMED HAPPENED. WE TOLD THEM NOT TO DO IT IN SOME KIND OF  
3 ORAL COMMUNICATION THAT IS NOT WRITTEN.

4 THAT'S WRONG. THAT'S WHAT THE EVIDENCE WON'T SHOW  
5 AND THAT DOES OPEN UP A DOOR TO GETTING SOME VERY, VERY STRONG  
6 WRITTEN EVIDENCE THAT SHOWS THEY KNEW EXACTLY WHAT WAS GOING  
7 ON.

8 THE COURT: RESPONSE?

9 MR. LANIER: YOUR HONOR, THIS IS A PROBLEM OF THEIR  
10 CREATION. PLAINTIFFS HAVE INSISTED THAT THEY BE ALLOWED TO PUT  
11 ON EVIDENCE OF CONTEXT AROUND ALL THESE ISSUES WHERE WE'VE  
12 STIPULATED. PLAINTIFFS HAVE INSISTED ON A THEORY THAT THE  
13 BOARD'S STATE OF MIND IS PART OF THEIR DAMAGES CASE.

14 WE ARE IN NO WAY RETRACTING THAT STIPULATION. IT  
15 WAS APPROVED BY THE BOARD OF THE COMPANY, IT IS BINDING ON THE  
16 COMPANY UNEQUIVOCALLY. THEY ASKED MR. BRANDT QUESTIONS THAT GO  
17 TO HIS STATE OF MIND BASED ON AN ARGUMENT THEY ARE MAKING.

18 THE FACTS ARE WHAT THE FACTS ARE. THE ONE WITNESS'  
19 TESTIMONY IS WHAT IT IS. AND LANGUAGE ISSUES -- RECALL THAT  
20 THE EXAMINATION WAS ABOUT THE DISTINCTIONS BETWEEN VICARIOUS  
21 AND CONTRIBUTORY, WHICH IS A POINT THAT SOMETIMES EVEN TRAPS  
22 THE LAWYERS.

23 MR. PICKETT: WELL, THE ONE LIVE WITNESS THEY  
24 OFFERED FROM THE BOARD, I BELIEVE, IS MR. BRANDT. IN FACT,  
25 THEY SAID WE HAD TO DO HIM TODAY BECAUSE HE WAS GOING BACK TO

1 GERMANY. WE WANTED HIM LATER IN THE CASE. NO, WE HAD TO BRING  
2 HIM TODAY.

3 NOW THE JURY IS CONFUSED. NOW THE JURY HAS BEEN  
4 TOLD THERE'S A STIPULATION, BUT THEY HEARD THE BOARD MEMBER  
5 SAY, WELL, YOU KNOW, THIS REALLY WASN'T WHAT WAS GOING ON.

6 THE COURT: YOU CAN CERTAINLY IMPEACH ANY SUGGESTION  
7 THAT HE MIGHT HAVE MADE THAT HE DIDN'T KNOW. YOU CAN IMPEACH  
8 THAT IF YOU HAVE OTHER WITNESSES THAT ARE ALREADY ON YOUR LIST  
9 OR DOCUMENTS THAT DO THAT. YOU MAY PUT THAT ON.

10 I DON'T SEE HOW THAT SHOULD REALLY ENTITLE YOU TO  
11 MORE TIME. YOU ALL OUGHT TO BE ABLE TO GET THROUGH THIS --  
12 (SIMULTANEOUS COLLOQUY.)

13 MR. PICKETT: WE CAN GET THROUGH IT. I AM  
14 SUGGESTING WE NEED AN HOUR OR TWO TOTAL. I WOULD EITHER SAY  
15 GOING FORWARD WE CAN BE EVEN THAT WOULD BE FINE. OR IF YOU  
16 WANT TO GO BACK AND RECALCULATE, IF WE GET AN EXTRA -- INSTEAD  
17 OF WHATEVER IT WOULD BE, I DON'T KNOW WHAT IT WOULD BE, INSTEAD  
18 OF 25/25, IT WOULD BE 26/24.

19 THE COURT: I AM NOT GOING TO DO THAT. WE ARE GOING  
20 TO SET IT AT 25. IF AT THE END OF YOUR TIME THERE IS SOMETHING  
21 THAT IS PRESSING THAT YOU ABSOLUTELY HAVE TO GET IN YOU NEED AN  
22 ADDITIONAL 30 MINUTES, I WILL PROBABLY GIVE IT TO YOU, BUT I AM  
23 NOT GOING TO PARSE IT.

TEXT REMOVED - NOT RELEVANT TO MOTION

CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, FRIDAY, NOVEMBER 5, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR



DIANE E. SKILLMAN, CSR, RPR, FCRR

FRIDAY, NOVEMBER 5, 2010

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

|                            |   |                          |
|----------------------------|---|--------------------------|
| ORACLE CORPORATION, ET AL. | ) | JURY TRIAL               |
|                            | ) |                          |
| PLAINTIFFS,                | ) | NO. C 07-01658 PJH       |
|                            | ) |                          |
| VS.                        | ) | VOLUME 5                 |
|                            | ) |                          |
| SAP AG, ET AL.,            | ) | PAGES 754 - 946          |
|                            | ) |                          |
| DEFENDANTS.                | ) | OAKLAND, CALIFORNIA      |
| _____                      | ) | MONDAY, NOVEMBER 8, 2010 |

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

BINGHAM MUCCUTCHEN LLP  
THREE EMBARCADERO CENTER  
SAN FRANCISCO, CALIFORNIA 94111-4607

BY: ZACHARY J. ALINDER,  
HOLLY A. HOUSE,  
GEOFFREY M. HOWARD,  
DONN P. PICKETT, ATTORNEYS AT LAW

BOIES, SCHILLER & FLEXNER LLP  
1999 HARRISON STREET, SUITE 900  
OAKLAND, CALIFORNIA 94612

BY: DAVID BOIES,  
STEVEN C. HOLTZMAN, ATTORNEYS AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY: RAYNEE H. MERCADO, CSR NO. 8258  
DIANE E. SKILLMAN, CSR NO. 4909  
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

TEXT REMOVED - NOT RELEVANT TO MOTION

13 Q. COULD YOU GIVE THE JURY A ROUGH IDEA OF HOW MUCH MONEY  
14 ORACLE HAS INVESTED IN DEVELOPING OR ACQUIRING SOFTWARE FOR  
15 COMPUTERS OVER THE LAST TEN YEARS?

16 A. WELL, THIS YEAR, WE'LL SPEND ABOUT \$4 BILLION IN RESEARCH  
17 AND DEVELOPMENT. WE'VE ACQUIRED A NUMBER OF COMPANIES AND SPENT  
18 IN EXCESS OF \$40 BILLION BUYING THOSE COMPANIES.

19 I HAVEN'T THOUGHT ABOUT HOW MUCH WE'VE ACTUALLY SPENT  
20 SINCE, YOU KNOW -- FROM THE VERY BEGINNING ON R & D. BUT I  
21 THINK A ROUGH CALCULATION WOULD BE WELL IN EXCESS OF  
22 \$25 BILLION, SO 25 PLUS 40, \$65 BILLION.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

15 Q. AND I'D LIKE TO ASK YOU SOME QUESTIONS ABOUT THAT.

16 IN TERMS OF TRYING TO VALUE THAT LICENSE, IF YOU HAD  
17 ENGAGED IN A NEGOTIATION WITH SAP AND TOMORROWNOW BACK IN EARLY  
18 2005, WHAT ARE THE CONSIDERATIONS THAT WOULD HAVE BEEN TAKEN  
19 INTO ACCOUNT IN THAT NEGOTIATION?

20 MR. LANIER: OBJECTION, YOUR HONOR. AS WE'VE  
21 DISCUSSED, WE OBJECT TO THIS LINE OF QUESTIONING.

22 THE COURT: ALL RIGHT. OVERRULED, HOWEVER.

23 THE WITNESS: WELL, I THINK -- I THINK THERE'S ONE  
24 OVERWHELMING CONSIDERATION, AND THAT IS HOW MANY PEOPLESOFT AND  
25 JD EDWARDS CUSTOMERS WE WOULD HAVE LOST TO SAP IF THEY WERE

1 PROVIDING THESE SERVICES. SO WE HAD PAID A LITTLE IN EXCESS OF  
2 \$11 BILLION ACQUIRING PEOPLESOFT, WHICH INCLUDED THE PEOPLESOFT  
3 PRODUCT LINE AND THE JD EDWARDS PRODUCT LINE.

4 IF WE HAD LICENSED SAP TO HAVE ACCESS TO ALL OF OUR  
5 BUG FIXES, ALL OF OUR REGULATORY UPDATES, AND NEW VERSIONS -- IN  
6 OTHER WORDS, IF WE HAD GIVEN THEM THE RIGHT TO ALL OF OUR  
7 ENGINEERING OUTPUT FOR THESE TWO PRODUCT LINES, JD EDWARDS  
8 AND -- AND PEOPLESOFT, MY ESTIMATE IS THAT THEY WOULD HAVE BEEN  
9 ABLE TO GET MORE THAN 20 PERCENT, 30 PERCENT OF THE PEOPLESOFT  
10 CUSTOMERS TO MOVE AWAY FROM ORACLE OVER TO SAP.

11 SAP WAS A -- WELL, SAP IS THE NUMBER ONE APPLICATIONS  
12 COMPANY IN THE WORLD. WE'RE NUMBER TWO. THEY'RE THE MARKET  
13 LEADER. THEY'RE CREDIBLE. THEY'RE HIGHLY RESPECTED. THEY'RE  
14 THE LARGEST SOFTWARE COMPANY IN EUROPE.

15 AND IF THEY HAD ACCESS TO ALL OF OUR INTELLECTUAL  
16 PROPERTY, IF THEY HAD ACCESS TO ALL OF OUR ENGINEERING,  
17 THEY'RE -- THEY COULD MAKE A VERY CREDIBLE OFFER TO ANY OF OUR  
18 CUSTOMERS TO GET SERVICES AND -- AND PURSUE A FUTURE WITH SAP  
19 RATHER THAN WITH ORACLE.

20 AND, AGAIN, ON -- AGAIN, I THINK A CONSERVATIVE  
21 ESTIMATE IS, UNDER THOSE CIRCUMSTANCES, THEY WOULD BE ABLE TO  
22 GET AT LEAST 20, AS MUCH AS 30 PERCENT OF OUR CUSTOMERS.

23 BY MR. BOIES:

24 Q. NOW, BEFORE GOING ON TO THE OTHER FACTORS, YOU MENTIONED  
25 PEOPLESOFT AND JD EDWARDS. WHAT ABOUT SIEBEL?

1 A. WELL, SIEBEL -- SIEBEL IS A SLIGHTLY DIFFERENT SITUATION.  
2 WHEN WE ACQUIRED SIEBEL, THEY ALSO ANNOUNCED SUPPORT FOR SIEBEL  
3 IMMEDIATELY, SAP DID. SAP ALREADY HAD A TEAM IN PLACE THAT WAS  
4 SUPPORTING PEOPLESFT APPLICATIONS AND JD EDWARDS APPLICATIONS.  
5 TO THE BEST OF MY KNOWLEDGE, THEY HAD NO -- THEY HAD NO BUSINESS  
6 AT ALL SUPPORTING SIEBEL CUSTOMERS SO THEY HAD A HEAD START, IF  
7 YOU WILL; THEY HAD AN ONGOING BUSINESS.

8 SO WHILE I THINK IT WAS REASONABLE TO ASSUME THAT  
9 THEY COULD GET 20 OR 30 PERCENT OF OUR CUSTOMERS HAD THEY  
10 LICENSED OUR ENGINEERING OUTPUT FOR JD EDWARDS AND PEOPLESFT, I  
11 THINK THEY WOULD HAVE GOTTEN A SMALLER PERCENTAGE OF THE SIEBEL  
12 CUSTOMERS JUST BECAUSE THAT WAS A BUSINESS THEY WERE STARTING  
13 FROM SCRATCH. AND SO MAYBE THEY WOULD HAVE GOTTEN 15,  
14 20 PERCENT OF THE SIEBEL CUSTOMERS.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

15 Q. TAKING INTO ACCOUNT THE FACTORS THAT YOU'VE IDENTIFIED AND  
16 ANY OTHER FACTORS THAT WOULD BE RELEVANT TO THE ADVANTAGE TO SAP  
17 OR THE DISADVANTAGE TO -- OF ORACLE IN TERMS OF NEGOTIATING A  
18 LICENSE, WHAT IS YOUR ESTIMATE, AS THE HEAD OF ORACLE, AS TO  
19 WHAT THAT LICENSE WOULD HAVE BEEN WORTH BACK IN 2005?

20 AND I'M ASKING YOU TO FOCUS ON THE BEGINNING OF 2005,  
21 NOT WHAT -- NOT WHAT'S HAPPENED SINCE, BUT THE TIME THAT THIS  
22 NEGOTIATION WOULD HAVE BEEN GOING ON.

23 A. OKAY.

24 MR. LANIER: AGAIN, YOUR HONOR, OBJECTION. IT CALLS  
25 FOR SPECULATION. IT'S UNDISCLOSED OPINION AND THE OTHER ISSUES

1 THAT WE'VE DISCUSSED --

2 THE COURT: I'M GOING TO OVERRULE IT AS TO THIS ONE.

3 THE WITNESS: WELL, I THINK, AGAIN, IT DEPENDS ON THE  
4 DETAILS OF THE LICENSE. FOR EXAMPLE, IF WE GRANTED THE LICENSE  
5 FOR OUR ENGINEERING OUTPUT -- AGAIN, THE LICENSE WOULD BE THAT  
6 SAP GETS THE RIGHT TO OUR REGULATORY UPDATES FOR PEOPLESOFT, JD  
7 EDWARDS, AND SIEBEL. THEY GET THE RIGHT TO BUG FIXES FOR  
8 PEOPLESOFT, JD EDWARDS, AND SIEBEL, AND THEY GET NEW VERSIONS OF  
9 PEOPLESOFT, JD EDWARDS, AND SIEBEL FOR A SPECIFIC PERIOD OF  
10 TIME. NOT FOREVER. BUT FOR A SPECIFIC PERIOD OF TIME.

11 IF -- CONSTRAINED LIKE THAT AND ALSO CONSTRAINED BY  
12 THE FACT THAT SAP COULD NOT ADVERTISE THAT THEY HAD SIGNED THIS  
13 LICENSE, SO UNDER THOSE TWO CONSTRAINTS, I THINK THE LICENSE --  
14 AGAIN, MY -- I'LL GO BACK TO MY EARLIER ESTIMATE THAT THEY WOULD  
15 HAVE PICKED OFF 30 PERCENT OF -- OF THE PEOPLESOFT JD EDWARDS  
16 BASE, WHICH IS WORTH ABOUT \$3 BILLION BASED -- NO, \$3.3 BILLION,  
17 WHICH IS BASED ON WHAT WE PAID FOR IT, AND LET'S SAY 10 PERCENT  
18 OF SIEBEL, WHICH IS WORTH ANOTHER \$600 MILLION. THAT WOULD BE A  
19 TOTAL OF \$4 BILLION.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

13 Q. OKAY. AND DESPITE THAT, IN JANUARY OF 2005, YOU ACTUALLY  
14 WERE NOT PARTICULARLY WORRIED ABOUT YOUR ABILITY TO COMPETE WITH  
15 SAP, WERE YOU?

16 A. "PARTICULARLY WORRIED." I -- SAP WAS THE NUMBER ONE  
17 APPLICATION COMPANY IN THE WORLD. THEY'RE A VERY FORMIDABLE  
18 COMPETITOR. I'M NOT SURE WHAT YOU MEAN BY "PARTICULARLY  
19 WORRIED."

20 I THOUGHT WE WERE ABLE TO COMPETE WITH SAP. I  
21 THOUGHT WE COULD COMPETE SUCCESSFULLY WITH SAP. WE WERE  
22 COMPETING, BUT THEY'RE THE NUMBER ONE, WE'RE THE NUMBER TWO.

23 Q. AND YOU DIDN'T ACTUALLY AT THAT TIME THINK THAT SAP COULD  
24 TAKE AS MANY AS 20 TO 30 PERCENT OF ORACLE'S CUSTOMERS, DID YOU?

25 A. I THOUGHT WHEN THEY ANNOUNCED TOMORROWNOW, IT WAS A

1 BRILLIANT IDEA. THE ACQUISITION OF TOMORROWNOW WAS A BRILLIANT  
2 IDEA, AND WE WERE AT GRAVE RISK BASED ON WHAT THEY DID WITH  
3 TOMORROWNOW.

4 Q. AND THERE'S NOT -- CAN YOU POINT TO A SINGLE CONTEMPORANEOUS  
5 EMAIL, PRESENTATION, DOCUMENT, STATEMENT, POWERPOINT SLIDE,  
6 ANYTHING WHERE ANYONE WITHIN ORACLE SAYS, IN JANUARY OF 2005, WE  
7 ARE WORRIED ABOUT THIS ACQUISITION. WE THINK WE'RE GOING TO  
8 LOSE AS MANY AS 30 PERCENT OF THE CUSTOMERS?

9 A. NO, WE WOULD -- I WOULD NEVER SAY THAT PUBLICLY.

10 Q. AND CAN YOU POINT TO A SINGLE INTERNAL EMAIL, POWERPOINT,  
11 PRESENTATION, INTERNAL SPEECH WHERE ANYONE WITHIN ORACLE,  
12 YOURSELF INCLUDED, SAID WE THINK SAP COULD GET AS MANY AS 20 TO  
13 30 PERCENT OF OUR CUSTOMERS USING TOMORROWNOW?

14 A. THEY -- WE HAD A NUMBER OF DISCUSSIONS ABOUT TOMORROWNOW.  
15 AND MY -- MY JUDGMENT AND MY -- MY WORK AROUND TOMORROWNOW AND  
16 THE DISCUSSIONS I HAD WERE ABOUT IF TOMORROWNOW -- IF SAP  
17 ACTUALLY MAKES THE APPROPRIATE INVESTMENTS IN TOMORROWNOW, IF  
18 THEY GO OUT AND HIRE THE ENGINEERS NECESSARY TO SUPPORT THE  
19 PEOPLESOFT PRODUCTS AND TO SUPPORT THE JD EDWARDS PRODUCTS, WE  
20 COULD BE IN DEEP TROUBLE.

21 IT'S GOING TO COST THEM A LOT OF MONEY. I DON'T KNOW  
22 IF THEY'RE WILLING TO DO IT. BUT IF THEY ACTUALLY GO OUT AND  
23 HIRE THOSE ENGINEERS AND PROVIDE REGULATORY UPDATES AND DO BUG  
24 FIXES AND DO IT AS WELL AS WE CAN, AND I THINK THEY CAN, I THINK  
25 THEY COULD ACTUALLY DO IT IF THEY'RE WILLING TO SPEND THE MONEY,

1 THEN WE'RE IN A LOT OF TROUBLE.

2 Q. AND THERE'S NOT A SINGLE PUBLIC OR PRIVATE, INTERNAL OR  
3 EXTERNAL EMAIL, POWERPOINT, SPEECH, SLIDE, SCRIBBLE ON A NAPKIN  
4 THAT SAYS ANY OF THAT, IS THERE?

5 A. I'VE -- I'VE HAD THAT DISCUSSION WITH PEOPLE, BUT I TEND NOT  
6 WRITE THOSE THINGS DOWN.

7 Q. AND YOU DIDN'T SEE -- YOU HAVEN'T SEEN MS. CATZ EVER WRITE  
8 THAT DOWN, HAVE YOU?

9 A. I'VE NEVER SEEN A DOCUMENT ABOUT THAT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

3                   YOU DID BETTER AFTER BUYING PEOPLESOFT THAN YOU  
4 PROJECTED TO THE BOARD EVEN BEFORE KNOWING ABOUT THIS THREAT,  
5 RIGHT?

6           A.    THAT'S CORRECT.

7           Q.    GRAND TOTAL OF CUSTOMERS THAT YOU KNOW OF THAT WENT TO  
8 TOMORROWNOW WAS 358 OUT OF THE THOUSANDS OF CUSTOMERS THAT WERE  
9 PURCHASED, CORRECT?

10          A.    THAT'S RIGHT.

11          Q.    AND YOU CAN'T, AS YOU SIT HERE TODAY, POINT TO A SINGLE  
12 PIECE OF PAPER, ELECTRONIC MAIL, POWERPOINT, ANYTHING THAT  
13 REFLECTS THE CONCERNS YOU'VE NOW TOLD THE JURY YOU ACTUALLY HAD  
14 BACK THEN; IS THAT RIGHT?

15          A.    I DID NOT WRITE DOWN WHAT I THOUGHT WAS A WORST-CASE  
16 SCENARIO ABOUT TOMORROWNOW.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

20 JUST A FEW MORE QUESTIONS, MR. ELLISON.

21 PUTTING IT IN PERSPECTIVE, JUST MAKING SURE WE'VE GOT  
22 IT, YOU TOLD THE JURY, YOU WERE -- YOU'D BE -- YOU WOULD HAVE  
23 BEEN CONCERNED BACK IN JANUARY OF 2005 THAT SAP COULD HAVE GOT  
24 AS MUCH AS 20- TO 30,000 (SIC) CUSTOMERS, RIGHT?

25 A. THAT'S CORRECT.

## CROSS EXAMINATION OF LARRY ELLISON

1 Q. YOU NEVER WROTE THAT DOWN; YOU DON'T WRITE THOSE KINDS OF  
2 THINGS DOWN, RIGHT?

3 A. THAT'S CORRECT.

4 Q. YOU DON'T KNOW OF ANYBODY WHO EVER WROTE DOWN A SIMILAR  
5 CONCERN.

6 A. YES.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

24 Q. NOW, HE ALSO ASKED YOU WHETHER YOU KNEW THAT TOMORROWNOW HAD  
25 ACTUALLY GOTTEN 358 CUSTOMERS.

1 DO YOU RECALL THAT?

2 A. YES.

3 Q. NOW, IF YOU'D BEEN NEGOTIATING A LICENSE TO GIVE ALL THIS  
4 INTELLECTUAL PROPERTY THAT THEY TOOK TO THEM BACK IN JANUARY OF  
5 2005, WOULD YOU HAVE CONDITIONED THE VALUE OF THAT LICENSE ON  
6 HOW MANY CUSTOMERS THEY ACTUALLY GOT?

7 A. NO. THE -- WE WOULD -- WE WOULD CONDITION THE LICENSE ON  
8 THE VALUE OF THE SOFTWARE THEY WERE TAKING AND THE POTENTIAL  
9 LOSS TO OUR BUSINESS.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

5 THE COURT: EXACTLY. AND THE RULING DOESN'T CHANGE.

6 THE EVIDENCE, IN MY VIEW, DOESN'T RELATE SOLELY TO  
7 CONTRIBUTORY INFRINGEMENT. AND EVEN IF IT DID, I DON'T SEE HOW  
8 SAP CAN ARGUE PREJUDICE FROM THE ALLOWANCE OF THE EVIDENCE. I  
9 MEAN, GIVEN THAT THERE'S BEEN AN ADMISSION OF LIABILITY OR  
10 LEAST -- I'M NOT EXACTLY SURE IT'S EVEN FAIR TO CALL IT AN  
11 ADMISSION OF LIABILITY GIVEN HOW THE WITNESSES HAVE TESTIFIED.  
12 THAT'S SOMETHING I'D LIKE TO ADDRESS IN CONJUNCTION WITH THIS  
13 MOTION.

14 NOW, IT'S -- IT'S A LITTLE -- WELL, LET ME START OUT  
15 THIS WAY: FIRST OF ALL, WHAT I'D LIKE FROM YOU ALL IS SOME  
16 ASSISTANCE IN TRYING TO KEEP ALL THE PLAYERS STRAIGHT. I MEAN,  
17 CLEARLY, I MADE A MISTAKE ON ANY WITH REGARD TO MR. BRANDT'S  
18 ROLE. BUT LOOKING BACK, I'M HAVING SOME DIFFICULTY KEEPING ALL  
19 THE PLAYERS STRAIGHT. AND I'M NOT EXACTLY SURE THAT THE JURY  
20 DOESN'T HAVE SOME OF THE SAME CONFUSION.

21 WHEN WE LOOK AT THE TESTIMONY SO FAR, I BELIEVE WE'VE  
22 HEARD FROM TWO SAP AG BOARD MEMBERS, MR. OSWALD AND MR. BRANDT.

23 MR. HOWARD: AND MR. AGASSI.

24 THE COURT: WELL, MR. AGASSI TESTIFIED THAT HE WAS A  
25 FORMER --

1 MR. HOWARD: FORMER, YES.

2 THE COURT: -- DIRECTOR.

3 OKAY. NOW, IS THE EXECUTIVE BOARD OF SAP AG THE SAME  
4 THING AS A BOARD OF DIRECTORS?

5 MR. LANIER: NO, IT'S NOT, YOUR HONOR. SAP AG IS A  
6 GERMAN CORPORATION. THEY HAVE JUST A DIFFERENT CORPORATE  
7 STRUCTURE. THE EXECUTIVE BOARD OPERATES IN SOME WAYS LIKE AN  
8 OFFICE OF THE C.E.O. THEY MAKE MANAGEMENT DECISIONS FOR THE  
9 COMPANY. THERE ARE CERTAIN THINGS THAT HAVE TO GO UP TO THE  
10 SUPERVISORY BOARD.

11 THE COURT: WELL, MR. AGASSI REFERRED TO THE  
12 SUPERVISORY BOARD AND TO THE CHAIRMAN, MR. PLATNER. WHAT IS THE  
13 RELATIONSHIP? WHO'S IN CHARGE?

14 MR. LANIER: THE EXECUTIVE -- I'M SORRY.

15 THE COURT: MORE SPECIFICALLY, WHO MADE THE DECISION  
16 TO STIPULATE TO CONTRIBUTORY INFRINGEMENT?

17 MR. LANIER: THE EXECUTIVE BOARD OF SAP AG, WHICH, AS  
18 I UNDERSTAND IT, UNDER GERMAN LAW, HAS SOLE CHARGE OF THOSE  
19 ISSUES. THERE ARE VERY --

20 THE COURT: NOT THE SUPERVISORY BOARD.

21 MR. LANIER: THAT'S CORRECT, YOUR HONOR.

22 THE COURT: WHAT'S THE RELATIONSHIP BETWEEN THE  
23 EXECUTIVE BOARD AND THE SUPERVISORY BOARD?

24 MR. LANIER: THERE ARE A VARIETY OF THINGS THAT I --  
25 GO BOTH BEYOND MY KNOWLEDGE AND IN ANY WAY RELATE TO HERE.

1 THE SUPERVISORY BOARD, FOR EXAMPLE, IS REQUIRED TO  
2 HAVE EMPLOYEE REPRESENTATIVES ON IT AND A LOT OF THINGS THAT ARE  
3 VERY DIFFERENT ABOUT A BOARD OF DIRECTORS IN AMERICAN -- UNDER  
4 AMERICAN LAW.

5 THE SUPERVISORY BOARD FUNDAMENTALLY HAS THE ABILITY  
6 TO CHANGE THE CONSTITUENCY OF THE EXECUTIVE BOARD AND TO, ON  
7 OCCASIONS, DEPENDING ON THE INTERNAL RULES OF THE COMPANY,  
8 APPROVE TRANSACTIONS OF A PARTICULAR SIZE, GENERALLY VERY LARGE.

9 THE COURT: SO I THINK WHAT'S -- WHAT IT WILL BE  
10 IMPORTANT FOR THE JURY TO KNOW IS WHICH BOARD, WHO APPROVED THE  
11 TOMORROWNOW ACQUISITION.

12 MR. LANIER: YEP.

13 THE COURT: AND WHO APPROVED THE CONTRIBUTORY  
14 INFRINGEMENT STIPULATION.

15 MR. LANIER: IT'S THE SAME ANSWER FOR BOTH, YOUR  
16 HONOR. IT'S THE EXECUTIVE BOARD OF SAP AG. I THINK THE REASON  
17 THERE'S SOME OF THIS CONFUSION IS YOUR HONOR'S RULED ON THE  
18 OTHER ISSUE, BUT THERE IS NOW EVIDENCE ABOUT STATE OF MIND THAT  
19 YOUR HONOR HAS RULED GOES TO DAMAGES. WE RESPECTFULLY DISAGREE,  
20 BUT YOU'VE RULED.

21 GIVEN THAT THAT ISSUE IS IN THE CASE, WE'RE IN A VERY  
22 DIFFICULT POSITION. SAP AG HAS KNOWINGLY, CONSCIOUSLY, WITH THE  
23 APPROVAL OF THE EXECUTIVE BOARD, STIPULATED TO LIABILITY -- TO  
24 VICARIOUS AND CONTRIBUTORY COPYRIGHT INFRINGEMENT LIABILITY.  
25 THAT IS A DONE DEAL. THOSE DECISIONS ARE MADE. BUT --

1 THE COURT: YOU WOULDN'T KNOW THAT FROM THE TESTIMONY  
2 OF THE WITNESSES.

3 MR. HOWARD: OR THE QUESTIONS THAT ARE POSED.

4 MR. LANIER: AND THAT'S THE PROBLEM, YOUR HONOR.  
5 BECAUSE THEY HAVE PUT, AGAIN OVER OUR OBJECTION, THE STATE OF  
6 MIND OF BOARD MEMBERS IN THE CASE. IF YOU WERE TO ASK  
7 MR. BRANDT, AS THEY DID, WAS THE STIPULATION MADE -- AND PUTTING  
8 ASIDE THE FACT THAT HE DOESN'T SPEAK ENGLISH AND HE'S NOT A  
9 LAWYER -- I CAN -- WITHOUT WAVING PRIVILEGE, I CAN ASSURE THAT  
10 THE BOARD APPROVED THIS, FULLY INFORMED.

11 BUT IF YOU'RE ASKING HIM, WHAT WAS IN YOUR MIND THEN  
12 OR WHAT IS IN YOUR MIND NOW AND IT'S RELEVANT TO SOME TOPIC,  
13 WHATEVER DECISION THE COMPANY MAY HAVE MADE TO SAY WE WILL  
14 STIPULATE FOR THESE BUSINESS OR LEGAL REASONS, THAT COULD BE  
15 DIFFERENT THAN WHAT AN INDIVIDUAL BOARD MEMBER MIGHT THINK ABOUT  
16 THE FACTS FROM THEIR OWN PERSPECTIVE. THAT'S THE THING.

17 AND, REALLY, THE CONFUSION CAME UP WHEN MR. BOIES WAS  
18 ASKING MR. BRANDT ABOUT THE DIFFERENCE BETWEEN VICARIOUS AND  
19 CONTRIBUTORY INFRINGEMENT LIABILITY.

20 THE COURT: SURE, BUT YOU'RE TAKING THE POSITION NOW  
21 IN YOUR MOTION THAT THE PLAINTIFF SHOULD BE PRECLUDED IN SOME  
22 WAY OF PUTTING ON ANY EVIDENCE OF CONTRIBUTORY LIABILITY  
23 BECAUSE, IN YOUR VIEW, IT GOES SOLELY TO --

24 MR. LANIER: RIGHT.

25 THE COURT: -- TO THE QUESTION OF LIABILITY, WHEN I

## STATEMENT OF COURT

1 DISAGREE, OBVIOUSLY, AND FIND THAT IT GOES TO DAMAGES.

2 BUT I'M NOT SO SURE THAT THE JURY'S NOT -- I DON'T  
3 KNOW WHAT THE JURY'S GOING TO MAKE OF THE FACT THAT EXECUTIVE  
4 BOARD MEMBERS COME IN AND TESTIFY THAT NOT ONLY DID THEY NOT  
5 KNOW ANYTHING, THEY DIRECTED TOMORROWNOW NOT TO INFRINGE.

6 MR. LANIER: SO THERE'S --

7 THE COURT: THAT'S, IN MY VIEW, INCONSISTENT WITH THE  
8 STIPULATION THAT'S BEEN ENTERED.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

20 Q. ALL RIGHT. LET'S MOVE FROM THE -- MOVE ON TO THE QUESTION  
21 OF THE APPROPRIATE DAMAGES HERE.

22 MS. CATZ, WOULD ORACLE HAVE PAID WHAT IT DID FOR  
23 PEOPLESOFT AND SIEBEL KNOWING THAT ORACLE'S KEY COMPETITOR  
24 WOULD HAVE ACCESS TO THE SOFTWARE AND SUPPORT MATERIALS THAT  
25 ORACLE THOUGHT WERE ITS ALONE?

1 A. NO. WE COULDN'T BECAUSE WE WOULDN'T HAVE THE EXCLUSIVE  
2 RIGHTS ANYMORE. SO A LOT OF THESE CUSTOMERS WOULD, IN FACT, BE  
3 A JUMP BALL. AND WE COULDN'T COUNT ON THE BILLION TWO, WHICH  
4 UNDERLIES THE ENTIRE MODEL, AND SO WE COULDN'T COUNT ON THE  
5 BILLION TWO COMING IN MINIMALLY ANNUALLY TO PAY THE  
6 \$11 BILLION.

7 Q. WHAT ADVANTAGES WOULD ORACLE LOSE BY PROVIDING SAP ACCESS  
8 TO ITS SOFTWARE AND SUPPORT MATERIALS AT THAT TIME?

9 A. IT'S THE SAME ADVANTAGES THAT ALL OF US SOFTWARE COMPANIES  
10 HAVE. WHEN YOU HAVE THE RIGHT TO USE YOUR SOFTWARE EXCLUSIVELY  
11 AND YOU SELL SUPPORT, AND YOU CAN DO NOT ONLY THE UPDATE  
12 WRITES, BUT THE SECURITY FIXES, AND REALLY EVERYTHING, REALLY  
13 ALL THE SUPPORT. WHEN YOU ARE THE ONLY ONE WHO HAS MADE THE  
14 INVESTMENT IN IT, IT'S A HUGE ADVANTAGE THAN FOR -- OVER  
15 ANYBODY ELSE.

16 Q. NOW, MS. CATZ, YOU'VE HEARD THE TESTIMONY OF YOUR FORMER  
17 CO-PRESIDENT, MR. PHILLIPS, AND THEN MR. ELLISON TODAY ABOUT  
18 THE BILLIONS IN LICENSE FEES THAT THEY BELIEVE ORACLE  
19 REASONABLY WOULD BE SEEKING FROM SAP FOR ACCESS TO THE SOFTWARE  
20 AND SUPPORT MATERIALS THAT SAP TOOK FROM ORACLE IF IT WAS BEING  
21 EVALUATED ON JANUARY 19, 2005.

22 DO YOU AGREE WITH THEM? AND WHY?

23 MR. LANIER: OBJECTION, YOUR HONOR. WE WOULD LIKE A  
24 CONTINUING OBJECTION TO THIS LINE OF QUESTIONING AS A  
25 NONDISCLOSED EXPERT OPINION, CALLING FOR SPECULATION AND THE

1 REASONS WE BRIEFED.

2 THE COURT: ALL RIGHT. OVERRULED.

3 THE WITNESS: SEE, RIGHT THEN AND THERE, WE HAD JUST  
4 PAID \$11 BILLION, OVER \$11 BILLION FOR THIS ASSET FOR THESE  
5 CUSTOMERS.

6 IF WE WERE ALL OF A SUDDEN GOING TO GIVE A LICENSE  
7 TO THE NUMBER ONE PLAYER IN THE INDUSTRY TO HAVE THAT SAME  
8 SOFTWARE AND SUCH THAT WE WOULD HAVE TO COMPETE FOR THOSE  
9 EXISTING CUSTOMERS ALL OVER AGAIN, AND, FRANKLY, THEY WOULD  
10 HAVE AS GOOD A CHANCE, IF NOT BETTER, OF WINNING BECAUSE THEY  
11 ARE THE NUMBER ONE PLAYER, IT'S DEFINITELY IN THE BILLIONS.  
12 THERE'S NO QUESTION. WE NEVER WOULD HAVE PAID \$11 BILLION FOR  
13 IT. WE COULDN'T AFFORD IT. AND TO SELL A LICENSE, IT WOULD  
14 HAVE TO MAKE UP FOR THE LOSS THAT WE WOULD GET BY GIVING IT  
15 TO -- SELLING IT TO SAP.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

5 Q. NOW SAP'S COUNSEL IN HIS OPENING STATEMENT SAID THAT SAP  
6 STANDS READY TO PAY ORACLE \$40 MILLION AS COMPENSATION FOR THE  
7 INFRINGEMENT IT HAS NOW ADMITTED TO.

8 WHY HAVEN'T YOU TAKEN THAT OFFER?

9 A. TAKING \$40 MILLION FROM SAP, SAP PAYING US \$40 MILLION IS  
10 A REWARD FOR THEIR BAD BEHAVIOR, FRANKLY. IT ACTUALLY, FOR  
11 PEOPLE WHO SAY THEY ARE TAKING RESPONSIBILITY FOR EVERYTHING  
12 THEY DID, THIS IS EXACTLY THE OPPOSITE OF THAT.

13 THIS IS LIKE TAKING SOMEONE'S WATCH AND HOCKING IT.  
14 SAY IT'S A \$2,000 WATCH, AND HOCKING IT FOR \$20, AND THEN  
15 OFFERING TO GIVE US \$20. IT'S CRAZY.

16 Q. WHAT WOULD ACCEPTING \$40 MILLION AS COMPENSATION FOR SAP'S  
17 ADMITTED EXTENSIVE INFRINGEMENT OF ORACLE'S SOFTWARE AND  
18 SUPPORT MATERIAL SIGNAL?

19 A. ACTUALLY, IT'S A REWARD FOR BAD BEHAVIOR. AND IT  
20 COMPLETELY UNDERVALUES THE ENTIRE BASIS OF OUR INDUSTRY THAT  
21 ALL OF US PARTICIPATE IN. BECAUSE WE'RE ALL ABOUT INTELLECTUAL  
22 PROPERTY. IF WE DON'T PROTECT IT, THAT MEANS PEOPLE CAN TAKE  
23 THE INTELLECTUAL PROPERTY AND HOPE THEY DON'T GET CAUGHT. IF  
24 THEY GET CAUGHT, MAYBE GIVE BACK THE HARM, YOU KNOW, THAT THEY  
25 THINK THEY CAUSED. WHEN, IN FACT, THAT ISN'T -- THAT ISN'T THE

<sup>1</sup> VALUE OF WHAT THEY DID AT ALL.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

24                   NOW, WE HAVE HEARD A LOT ABOUT THOUSANDS OF  
25 CUSTOMERS AND THINGS LIKE THAT. I WANT TO MAKE SURE I

1 UNDERSTAND A FEW PRETTY BASIC THINGS.

2 THERE WERE ALL TOLLED WITH PEOPLESOFT AND SIEBEL,  
3 YOU ACQUIRED ABOUT 13,000 CUSTOMERS, RIGHT?

4 A. YEAH. I MEAN, I THINK ACTUALLY IT'S A LITTLE BIT MORE.

5 Q. OKAY.

6 A. SOMETHING LIKE THAT, 14,000.

7 Q. ALL RIGHT. LET'S TAKE 14,000. I DON'T WANT TO PUT A  
8 NUMBER IN YOUR MOUTH THERE.

9 OUT OF THE 14,000 PEOPLESOFT AND SIEBEL CUSTOMERS,  
10 YOU'VE HEARD THIS NUMBER A BUNCH, I DOUBT YOU DISAGREE, OVER  
11 TIME, TOMORROWNOW GOT ABOUT 358 OF THEM, CORRECT?

12 A. I THINK IT WAS -- I DON'T KNOW EXACTLY THE NUMBERS, BUT IT  
13 WAS LIKE 24 SIEBEL CUSTOMERS AND 358 PEOPLESOFT/J.D. EDWARDS  
14 CUSTOMERS, IS THAT RIGHT?

15 Q. I WANTED TO MAKE SURE I GOT THAT RIGHT. SO IT WAS ABOUT  
16 24 SIEBEL CUSTOMERS, MAYBE EVEN LESS, RIGHT?

17 A. REMEMBER, THEY STARTED OFFERING IT AND THEN WE FILED SUIT  
18 PRETTY SOON AFTERWARDS. SO WE CAUGHT THEM.

19 Q. I JUST WANT TO MAKE SURE WE'VE GOT THE NUMBERS RIGHT.  
20 OVER THE TWO YEARS THAT TOMORROWNOW WAS IN OPERATION, IT GOT  
21 358 CUSTOMERS SO FAR AS YOU KNOW, RIGHT?

22 A. WE NEVER KNEW UNTIL IT WAS PRODUCED IN LITIGATION. SO  
23 THAT SEEMS TO BE THE RIGHT NUMBER.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

19                   NOW, YOU HEARD MR. ELLISON TESTIFY THAT HE WAS  
20                   WORRIED THERE MIGHT BE 20 TO 30 PERCENT OF THE CUSTOMERS WOULD  
21                   GO, RIGHT?

22                   YOU HEARD HIM TESTIFY TO THAT THIS MORNING?

23                   A.     YEAH.   IF -- AS I UNDERSTOOD IT, IF WE GAVE A LICENSE  
24                   TO -- GAVE A LICENSE TO SAP, CORRECT.

25                   Q.     SO, AS IT TURNS OUT, MAYBE TWO PERCENT OF THE CUSTOMERS

1 LEFT, RIGHT? SOMETHING LIKE THAT, ABOUT 358 OF THEM OVER TIME.  
2 WE WILL ROUND IT UP THREE PERCENT.  
3 A. YEAH, BUT IT WAS A MIX OF SOME OF THE BIGGEST CUSTOMERS  
4 THAT THERE WERE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

15 Q. MR. MEYER, HOW DID YOU MEASURE THE DAMAGES THAT SAP  
16 INFLECTED ON ORACLE FOR THE COPYRIGHT INFRINGEMENT CLAIMS?

17 A. THE FORM OF MEASUREMENT IS I DETERMINED THE FAIR MARKET  
18 VALUE OF A LICENSE FOR THOSE SOFTWARE MATERIALS THAT WERE  
19 TAKEN. AND SO I WENT INTO A PROCESS OF DETERMINING THE VALUE  
20 OF THAT LICENSE AND THEN AS A PROCESS THAT I HAVE USED MANY  
21 TIMES TO DO THAT.

22 Q. AND WAS IT A SINGLE LICENSE THAT YOU MEASURED THE VALUE  
23 OF?

24 A. NO. THERE'S THREE SEPARATE LICENSES. AND THERE'S ONE  
25 THAT BASICALLY COVERS A LICENSE THAT SAP WOULD HAVE FOR THE USE

1 OF THE PEOPLESOFT AND JDE SOFTWARE. AND THEN A SEPARATE  
2 LICENSE FOR THE SOFTWARE AND SOFTWARE MATERIALS FOR SIEBEL.  
3 AND THEN LASTLY I WILL TALK ABOUT A LICENSE FOR ORACLE'S  
4 DATABASE THAT WAS ALSO USED BY TOMORROWNOW IN DOING ITS  
5 CUSTOMER SERVICINGS. THERE'S A THIRD LICENSE THAT I WILL SHOW  
6 YOU HOW I VALUE THAT, THE DATABASE LICENSE FOR ORACLE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

8 Q. AND HOW DOES THE -- LET'S GO INTO SOME DETAIL. HOW DOES  
9 THE LICENSE NEGOTIATION APPROACH WORK?

10 A. WELL, I HAVE A SLIDE THAT GOES THROUGH A SERIES OF FACTORS  
11 THAT I HAVE COMPILED FOR THE JURY.

12 (SLIDE DISPLAYED ON SCREEN.)

13 AND I HAVE WORKED OFF THE LAST CHART WHERE I HAD ON  
14 THE LEFT-HAND SIDE, ORACLE IN THE RED, AND FAR RIGHT-HAND SIDE,  
15 SAP IN THE BLUE. AND IN THE MIDDLE I HAVE SORT OF LAID OUT  
16 WHAT I CALL THE NEGOTIATION FACTORS.

17 AND I HAVE AN ASTERISK THERE, AND I MAKE THE  
18 NOTATION THAT IT IS CONSISTENT WITH GEORGIA-PACIFIC CORPORATION  
19 VERSUS U.S. PLYWOOD. THAT WAS A PATENT CASE FROM THE EARLY  
20 1970'S WHEN THIS FIRST FRAMEWORK WAS PUT TO A JURY TO USE IN  
21 THIS PROCESS. SO I HAVE BEEN CONSISTENT WITH THAT.

22 IN THIS CASE, I HAVE A SERIES OF FACTORS THAT I AM  
23 GOING TO WALK YOU THROUGH TODAY AND TELL YOU WHAT THEY TOLD ME  
24 ABOUT HOW TO VALUE THIS LICENSE.

25 THE FIRST ONE IS THE SCOPE AND DURATION OF THE

1 LICENSE. WE WILL TALK ABOUT THAT, WHAT IT COVERS, AND HOW LONG  
2 IT'S GOING TO GO FOR.

3 THE NEED FOR THE COPYRIGHTED WORKS. YOU ALWAYS HAVE  
4 TO FIGURE OUT WHAT'S THE DEMAND AND NEED FOR THOSE SOFTWARE  
5 MATERIALS, AND ASSESS THAT.

6 WHAT I WILL CALL RISK ACCEPTANCE, AND WAS THERE RISK  
7 IN THIS SORT OF FRAMEWORK OF A LICENSE.

8 THE COMPETITIVE RELATIONSHIP OF THE PARTIES. AND  
9 THAT REALLY MEANS ARE THEY DIRECT COMPETITORS OR ARE THEY IN  
10 SEPARATE MARKETS, YOU LOOK AT THAT ISSUE.

11 AND THEN THE NEXT ONE IS REALLY IMPORTANT, AND THAT  
12 IS WHAT I CALL COPYRIGHTED WORKS. THAT'S THE SOFTWARE AND THE  
13 SOFTWARE MATERIALS, THE MANUALS AND THINGS.

14 WHAT WERE THE GOALS AND BUSINESS PLANS, IN THIS  
15 CASE, FOR SAP AS TO HOW AND WHY THEY WANTED TO USE THOSE AND  
16 THEN MATCHED UP AT THE SAME TIME WITH ORACLE'S PLANS WERE.

17 AND THEN THE SECOND TO THE LAST ONES YOU WILL SEE A  
18 LOT OF FINANCIAL CALCULATIONS. I HAVE DONE DIFFERENT MODELS TO  
19 COME UP WITH WHAT I CALL THE, IN THIS CASE, EXPECTED BENEFITS  
20 TO SAP, SAP'S GAINS, IF THEY TAKE THE LICENSE. AND I COMPARE  
21 THAT TO WHAT ORACLE IS GIVING UP. I CALL THOSE ORACLE'S  
22 IMPACTS OR ORACLE'S FINANCIAL LOSSES, WHEN THEY GIVE THE  
23 LICENSE UP THEY LOSE SOMETHING OR IMPACTED.

24 SOMETIMES THINGS CANNOT BE QUANTIFIED, AND I CALL IT  
25 VALUES NOT QUANTIFIED. AND WE WILL TALK ABOUT HOW THAT COMES

1 INTO THE TRANSACTION ALSO FOR THIS LICENSE IN THE NEGOTIATION.  
2 ULTIMATELY IT RESULTS IN A VALUE, AN AMOUNT TO PAY  
3 FOR USE OF, IN THIS CASE, THE SOFTWARE AND THE SOFTWARE  
4 MATERIALS.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

11 Q. ALL RIGHT. LET'S GO TO THE NEXT SLIDE.

12 (SLIDE DISPLAYED ON SCREEN.)

13 WHAT DOES THIS SHOW?

14 A. THIS LAYS OUT WHY I BELIEVE THE FAIR MARKET APPROACH,  
15 VALUE APPROACH TO THE LICENSE IS THE BEST METHOD IN THESE, IN  
16 THIS SITUATION, IN THESE CIRCUMSTANCES.

17 I THINK THEY EACH HAVE THEIR OWN NUANCE, BUT THE  
18 FIRST ONE IS VERY IMPORTANT. WHAT IT DOES IS WE CAN MEASURE  
19 THE FAIR MARKET VALUE. BASICALLY IT MEASURES THE FAIR MARKET  
20 VALUE, WHAT ORACLE WOULD HAVE BEEN PAID, THAT AMOUNT THEY WOULD  
21 HAVE BEEN PAID AT THE TIME -- WE WILL TALK ABOUT THE DATE IN A  
22 MOMENT -- BASED ON THE TOTAL SCOPE OF INFRINGING ACTIVITIES.  
23 SO ALL OF THE PROPERTY TAKEN BY SAP, WE HAVE THAT, AND WE GET  
24 TO MEASURE AT THAT POINT IN TIME WHAT ONE WOULD PAY ORACLE FOR  
25 THAT. AND THIS METHOD CLEARLY DOES THAT THE BEST. THERE'S NO

1 QUESTION ABOUT THAT.

2 SECONDLY, IT ALLOWS YOU TO REFLECT ORACLE'S  
3 INVESTMENTS. AND THEY MADE A LARGE INVESTMENT IN PEOPLESOFT,  
4 \$11.1 BILLION. MR. ELLISON AND MS. CATZ THIS MORNING TALKED  
5 ABOUT THAT. AND THEY ALSO BOUGHT SIEBEL PAYING MONIES UP  
6 FRONT. THE ORACLE TRANSACTION OF PEOPLESOFT WAS A CASH  
7 TRANSACTION, \$11.1 BILLION.

8 THOSE UPFRONT PAYMENTS CAN BE MEASURED IN THIS  
9 APPROACH BECAUSE YOU GET TO PUT THAT INTO THE NEGOTIATION. AND  
10 IN THOSE TRANSACTIONS, THE SOFTWARE THAT'S IN QUESTION IN THIS  
11 CASE AND THE MATERIALS THAT ARE PART OF THAT SOFTWARE WERE PART  
12 OF THOSE TRANSACTIONS. AND YOU GET TO MEASURE THAT IN THIS  
13 HYPOTHETICAL NEGOTIATION.

TEXT REMOVED - NOT RELEVANT TO MOTION

23 THEN ALSO WHAT IT DOES IT ALLOWS YOU TO SUBSTITUTE  
24 THE NEGOTIATION THAT WE ARE GOING TO DO FOR INFRINGEMENT. SO  
25 IF YOU TAKE A LICENSE, YOU DON'T NEED TO INFRINGE; YOU HAVE A

1 LICENSE NOW TO USE WHAT YOU TOOK. SO IT'S REALLY A GOOD METHOD  
2 IN THIS CASE TO MEASURE DAMAGES.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

25

FIRST OF ALL, WHAT WOULD A LICENSE FOR THE

1 PEOPLESOFT SOFTWARE BETWEEN SAP AND ORACLE, WHAT WOULD THAT  
2 LICENSE HAVE COVERED?

3 A. WELL, I HAVE A CHART ON THIS, A SLIDE ON THIS.

4 (SLIDE DISPLAYED ON SCREEN.)

5 BUT REALLY IT WOULD COVER ALL THE PROPERTY THAT'S  
6 BEEN TAKEN AND ALL THE PROPERTY THAT'S IN THE STIPULATIONS OF  
7 LIABILITY.

8 AND SO I HAVE LAID IT OUT FOR THE JURY HERE, WHAT I  
9 CALL THE SCOPE. BACK ON THE NEGOTIATION FACTORS CHARTS A WHILE  
10 BACK, SLIDES A WHILE BACK, ONE OF THE FACTORS WAS THE SCOPE.

11 WHAT'S IN THIS LICENSE. SO WE KNOW THERE IS FOR  
12 PEOPLESOFT A HUNDRED AND FIVE COPYRIGHT REGISTRATIONS. THAT  
13 COVERS AT LEAST HUNDREDS OF THOUSANDS OF SOFTWARE FILES, AT  
14 LEAST THOUSANDS OF COPIES OF ENTIRE APPLICATIONS, AND AT LEAST  
15 HUNDREDS OF THOUSANDS OF DOWNLOADS. SO THAT'S ALL THE  
16 REGISTRATION THAT'S THE PROPERTY OF ORACLE THAT IS UNDER  
17 LICENSE NOW IN THIS NEGOTIATION.

18 ON THE RIGHT-HAND SIDE, I TRIED TO MAKE IT MORE REAL  
19 LIFE TO WHAT I CALL THE PROPERTY OR THE COPYRIGHTED WORKS. SO  
20 THEY ARE GETTING A LIBRARY OF THINGS, SORT OF A TOOL BOX OF  
21 ITEMS. YOU ARE GETTING SOFTWARE OBJECTS, SOFTWARE UPDATES.  
22 MR. ELLISON MENTIONED THE, I THINK HE MENTIONED THE BUG FIXES,  
23 THE PATCHES, SOFTWARE APPLICATIONS, INSTRUCTIONAL MATERIALS AND  
24 CUSTOM SOLUTIONS.

25 WHAT WAS IMPORTANT TO ME IN THIS CASE WAS IT WASN'T

1     LIKE THEY JUST GOT A LICENSE NOT TO BE SUED, THEY ACTUALLY GOT  
2     REAL PROPERTY. THAT REAL PROPERTY WAS DOWNLOADED AND OBTAINED  
3     AND COPIED, AND IT WAS VERY VALUABLE PROPERTY WHEN IT WAS  
4     DOWNLOADED. LOTS OF TIME WAS SPENT. AS I MENTIONED ON THE  
5     BOTTOM THERE WITH MY DEPICTION, ORACLE SOFTWARE ENGINEERS AND  
6     DEVELOPERS DEVELOPING THOSE SOFTWARE MATERIALS.

7             AND MR. ELLISON THIS MORNING TESTIFIED TO THE SIZE  
8     OF SOME OF THOSE EXPENDITURES ON IN-HOUSE DEVELOPMENT, BUT WHEN  
9     YOU THINK ABOUT THE PEOPLESOFT TRANSACTION OF \$11 BILLION, WHAT  
10    YOU ARE PAYING FOR IS ALL THOSE SOFTWARE MATERIALS THAT WERE  
11    DEVELOPED BY PEOPLESOFT THAT IS NOW PART OF YOUR COMPANY.

12            SO THAT'S ALL -- YOU ACQUIRED ALL THAT. IT'S LIKE  
13    SPENDING YOUR OWN DEVELOPMENT MONEY, YOU HAPPENED TO DO IT IN A  
14    TRANSACTION.

15    Q.     SO, THE LICENSE WOULD COVER A RIGHT TO EVERYTHING THAT  
16    THEY TOOK WITHOUT A LICENSE?

17    A.     THAT'S RIGHT. ALL THE THINGS THAT THEY ACTUALLY TOOK THAT  
18    ARE NOW IN THE STIPULATIONS IS ALL NOW IN OUR SCOPE FOR OUR  
19    LICENSED NEGOTIATION.

20    Q.     THEY WOULD HAVE HAD A RIGHT TO USE IT UNDER THIS LICENSE  
21    RATHER THAN JUST TAKE IT?

22    A.     RIGHT. THEY WOULD HAVE A RIGHT NOW WITH THE LICENSE TO  
23    USE THIS IN THEIR BUSINESS STARTING IN RELEASE WITH PEOPLESOFT  
24    IN JANUARY 2005.

25    Q.     ALL RIGHT.

1                   NOW, WHEN WOULD THIS LICENSE NEGOTIATION, WHEN WOULD  
2 IT HAVE OCCURRED? WHAT IS THE BEGINNING DATE OF THE LICENSE?

3           A.     THE NEGOTIATION OCCURS ON JANUARY 19TH, 2005. AND I PUT  
4 UP A CHART HERE TO SORT OF PLACE IN TIME WHY THAT IS AN  
5 IMPORTANT SORT OF MEETING OF A COUPLE DATES.

6                   (SLIDE DISPLAYED ON SCREEN.)

7                   BASICALLY, ON JANUARY 18, 2005, THERE IS A BIG  
8 ANNOUNCEMENT BY ORACLE WHERE THEY ARE DESCRIBING TO ALL THEIR  
9 CUSTOMERS AND THE FINANCIAL ANALYSTS AND THE PUBLIC HOW THEY  
10 ARE GOING TO COMBINE PEOPLESOFT AND J.D. EDWARDS WITH THEIR  
11 BUSINESS, AND THAT'S THE \$11.1 BILLION ACQUISITION.

12                   SO, YOU'VE HEARD A LOT ABOUT THAT TODAY FROM  
13 MS. CATZ AND MR. ELLISON, AND I BELIEVE MR. PHILLIPS LAST WEEK.  
14 SO THAT'S A LOT THAT HAPPENED.

15                   THEN JUST ONE DAY LATER, ONE DAY LATER, SAP HAS A  
16 SIMILAR CONFERENCE. THEY HAVE A CONFERENCE CALL, AND THEY TALK  
17 TO THEIR CUSTOMERS, THEY TALK TO THE FINANCIAL ANALYSTS AND  
18 THEY TALK TO THE PUBLIC, AND THEY ANNOUNCE A COMPETING BUSINESS  
19 CALLED SAFE PASSAGE. AND AS PART OF THAT ANNOUNCEMENT, THEY  
20 ANNOUNCE THE ACQUISITION OF TOMORROWNOW TO BE THEIR SERVICE  
21 PROVIDER TO PROVIDE SERVICE ON PEOPLESOFT AND J.D. SOFTWARE  
22 PRODUCTS.

23                   AND SO FROM MY PERSPECTIVE, AT THAT POINT, ON  
24 JANUARY 19TH, 2005, TO LAUNCH THAT NEW BUSINESS OFFERING FROM  
25 SAP, THEY WOULD NEED A LICENSE. SO THEY WOULD NEGOTIATE RIGHT

1 THERE AND TAKE THE LICENSE SO THAT WHAT THEY DID WAS NOT  
2 INFRINGING.

3 Q. SO, THE LICENSE WOULD BE NEGOTIATED AND START DAY ONE  
4 JANUARY 19, 2005?

5 A. YES.

6 Q. BECAUSE THAT'S WHEN THE INFRINGEMENT STARTED?

7 A. THAT'S CORRECT.

8 Q. AND THAT'S WHEN THEY WOULD HAVE NEEDED A LICENSE?

9 A. THAT'S CORRECT.

10 Q. ALL RIGHT. HOW LONG WOULD THIS LICENSE LAST?

11 A. THE LICENSE WILL LAST UNTIL OCTOBER 2008. AND IT WOULD BE  
12 THAT PERIOD BECAUSE THAT'S THE PERIOD WHEN TOMORROWNOW CEASED  
13 OPERATIONS AND SHUT DOWN THEIR BUSINESS. SO, THE LICENSE GOES  
14 FROM JANUARY 19TH, 2005 OUT TO OCTOBER 2008 WHEN THE BUSINESS  
15 OF TOMORROWNOW WAS NO LONGER IN BUSINESS.

16 Q. YOU MENTIONED EARLIER A NEED, SAP'S NEED FOR THESE  
17 COPYRIGHTED SOFTWARE AND SUPPORT MATERIALS. WHY ARE THOSE  
18 COPYRIGHTED SOFTWARE AND SUPPORT MATERIALS VALUABLE?

19 A. WELL, THEY ARE REALLY VALUABLE BECAUSE THEY LEAD TO A VERY  
20 SUCCESSFUL BUSINESS.

21 SO, IF YOU HAVE THE SOFTWARE AND THE SUPPORT  
22 MATERIALS FROM ORACLE ON PEOPLESOFT, YOU CAN THEN HAVE  
23 MAINTENANCE PROVIDED ON PEOPLESOFT AND J.D. PRODUCTS.

24 AND SO THE SOFTWARE LEADS TO THE REVENUE YOU HEARD  
25 ABOUT THIS MORNING. AND SO MS. CATZ MENTIONED THERE WAS

1 \$1.2 BILLION OF ANNUAL MAINTENANCE REVENUE ON PEOPLESOFT  
2 PRODUCTS. AND THAT IS EVERY YEAR. THAT IS CALLED RECURRING  
3 REVENUE.

4 SO, THE SOFTWARE IN THIS CASE, YOU DON'T HAVE THAT  
5 SOFTWARE, YOU CAN'T PROVIDE WHAT'S CALLED VENDOR LEVEL SERVICE.  
6 THAT'S WHERE YOU GET ALL THE UPDATES, THE BUG FIXES, AND ALL  
7 THE THINGS MR. ELLISON MENTIONED. SO YOU NEED THE SOFTWARE TO  
8 HAVE AN OPPORTUNITY TO COMPETE FOR THAT \$1.2 BILLION, AND  
9 THAT'S AN ANNUAL REVENUE ITEM.

10 Q. HOW DO YOU KNOW THAT THE DEFENDANTS NEEDED ACCESS TO THIS  
11 SOFTWARE?

12 A. THERE'S VERY MANY DOCUMENTS THAT I HAVE GONE THROUGH, I  
13 BELIEVE THE JURY HAS SEEN MANY OF THESE DOCUMENTS. THEY BEGAN  
14 BEING CREATED IN DECEMBER OF 2004 BY SAP'S EXECUTIVE BOARD.

15 SO, MR. APOTHEKER, MR. AGASSI, MR. KAGERMANN AND  
16 MR. BRANDT, MR. OSWALD, THEY ALL WERE INVOLVED STARTING IN  
17 DECEMBER 2004 IN A WIDE VARIETY OF DOCUMENTS THAT LEAD UP TO  
18 THE LAUNCH OF SAFE PASSAGE ON JANUARY 19TH, 2005.

19 SO OVER SIX WEEKS THAT GROUP COMES TOGETHER WITH ALL  
20 OF THEIR COLLEAGUES AND PLAN A BUSINESS. AND IN THOSE BUSINESS  
21 DOCUMENTS, IT'S VERY CLEAR THAT THE CORNERSTONE OF THIS  
22 PEOPLESOFT MAINTENANCE WOULD BE PROVIDED BY TOMORROWNOW.

23 Q. YOU MENTIONED -- LET ME JUST GO THROUGH THAT. YOU  
24 MENTIONED THE EXECUTIVE BOARD OF SAP AG. YOU MENTIONED  
25 MR. APOTHEKER, MR. BRANDT, MR. OSWALD AND MR. AGASSI AND

1 MR. SOMEBODY -- MR. BRANDT, THE ONE WHO SHOWED UP. OKAY.

2 WHAT IS THAT EXECUTIVE BOARD?

3 A. WELL, IT'S BASICALLY THE GROUP THAT MANAGES. IT'S THE  
4 MANAGEMENT TEAM OF SAP.

5 SO, MR. APOTHEKER IS ON THAT GROUP, AND HE WAS HEAD  
6 OF SALES. MR. AGASSI WAS PART OF THAT GROUP AND HE WAS HEAD OF  
7 TECHNOLOGY PRODUCTS. MR. KAGERMANN, WHO YOU SAW LAST WEEK, WAS  
8 HEAD OF FINANCE. MR. OSWALD WAS HEAD OF SUPPORT SERVICES,  
9 WHICH WOULD FIT INTO WHAT WE ARE TALKING ABOUT HERE, PEOPLESOFT  
10 SUPPORT.

11 Q. YOU MISSPOKE. YOU SAID KAGERMANN WAS FINANCE. IT WAS --

12 A. MR. BRANDT WAS. MR. KAGERMANN, I AM NOT CERTAIN --

13 Q. CEO?

14 A. HE WAS CEO AND THEN LATER ON I THINK MR. APOTHEKER BECAME  
15 CO-CEO. THEY ARE THE GROUP THAT BASICALLY RUNS THE COMPANY AS  
16 MANAGEMENT DAY-TO-DAY. AND THAT WOULD BE AKIN TO WHAT WE CALL  
17 OUR EXECUTIVE OFFICES IN A U.S. COMPANY.

18 AND THEN THERE'S A SEPARATE OUTSIDE BOARD THEY HAVE.  
19 I THINK THEY CALL IT A SUPERVISORY BOARD. WE CALL THAT HERE IN  
20 U.S. COMPANIES THE BOARD OF DIRECTORS, WHICH IS MOSTLY OUTSIDE  
21 DIRECTORS, BUT THESE ARE THE INSIDE PEOPLE THAT RUN THE COMPANY  
22 AND MAKE DECISIONS AND APPROVE BUSINESS DECISIONS EVERY DAY.

23 Q. SO WHEN DOCUMENTS ARE PRESENTED TO THAT BOARD AND THAT  
24 BOARD TESTIFIES THAT SAP NEEDED THIS PEOPLESOFT SOFTWARE, WHAT  
25 DO YOU CONCLUDE?

1 A. FROM MY REVIEW, THAT IS THE MANAGEMENT OF THIS COMPANY.  
2 THAT'S THE HIGHEST IT GOES IN TERMS OF WHAT IT DOES EVERY  
3 SINGLE DAY WITH ITS EMPLOYEES AND ITS CUSTOMERS.

4 Q. SO, GIVEN, GIVEN SAP'S NEED FOR THIS PEOPLESFT SOFTWARE,  
5 WHAT WERE THEIR OPTIONS IN JANUARY 2005?

6 A. WELL, THEY HAD BASICALLY, I GUESS, REALLY TWO, MAYBE  
7 THREE. THE FIRST TWO WOULD BE YOU TAKE A LICENSE. YOU GO TO  
8 ORACLE AND SAY, WE WANT TO OFFER THIS SERVICE ON PEOPLESFT.  
9 WILL YOU SIT DOWN AND NEGOTIATE A LICENSE? THEY CAN DO THAT.  
10 THEY CAN TRY TO BUILD IT LIKE IN THEIR OWN COMPANY.

11 MR. ELLISON DESCRIBED THAT THIS MORNING. BASICALLY HE THOUGHT  
12 THEY WERE GOING TO SPEND A LOT OF MONEY TO BUILD THOSE  
13 MATERIALS AND THAT WOULD COST A LOT. BE VERY EXPENSIVE TO  
14 BUILD IT IN-HOUSE. I BELIEVE THERE'S TESTIMONY IN THIS CASE  
15 WHERE SAP TOMORROWNOW DETERMINED THEY COULD NOT BUILD IT, AND I  
16 THINK THEIR EXPERTS HAVE TAKEN THAT POSITION.

17 AND THEN THE THIRD OPTION IS YOU TAKE IT. OBVIOUSLY  
18 THAT IS NOT A LEGAL OPPOSITE.

19 Q. BASICALLY THEIR CHOICE WAS TO BUY THROUGH A LICENSE OR  
20 ILLEGALLY TAKE?

21 A. THAT'S HOW I SEE IT.

22 Q. LET'S GO TO SOME TESTIMONY OF MR. BRANDT, THE ONLY BOARD  
23 MEMBER WHO HAS APPEARED HERE LAST FRIDAY. AND THROUGH THE  
24 MAGIC OF THESE WONDERFUL COURT REPORTERS, AND I'M HOPING YOU  
25 ARE GETTING ALL THIS DOWN, WE HAVE TRANSCRIPTS OF WHAT WAS SAID

1 SO THERE'S NO DOUBT ABOUT IT.

2 I WOULD LIKE TO, IF I COULD, PUT UP PAGE 699 OF THE  
3 TRANSCRIPT FROM FRIDAY'S TESTIMONY OF MR. BRANDT.

4 (TRANSCRIPT DISPLAYED ON SCREEN.)

5 AND I WANT TO START WITH A QUESTION HE WAS ASKED,  
6 MR. BOIES ASKED HIM.

7 "QUESTION: IN JANUARY OF 2005," THIS IS TO THE  
8 BOARD MEMBER, MR. BRANDT, "IF YOU HAD KNOWN THAT  
9 THE RESULT OF WHAT YOU WERE GOING TO BE DOING  
10 WAS GOING TO BE TOMORROWNOW AND SAP BEING FOUND  
11 LIABLE FOR COPYRIGHT INFRINGEMENT, YOU WOULD  
12 HAVE WANTED TO AVOID THAT BY BUYING A LICENSE,  
13 CORRECT, SIR?

14 ANSWER: YOU SAID THROUGH A LICENSE QUESTION?

15 QUESTION: YES.

16 "ANSWER: I UNDERSTOOD THE QUESTION. THE ANSWER  
17 IS NO BECAUSE IN THAT CASE WE EITHER WOULD HAVE  
18 CONSIDERED NOT TO BUY TOMORROWNOW OR WE WOULD  
19 HAVE INSISTED THAT TOMORROWNOW CHANGE THEIR  
20 OPERATING PROCEDURES IN ORDER NOT TO VIOLATE ANY  
21 COPYRIGHT INFRINGEMENT."

22 DOES THIS CHANGE YOUR OPINION IN ANY WAY?

23 A. NO, IT DOES NOT. I DON'T SEE THOSE AS BEING VIABLE  
24 OPTIONS FROM THE MANY RECORDS I REVIEWED IN THIS CASE.

25 AND IN PARTICULAR, WHEN YOU SEE THE NUMBER OF

1 RECORDS THAT RELATE TO HOW IMPORTANT IT WAS, IMPORTANT IT WAS  
2 ON JANUARY 19TH, 2005, THE DAY AFTER ORACLE ANNOUNCES  
3 PEOPLESOFT TO MARKET, SAP NEEDED TO HAVE A SOLUTION. AND THAT  
4 WAS WHAT THIS WAS ALL ABOUT, THE TIMING.

5 SO YOU BASICALLY HAD TO HAVE A PRODUCT RELEASE THEN.  
6 SO THEY NEEDED A LICENSE. AND THEY CAN'T GO BACK AND NOT BUY  
7 THE COMPANY.

8 IN FACT, ALL THE RECORDS I HAVE SEEN IS THEY REALLY  
9 WANTED THIS COMPANY. THEY RESEARCHED THE COMPANY OF  
10 TOMORROWNOW BECAUSE THEY WANTED TO GET INTO THIS MARKET IN  
11 JANUARY OF 2005.

12 AND THEN I THINK THE RECORD REFLECTS THAT,  
13 BASICALLY, THERE WAS NO CHANGE IN OPERATING PROCEDURES AT  
14 TOMORROWNOW. WHEN THEY WENT TO -- WHEN THE LAWSUIT WAS FILED,  
15 THEY TRIED TO CHANGE OPERATING PROCEDURES AND TOMORROWNOW WAS  
16 SHUT DOWN BECAUSE THEY COULDN'T OPERATE WITHOUT INFRINGING.

17 Q. CAN SAP GO BACK IN TIME, GO BACK TO 2005 AND PRETEND IT  
18 DIDN'T BUY TOMORROWNOW?

19 A. I HAVE BEEN IN MANY ASSIGNMENTS LIKE THIS WHERE THERE'S  
20 INFRINGEMENT, AND I HAVE NEVER SEEN THAT ALLOWED. IT'S JUST  
21 NOT AN OPTION.

22 Q. COULD SAP GO BACK IN TIME FIVE YEARS AND SAY, OH, WELL, WE  
23 WOULDN'T HAVE VIOLATED, WE WOULDN'T HAVE INFRINGED?

24 A. I JUST MENTIONED THAT. WHEN THE LAWSUIT WAS FILED,  
25 TOMORROWNOW DID LOOK TO SEE WHETHER THEY COULD OPERATE WITHOUT

1 VIOLATING THE COPYRIGHTS. AND THEY HAD NO WAY TO DO IT, SO  
2 THEY SHUT THE COMPANY DOWN.

3 Q. IN YOUR OPINION, THEY NEEDED A LICENSE?

4 A. THEY HAD TO TAKE A LICENSE.

5 Q. ALL RIGHT.

6 NOW, WAS THE TIMING OF THE DEFENDANTS' ACCESS TO THE  
7 PEOPLESOFT SOFTWARE, WAS THAT IMPORTANT IN ANY WAY?

8 A. YES, IT WAS VERY IMPORTANT. I THINK IT'S ONE OF THE MOST  
9 IMPORTANT ISSUES IN THIS CASE ON DAMAGES IS THE TIMING ISSUE.

10 Q. WHY IS THAT?

11 A. BECAUSE THERE IS SO -- THE TRANSACTION OF PEOPLESOFT,  
12 WHICH YOU WILL SEE IN A MOMENT, BY ORACLE WAS BEGINNING TO  
13 CHANGE THE MARKET SHARES IN THE ENTERPRISE SOFTWARE MARKET SO  
14 SIGNIFICANTLY THAT SAP WANTED TO RESPOND AND WANTED TO TAKE  
15 ADVANTAGE OF PEOPLESOFT BEING ACQUIRED BY ORACLE WHEN THESE  
16 CUSTOMERS HAD TO BE SORT OF TRANSITIONED INTO ORACLE. AND THEY  
17 WANTED DO SOMETHING RIGHT AT THAT POINT IN TIME, IN JANUARY OF  
18 2005, TO IMPACT ORACLE AND TAKE THOSE CUSTOMERS.

19 Q. LET'S LOOK AT PLAINTIFFS' EXHIBIT 141, WHICH IS ON THE  
20 NEXT SLIDE. RELEVANT PORTION OF IT. WHAT DOES THIS DOCUMENT  
21 SHOW YOU?

22 (EXHIBIT DISPLAYED ON SCREEN.)

23 A. THIS IS A DOCUMENT THAT BASICALLY GOES RIGHT TO THE POINT  
24 I MENTIONED A MOMENT AGO. I THINK THE TITLE IS ALWAYS  
25 IMPORTANT ON THESE DOCUMENTS. IT IS CALLED "SAFE PASSAGE:

1 WINNING CUSTOMERS AND MARKETS FROM ORACLE, PEOPLESOFT,  
2 J.D. EDWARDS JANUARY 16TH, 2005."

3 I THINK THE KEY LANGUAGE HAS BEEN HIGHLIGHTED THERE.  
4 IT SAYS "KEY TACTICS." THIS IS NOW SAP'S MANAGEMENT.  
5 "ANNOUNCE A DRAMATIC MARKET CHANGING PEOPLESOFT AND  
6 J.D. EDWARDS SUPPORT AND UPGRADE OFFERING IN JANUARY JUST AS  
7 ORACLE ANNOUNCES THEIR NEW STRATEGY."

8 SO IT'S ALL ABOUT TIMING.

9 Q. AND WHAT CONCLUSIONS DO YOU DRAW THAT -- WITH RESPECT TO  
10 THE DATE AND THE FACT THAT THE BOARD AND OTHER TOP MANAGEMENT  
11 WAS GETTING THIS STATEMENT OF STRATEGY?

12 A. THERE WAS NO QUESTION IN MY MIND THAT THE EXECUTIVE BOARD  
13 OF SAP WAS FULLY ORCHESTRATING THIS NEW BUSINESS, AND THERE'S  
14 MANY INDICATIONS THAT THEY PLAN TO ANNOUNCE IT THE DAY AFTER  
15 ORACLE'S ANNOUNCEMENT.

16 Q. IS THIS THE ONLY DOCUMENT YOU SAW -- SAP DOCUMENT THAT YOU  
17 SAW THAT STRESSES THE IMPORTANCE OF BEING ABLE TO COMPETE  
18 AGAINST ORACLE WITH PEOPLESOFT SOFTWARE IMMEDIATELY?

19 A. NO. THERE'S MANY MORE LIKE THIS.

20 Q. HOW IS THE TIMING OF SAP'S NEED FOR ACCESS TO PEOPLESOFT  
21 SOFTWARE, HOW IS THE TIMING RELEVANT TO THE LICENSE  
22 NEGOTIATION?

23 A. THE TIMING IS VERY IMPORTANT BECAUSE YOU HAVE A THEN B.  
24 YOU HAVE ORACLE SPENDING \$11 BILLION ON PEOPLESOFT AND THEN THE  
25 NEXT DAY YOU HAVE SAP GOING TO THE MARKET AND COMPETING HEAD TO

1 HEAD AND TELLING CUSTOMERS THAT WE HAVE COMPARABLE OR BETTER  
2 SERVICE AT HALF THE PRICE.

3 SO IT'S ALL ABOUT THE TIMING. IT IS ALL ABOUT THE  
4 ANNOUNCEMENT. AND IT IS ALL ABOUT IMPACTING ORACLE.

5 Q. WOULD YOU EXPECT SOMEONE LIKE SAP IN THAT NEGOTIATION TO  
6 PAY MORE OR LESS FOR A LICENSE GIVEN THIS TIMING ISSUE?

7 A. FROM MY PERSPECTIVE, YOU SEE HOW QUICKLY SAP MOVED ON THIS  
8 PLAN FROM MID-DECEMBER 2004 TO FIVE WEEKS LATER ANNOUNCING THIS  
9 BUSINESS? FROM MY PERSPECTIVE THEY DESPERATELY WANTED TO  
10 ANNOUNCE THIS AND IMPACT ORACLE, AND IT WOULD BASICALLY SAY, WE  
11 WILL PAY MORE FOR THIS LICENSE.

12 Q. NOW, IN REVIEWING THE SAP MATERIALS GOING TO THE BOARD,  
13 MR. MEYER, DID YOU SEE ANY EVIDENCE THAT GOING INTO THE DEAL,  
14 BEFORE THEY DECIDED TO GO AHEAD AND LAUNCH THIS NEW PROJECT,  
15 THAT THE -- THAT SAP RECOGNIZED IT HAD A RISK OF SERIOUS  
16 LIABILITY DUE TO TOMORROWNOW'S INFRINGEMENT PRACTICES?

17 A. YES. I HAVE SEEN A VARIETY OF COMMUNICATIONS TO AND  
18 BETWEEN THE EXECUTIVE BOARD WHERE THEY FULLY RECOGNIZED THAT  
19 THEY COULD HAVE LEGAL LIABILITY FOR SOFTWARE INFRINGEMENT.

20 Q. WHAT'S THE RELEVANCE TO THE VALUE OF WHAT THEY TOOK OF  
21 SAP'S TOP MANAGEMENT KNOWING ABOUT THESE LEGAL RISKS AND GOING  
22 AHEAD ANYWAY?

23 MR. MITTELSTAEDT: YOUR HONOR, I OBJECT TO THIS AS  
24 BEYOND THE SCOPE OF HIS REPORT IN THIS CASE. IT'S OUTSIDE THE  
25 SCOPE OF HIS REPORT.

1 THE COURT: THE REPORT IS 234 PAGES LONG. I DON'T  
2 REMEMBER IF IT'S IN THERE OR NOT.

3 MR. PICKETT: WELL --

4 THE COURT: DO YOU WANT TO RESPOND?

5 MR. PICKETT: THE REPORT IS LONG. I THINK IT IS IN  
6 THERE, BUT MORE TO THE POINT, THIS IS AN ISSUE THAT HAS COME UP  
7 BECAUSE THEY HAVE MADE CERTAIN OBJECTIONS TO YOUR HONOR, AND WE  
8 NEED TO SUPPORT THE FACT THAT YOUR HONOR'S BEEN CORRECT IN HER  
9 RULINGS THAT THIS IS A RELEVANT ISSUE TO VALUE.

10 THE COURT: I AM GOING TO ALLOW IT.

11 BY MR. PICKETT:

12 Q. SO LET'S GO BACK, MR. MEYER.

13 WHAT IS THE RELEVANCE OF THE FACT THAT SAP'S TOP  
14 MANAGEMENT, ITS BOARD, KNEW ABOUT THESE LEGAL RISKS OF  
15 TOMORROWNOW INFRINGEMENT AND WENT AHEAD WITH THE PROJECT  
16 ANYWAY? WHAT IS THE RELEVANCE TO VALUE?

17 A. IT'S RELEVANT TO VALUE BECAUSE IF THE EXECUTIVE BOARD  
18 IDENTIFIES A RISK, DOCUMENTS A RISK, DISCUSSES A RISK AND THEN  
19 GOES FORTH AND STILL DOES IT AND LAUNCHES SAFE PASSAGE WITH  
20 TOMORROWNOW WHICH IS USING THE INFRINGING SOFTWARE MATERIALS,  
21 THEY STILL DO THAT, IT INDICATES THAT THEY HAVE ASSESSED THE  
22 RISK, THEY HAVE SAID, WE WILL DO THIS BECAUSE IT IS REALLY,  
23 REALLY IMPORTANT TO SAP TO RESPOND IN JANUARY AND NOT A YEAR OR  
24 TWO FROM NOW. THEY HAVE TO DO IT NOW. SO THEY HAVE CONFRONTED  
25 THAT RISK AND THEY HAVE DECIDED IN THE CASE OF THE LICENSE, WE

- 1 WOULD PAY MORE FOR THAT TO BE ABLE TO RESPOND TO ORACLE'S
- 2 EMERGING ENTERPRISE MARKET SHARE INCREASE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

24 WE KNOW THAT ORACLE AND SAP THEY ARE ONE AND TWO,  
25 THEY'RE FIERCE COMPETITORS, HOW WOULD THAT HAVE IMPACTED THE

1 LICENSE NEGOTIATION AND WHAT THE PRICE OF THE LICENSE WOULD  
2 HAVE BEEN?

3 A. IT'S A VERY BIG ISSUE BECAUSE OF BEING DIRECT COMPETITORS.  
4 WHENEVER THERE IS A LICENSE BETWEEN COMPETITORS, THE  
5 PARTY THAT TAKES THE LICENSE IS NOW GOING TO COMPETE HEAD TO  
6 HEAD. AND IF THEY ARE SUCCESSFUL, THEY ARE TAKING A CUSTOMER  
7 AWAY FROM THE GROUP THAT LICENSED IT OUT, THE LICENSOR.

8 SO WHEN IT IS HEAD TO HEAD, IT'S NEVER WIN-WIN.  
9 SOMEONE IS GOING TO LOSE SOMETHING BECAUSE YOU MAY GET PAID A  
10 ROYALTY AMOUNT, BUT YOU ARE GOING TO LOSE A CUSTOMER. AND  
11 CUSTOMERS IN THE SOFTWARE BUSINESS WHERE THERE'S LICENSE AND  
12 ONGOING MAINTENANCE, IT'S HUGE TO BE INSTALLED IN THAT COMPANY  
13 LONG-TERM RELATIONSHIPS MS. CATZ MENTIONED THIS MORNING, THEY  
14 CAN BE THERE FOR DECADES.

15 SO, HEAD-TO-HEAD COMPETITION MEANS YOU NEED TO  
16 CHARGE A LOT MORE, AND AS I MENTIONED A WHILE BACK, UP FRONT TO  
17 MAKE CERTAIN THAT YOU ARE NOT INVITING THE FOX INTO THE HEN  
18 HOUSE.

19 Q. THANK YOU, MR. MEYER.

20 WE HAVE TALKED ABOUT WHAT THE LICENSE WOULD COVER,  
21 WE HAVE TALKED ABOUT THE TIMING OF THE LICENSE, SAP'S NEED FOR  
22 THE LICENSE, THE SIGNIFICANCE OF THE LEGAL RISK THAT SAP  
23 ACKNOWLEDGED, AND THE FACT THEY ARE COMPETITORS.

24 WITH ALL OF THAT AS BACKGROUND, HOW DO WE GO ABOUT  
25 MEASURING WHAT THE RESULT, THE ACTUAL RESULT OF A LICENSED

1 NEGOTIATION BETWEEN ORACLE AND SAP FOR THE PEOPLESOFT SOFTWARE  
2 AND SUPPORT MATERIALS, HOW THAT WOULD COME OUT?

3 A. I WOULD GO TO THE NEXT PHASE OF MY ANALYSIS. I'VE ALREADY  
4 SORT OF DESCRIBED THE SCOPE AND NEED AND TIMING AND  
5 COMPETITION. NOW I FOCUS ON THINGS THAT START TAKING US DOWN  
6 THE PATH OF THE VALUE.

7 I HAVE A CHART THAT LAYS OUT FOR SAP WHAT I BELIEVE  
8 ARE THOSE KEY FACTORS AND CONSIDERATIONS AT A HIGH LEVEL, SOME  
9 OF MY FEEDBACK ON THAT.

10 (SLIDE DISPLAYED ON SCREEN.)

11 Q. YOU HAVE GOT THE TABLE NEGOTIATING, YOU'VE GOT ORACLE ON  
12 ONE SIDE, YOU'VE GOT SAP ON THE OTHER, AND THE DATE JANUARY 19,  
13 2005.

14 WHAT ARE THE NEGOTIATION FACTORS YOU ARE CONSIDERING  
15 IN YOUR ANALYSIS OF THEM?

16 A. THERE ARE THREE OVERALL CATEGORIES. I WILL GO THROUGH  
17 THESE.

18 FIRST OFF, THERE'S A CATEGORY ONE. IT'S CALLED  
19 "SAP'S GOALS FOR THE NEW OFFERING." WE WILL TALK ABOUT, AT  
20 LENGTH ABOUT THE GOALS AND IN THIS CASE, WHAT I CALL THE DEMAND  
21 FOR THE SOFTWARE, WHAT IT DOES FOR YOU.

22 SECONDLY, A VERY IMPORTANT POINT IN A NEGOTIATION IS  
23 NOW SAP'S EXPECTED IMPACT ON ORACLE, HOW THEY THINK THEY ARE  
24 GOING TO IMPACT ORACLE. AND YOU WILL SEE THERE THAT I  
25 MENTIONED AGAIN THE \$11 BILLION TRANSACTION WITH PEOPLESOFT AND

1 TAKING CUSTOMERS AWAY FROM ORACLE.

2 AND ALSO I MENTIONED THIS CONCEPT A MOMENT AGO ABOUT  
3 THE FACT THAT IF SAP INCREASES REVENUE, THEN ORACLE'S REVENUES  
4 ARE IMPACTED.

5 THEN LASTLY I DO A LOT OF FINANCIAL CALCULATIONS.

6 THIS IS CALLED SAP'S EXPECTED FINANCIAL GAINS.

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TEXT REMOVED - NOT RELEVANT TO MOTION

12                   SO, I WANT TO TALK ABOUT, FIRST OF ALL, WHAT  
13 EVIDENCE DID YOU SEE THAT SUMMARIZED YOUR FINDINGS WITH RESPECT  
14 TO THESE THREE NEGOTIATION FACTORS?

15       A.     WELL, THERE IS LOTS OF DIFFERENT SOURCES OF INFORMATION.  
16 I WAS IN THE COURTROOM THIS MORNING AND I HEARD A LOT OF  
17 QUESTIONING ABOUT PLANS AND PROJECTIONS. AND I WAS VERY  
18 FOCUSED IN MY ANALYSIS TO GO BACK INTO SAP'S RECORDS AND LOOK  
19 AT ALL THE DOCUMENTS THAT INVOLVE THEIR BOARD EXECUTIVES THAT  
20 LED UP TO THE LAUNCHING OF SAFE PASSAGE.

21                   SO I HAVE SUMMARIZED HERE, I THINK, EIGHT OF THOSE  
22 DOCUMENTS, BUT THERE WERE MANY MORE. THIS ONE IS IMPORTANT  
23 BECAUSE I TRIED TO JUST GIVE YOU SORT OF A SCHEDULE OR ROAD MAP  
24 OF WHAT THEY TELL US AT A HIGH LEVEL.

25                   YOU WILL SEE THE DATE. AND THE FIRST DATE WE LOOK

1 AT IS DECEMBER 15TH OF 2004. AND THE LAST ONE IS, I THINK,  
2 JANUARY 25TH, 26TH, 2005.

3 AND THEN THERE IS A DOCUMENT, AND THEN THERE'S  
4 BASICALLY THE THREE NEGOTIATION FACTORS. AND I HAVE PUT AN "X"  
5 IN THERE IF THAT DOCUMENT REFERENCED SOMETHING IN IT THAT  
6 RELATED TO A GOAL OF SAP'S, NUMBER ONE, AND IMPACT ON ORACLE  
7 WAS ONE OF THE OBJECTIVES, AND THEN LASTLY, THREE, WHAT SAP  
8 EXPECTED ITS FINANCIAL GAINS WOULD BE IF IT LAUNCHED SAFE  
9 PASSAGE WITH THE INFRINGING SOFTWARE.

10 THEN I WANTED TO SEE ALSO, WHEN I GOT DONE WITH THE  
11 ANALYSIS OF THESE EIGHT DOCUMENTS AND OTHERS, WHO WAS INVOLVED.  
12 AND SO I PUT IN BOLD ON THE RIGHT-HAND SIDE IF THE EXECUTIVE  
13 BOARD WAS INVOLVED EITHER IN RECEIVING THE DOCUMENT OR IN  
14 DRAFTING THE DOCUMENT. AND THEN I HAVE ALSO NOTED THE NAMES.  
15 YOU WILL SEE THE BOARD OVERALL. AND THEN MR. AGASSI AND OSWALD  
16 AND APOTHEKER AND KAGERMANN, ET CETERA. YOU WILL SEE THAT.

17 ONCE AGAIN, THIS HELPS ME COME IN HERE AND TESTIFY,  
18 HAVE A FOUNDATION OF WHAT I BELIEVE SAP WAS ACTUALLY PLANNING  
19 TO DO AND THAT THEY WERE A VERY SOPHISTICATED COMPANY LAUNCHING  
20 THIS COMPETITIVE BUSINESS AGAINST ORACLE AT THE SAME POINT IN  
21 TIME ORACLE HAD SPENT \$11 BILLION.

22 Q. ARE THESE EIGHT DOCUMENTS FROM SAP, ARE THEY THE ONLY SAP  
23 DOCUMENTS, ONLY EVIDENCE THAT YOU SAW THAT RELATES TO EACH OF  
24 THESE FACTORS?

25 A. NO. THERE'S MANY MORE.

1 Q. BUT THESE ARE THE KEY?

2 A. THESE ARE KEY DOCUMENTS, THAT'S CORRECT.

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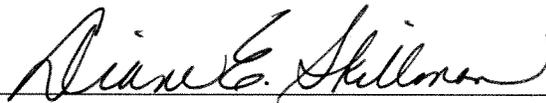
CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, MONDAY, NOVEMBER 8, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR



DIANE E. SKILLMAN, CSR, RPR, FCRR

TUESDAY, NOVEMBER 9, 2010

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

|                            |   |                           |
|----------------------------|---|---------------------------|
| ORACLE CORPORATION, ET AL. | ) | JURY TRIAL                |
|                            | ) |                           |
| PLAINTIFFS,                | ) | NO. C 07-01658 PJH        |
|                            | ) |                           |
| VS.                        | ) | VOLUME 6                  |
|                            | ) |                           |
| SAP AG, ET AL.,            | ) | PAGES 947 - 1187          |
|                            | ) |                           |
| DEFENDANTS.                | ) | OAKLAND, CALIFORNIA       |
| _____                      | ) | TUESDAY, NOVEMBER 9, 2010 |

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

BINGHAM MUCCUTCHEN LLP  
THREE EMBARCADERO CENTER  
SAN FRANCISCO, CALIFORNIA 94111-4607

BY: ZACHARY J. ALINDER,  
HOLLY A. HOUSE,  
GEOFFREY M. HOWARD,  
DONN P. PICKETT, ATTORNEYS AT LAW

BOIES, SCHILLER & FLEXNER LLP  
1999 HARRISON STREET, SUITE 900  
OAKLAND, CALIFORNIA 94612

BY: DAVID BOIES,  
STEVEN C. HOLTZMAN, ATTORNEYS AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY: RAYNEE H. MERCADO, CSR NO. 8258  
DIANE E. SKILLMAN, CSR NO. 4909

RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

TEXT REMOVED - NOT RELEVANT TO MOTION

5 THE COURT: THAT'S THE PROBLEM THAT WE HAVE. THEY --  
6 THE WITNESSES CAN'T COME IN HERE -- AS LONG AS YOU ARE STANDING  
7 BY THIS PRETRIAL STIPULATION, THE WITNESSES CAN'T COME IN HERE  
8 AND DISAVOW IT. AND THEIR TESTIMONY DOES SUGGEST SOME LEVEL OF  
9 DISAVOWING.

10 MR. LANIER: SO IF I MAY BRIEFLY ADDRESS, YOUR HONOR,  
11 NOT REARGUE FROM OUR PARAGRAPH. WE'VE OFFERED IT, AND WE  
12 UNDERSTAND YOUR RULING.

13 SIMPLY PUT, HERE IS WHERE I THINK THE CONFUSION HAS  
14 ARISEN. WHAT PLAINTIFFS ARE ESSENTIALLY ARGUING IS THAT  
15 CONTRIBUTORY INFRINGEMENT IS THE WILLINGNESS TO STEAL OR THE  
16 WILLINGNESS TO INFRINGE THAT THEY ARE ARGUING SUPPORTS A  
17 PARTICULAR VALUATION OF THE INTELLECTUAL PROPERTY AT ISSUE IN  
18 THIS CASE.

19 AND GIVEN YOUR HONOR'S RULING, THAT, IN FACT,  
20 INACTION MIGHT CONSTITUTE THE MERE -- THE MATERIAL CONTRIBUTION  
21 THAT'S NECESSARY IN CERTAIN CIRCUMSTANCES, IT CANNOT BE THE CASE  
22 THAT WILLINGNESS TO INFRINGE AND CONTRIBUTORY INFRINGEMENT ARE  
23 ALWAYS THE SAME THING, THAT CONTRIBUTORY INFRINGEMENT PROVES  
24 WILLINGNESS TO INFRINGE.

25 THE COURT: BUT THERE'S A KNOWLEDGE COMPONENT.

1 THERE'S A KNOWLEDGE COMPONENT, AND THE WITNESSES HAVE NOT ONLY  
2 DISAVOWED ANY CONDUCT, BUT THEY HAVE -- THEIR TESTIMONY SUGGESTS  
3 THAT THEY'RE ALSO DENYING ANY KNOWLEDGE.

4 MR. LANIER: AND THAT'S ACTUALLY -- AND THAT'S JUST  
5 NOW OCCURRED -- THAT OCCURRED TO ME OVERNIGHT, IS THAT'S WHERE  
6 THE CONFUSION IS.

7 AND IF YOUR HONOR HARKENS BACK TO THE ARGUMENT ON  
8 SUMMARY JUDGMENT, I WAS STANDING RIGHT HERE, AND CONSISTENT WITH  
9 OUR PAPERS, ARGUED THAT, IN FACT, THE EVIDENCE WAS THAT AS OF  
10 THE TIME OF THE ACQUISITION, SAP AG'S EXECUTIVE BOARD WAS AWARE  
11 OF THE PRESENCE OF THE SOFTWARE ON TOMORROWNOW'S COMPUTERS. AND  
12 THEN WE ARGUED OVER WHETHER WHAT HAPPENED NEXT WAS SUFFICIENT TO  
13 BE CONTRIBUTORY INFRINGEMENT.

14 WHAT THERE -- WE'RE DEALING WITH HERE IS A WIDE RANGE  
15 OF INFRINGING ACTIVITY BY TOMORROWNOW. AND THE FACTS ARE THAT  
16 THE EXECUTIVE BOARD KNEW ABOUT ONE PIECE OF IT, WHICH I  
17 AFFIRMATIVELY ARGUED TO YOU THEY DID, AND DIDN'T KNOW ABOUT THE  
18 REST OF IT.

19 SO AFTER YOUR HONOR RULED ON SUMMARY JUDGMENT -- AND,  
20 AGAIN, WE TOOK A DIFFERENT POSITION, BUT ONCE YOUR HONOR GAVE  
21 THAT RULING, WE MADE, CANDIDLY, THE TACTICAL CHOICE ULTIMATELY  
22 TO DECIDE NOT TO FIGHT OVER CONTRIBUTORY INFRINGEMENT, BECAUSE  
23 THE RISK OF CONFUSION OF THE JURY OF, WELL, WE KNEW THIS, BUT WE  
24 DIDN'T KNOW THIS, AND HERE'S HOW IT MATTERS, WE JUST DECIDED,  
25 SINCE IT DOES NOT AFFECT DAMAGES, WE'RE NOT GOING TO FIGHT OVER

1 CONTRIBUTORY INFRINGEMENT.

2 SO THE EVIDENCE WILL BE A LITTLE, ARGUABLY, CONFUSING  
3 HERE BECAUSE THERE'S A WIDE RANGE OF ALLEGED OR NOW STIPULATED  
4 INFRINGING CONDUCT. THERE IS A CLEAR UNEQUIVOCAL ADMISSION,  
5 INCLUDING BY MR. BRANDT, THAT THEY WERE AWARE OF THE PRESENCE OF  
6 ENVIRONMENTS.

7 BUT HERE'S WHERE THE DAMAGES ISSUE COMES UP. AND,  
8 AGAIN, WE'VE ARGUED WE DON'T THINK THIS SHOULD BE RELEVANT TO  
9 DAMAGES, AND YOUR HONOR'S RULED. SO ASSUMING THAT RULING,  
10 THEY'VE ARGUED THAT WILLINGNESS TO INFRINGE IS EVIDENCE OF  
11 VALUATION. GIVEN THAT THAT'S AN ISSUE THEY'RE PERMITTED TO  
12 ARGUE, WE ARE ENTITLED TO ARGUE -- WE HAVE TO ARGUE THAT WE WERE  
13 NOT WILLING TO INFRINGE.

14 SO TO SAY WE'VE STIPULATED TO CONTRIBUTORY  
15 INFRINGEMENT BECAUSE UNDER YOUR HONOR'S RULING, KNOWLEDGE BUT  
16 MERE INACTION MIGHT BE ENOUGH, AND THEY COULD -- WOULD -- IF WE  
17 WERE FIGHTING THIS ISSUE, WOULD BE ARGUING THAT YOU DIDN'T DO  
18 ENOUGH. YOU REALLY DIDN'T DO ANYTHING. THEREFORE, THAT WAS THE  
19 INACTION.

20 WE'RE ENTITLED TO SAY, LOOK, EVEN IF WE DIDN'T DO  
21 ENOUGH TO AVOID CONTRIBUTORY INFRINGEMENT, WE WERE NOT WILLING  
22 TO INFRINGE. AND THAT'S THE FINE LINE HERE. THAT'S THE PROBLEM  
23 THAT WE HAVE. BECAUSE OTHERWISE, IF YOU -- IF WE CANNOT PUT IN  
24 ANY EVIDENCE WE TRIED TO AVOID INFRINGEMENT, TO GET TO THE  
25 DAMAGES ISSUE, WE CAN'T DEFEND THE DAMAGES CLAIM, WHICH WE DON'T

1 THINK IS WHAT YOUR HONOR INTENDED.

2 SO TO MAKE OUR POSITION CLEAR, WE DIDN'T OFFER IT AS  
3 A LIMITING INSTRUCTION ACTUALLY TO LIMIT THEIR PRESENTATION OF  
4 THE EVIDENCE, AND OUR COMMUNICATION MAY HAVE BEEN UNCLEAR.

5 WE ACTUALLY THOUGHT WE WERE LIMITING OURSELVES BY  
6 SAYING WE'RE NOT GOING TO FIGHT CONTRIBUTORY INFRINGEMENT SO  
7 THAT OUR INTENTION WAS CLEAR.

8 ALL WE WANT TO DO IS TO BE ABLE TO SAY, AS  
9 MR. MITTELSTAEDT DID IN OPENING, WE'VE DONE WRONG, WE'VE  
10 STIPULATED, BUT WE DIDN'T HAVE THE WILLINGNESS TO INFRINGE THAT  
11 THEY'RE ARGUING JUSTIFIES THIS EXTRAORDINARY VALUE ON THIS  
12 INTELLECTUAL PROPERTY.

13 THAT IS ALL WE ARE TRYING TO DO. NOTING ALSO THAT A  
14 LOT OF THIS TESTIMONY THAT YOUR HONOR IS POINTING MIGHT BE  
15 CONFUSING THIS ISSUE EITHER WAS ELICITED A YEAR OR MORE BEFORE  
16 THE STIPULATION.

17 THE COURT: RIGHT.

18 MR. LANIER: OR UNDER EXAMINATION FROM PLAINTIFFS'  
19 COUNSEL.

20 THE COURT: NO, I'M FULLY AWARE ONLY ONE WITNESS HAS  
21 TESTIFIED ON THIS SUBJECT IN PERSON. ALL OF THEM -- THE  
22 DEPOSITIONS PREDATE THE STIPULATION, FOR SURE.

23 MR. LANIER: SO ALL WE WOULD ASK IS THAT THAT FINAL  
24 SENTENCE OF YOUR HONOR'S RULING -- WE JUST WANT TO MAKE IT  
25 CLEAR -- WE CAN LIVE WITH THE SENTENCE AS LONG AS IT'S CLEAR

1 THAT WE CAN LOOK AT THE JURY AND SAY, WE DID NOT HAVE THE  
2 WILLINGNESS TO INFRINGE THAT THEY ARE ARGUING JUSTIFIES AN  
3 EXTRAORDINARY VALUATION HERE, AND HERE ARE THE FACTS THAT PROVE  
4 THAT, WITHOUT CHALLENGING THE STIPULATION ON CONTRIBUTORY  
5 INFRINGEMENT.

6 THE COURT: UM-HMM.

7 MR. LANIER: BECAUSE CONTRIBUTORY INFRINGEMENT AND  
8 WILLINGNESS TO INFRINGE CAN BE THE SAME THING, BUT THEY CAN BE  
9 DIFFERENT. AND IT'S THAT DIFFERENCE THAT WE'RE TRYING TO ARGUE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

7 (EXHIBIT PUBLISHED TO JURY.)

8 BY MR. PICKETT:

9 Q. ALL RIGHT. LET'S GO TO FACTOR NO. 3 IN SAP'S MIND ON THIS  
10 NEGOTIATION OF A LICENSE. AND THAT'S THE SAP'S EXPECTED  
11 FINANCIAL GAINS. THAT'S PRETTY OBVIOUS WHAT THAT IS.

12 WHAT HAVE YOU SUMMARIZED HERE?

13 A. WHAT I'VE SUMMARIZED HERE ARE SOME OF THE KEY DOCUMENTS OR  
14 IMPORTANT DOCUMENTS IN THIS TIME FRAME OF DECEMBER 2004 AND  
15 JANUARY 2005. AND SIMILAR TO THE OTHER CHARTS, IT'S SET UP  
16 SHOWING WHO RECEIVED OR WAS PRESENTED THE DOCUMENTS AND -- AND  
17 YOU'LL SEE EXECUTIVE BOARD MEMBERS IN THAT COLUMN.

18 AND I'VE NOTED IN RED SOME OF THOSE PROJECTION  
19 FIGURES ABOUT THE -- POTENTIAL CONVERSION OF CUSTOMERS FROM  
20 PEOPLESOFT OVER TO THE SAP APPLICATION. SO YOU SEE 3,000  
21 MAINTENANCE CUSTOMERS, YOU'LL SEE 1375 CUSTOMERS TO SAP BY 2007.  
22 SO THAT'S BY THE END OF 2007, A SHORT PERIOD OF TIME.

23 AND THEN DOWN THE PAGE, YOU'LL SEE CONVERT THE  
24 MAJORITY -- I THINK IT'S IMPORTANT TO NOTE ON ITEM 2 THERE ABOUT  
25 THE TIMING ISSUE. THIS WAS PART OF A JANUARY 16TH, 2005, SORT

1 OF LAUNCH AT SAP. IT SAYS, "AGGRESSIVELY CONVERT 450 OF GLOBAL  
2 1000 OVER THE NEXT 30 DAYS."

3 SO THAT MEANS THE GOAL WAS FOR SAP IN THE NEXT 30  
4 DAYS BETWEEN JANUARY 19TH, 2005, OUT FOR THE NEXT MONTH, TO GO  
5 TO THE TOP 450 CUSTOMERS THEY HAD AND TO AGGRESSIVELY CONVERT  
6 THEM TO SAP. I THINK IT'S VERY IMPORTANT ON TIMING AND  
7 PROJECTIONS.

8 THEN YOU'LL SEE THE 4,000 JOINT SAP CUSTOMERS BEING A  
9 TARGET, CONVERT 50 PERCENT. AND THEN AS YOU WORK DOWN THE PAGE,  
10 2,000 TO 4,000 WAS -- WAS ALSO A PROJECTION. AND THEN  
11 ULTIMATELY, THERE WAS TESTIMONY BY MR. AGASSI THAT HE FELT,  
12 UNDER SOME CIRCUMSTANCE, THAT SAP COULD CONVERT 60 PERCENT OF  
13 THE 10,000 CUSTOMERS. I ACTUALLY DID THE MATH THERE, THE 9,920,  
14 WHICH CAME OUT OF A DOCUMENT MS. CATZ SHOWED YESTERDAY, TIMES  
15 60 PERCENT. SO IT WOULD BE 5,952 CONVERTED CUSTOMERS.

16 Q. AND ALL OF THIS EVIDENCE ON THIS CHART 21 IS FROM WHOM?

17 A. THIS EVIDENCE IS -- EITHER BEEN PRESENTED TO OR PREPARED BY  
18 OR APPROVED BY THE EXECUTIVE BOARD, THE INDIVIDUALS THAT MANAGE  
19 SAP DAY TO DAY.

20 Q. SO WE KNOW EXACTLY WHAT THEY WERE THINKING AT THE TIME ABOUT  
21 HOW MANY CUSTOMERS THEY COULD TAKE ON THE PEOPLESOFT SIDE FROM  
22 ORACLE IF THEY LAUNCHED THIS PROGRAM; IS THAT RIGHT?

23 A. THAT IS CORRECT.

24 Q. AND WHAT IMPACT DOES THAT HAVE ON THEIR THINKING GOING INTO  
25 THE NEGOTIATION FOR THE LICENSE?

1 A. WELL, FROM MY PERSPECTIVE, IT'S VERY IMPORTANT. OBVIOUSLY,  
2 THEY'VE LAID OUT A VARIETY OF GOALS. BUT A BIG GOAL WAS TO  
3 CONVERT CUSTOMERS. AND THIS IS THEIR EXPECTATION, THEIR BEST  
4 POSITION IN THE INFORMATION THEY USE TO MAKE THE DECISION TO GO  
5 FORWARD TO -- TO LAUNCH THIS -- THIS PRODUCT. AND SO IT'S RIGHT  
6 FROM THE BOARD MEMBERS, AND IT'S, FROM MY PERSPECTIVE, VERY  
7 APPROPRIATE AND ACCURATE AND HIGH-QUALITY INFORMATION.

8 Q. ALL RIGHT. AND YOU CAN BASE THEIR EXPECTED GAIN BASED ON  
9 THE NUMBER OF CUSTOMERS THAT THEY EXPECTED TO GAIN?

10 A. THAT'S RIGHT.

11 ONCE YOU UNDERSTAND THE NUMBER OF CUSTOMERS, YOU THEN  
12 GO THROUGH FINANCIAL MODELS AND PUT A VALUE ON THAT. THE KEY  
13 INFORMATION WOULD COME FROM THE BOARD MEMBERS AT SAP, THE  
14 PROJECTED CUSTOMERS TO CONVERT.

TEXT REMOVED - NOT RELEVANT TO MOTION

20 LET'S FIRST LOOK AT PLAINTIFFS' EXHIBIT 6. SHOULD BE  
21 THE NEXT SLIDE.

22 (EXHIBIT PUBLISHED TO JURY.)

23 MR. PICKETT: RIGHT. PLAINTIFFS' EXHIBIT 6.

24 Q. WHAT DOES THIS -- HOW THIS DOCUMENT RELATE TO YOUR OPINION,  
25 MR. MEYER?

1 A. THIS DOCUMENT FITS INTO THE CATEGORY OF GOALS. AND, ONCE  
2 AGAIN, IT AFFIRMS THAT STEP ONE -- AND IT WAS CALLED THE  
3 CORNERSTONE -- WAS TO PROVIDE CURRENT SAP CUSTOMERS PEOPLESOFT  
4 SUPPORT, AND THAT WOULD BE PROVIDED BY TOMORROWNOW USING THE  
5 INFRINGING SOFTWARE.

6 SO IT JUST SHOWS THAT THE CORNERSTONE AND THE MOST  
7 IMPORTANT PART OF THIS PROGRAM WAS STEP ONE, TOMORROWNOW WITH  
8 THE SOFTWARE.

9 Q. AND ONE STEP -- STEP ONE WAS TOMORROWNOW, BUT WHAT DID IT  
10 LEAD TO STEP TWO AND STEP THREE?

11 A. WELL, AND STEP TWO WAS ONCE THE CUSTOMER TOOK THE  
12 SOFTWARE -- THE SUPPORT ON THE SOFTWARE, WAS -- IT SAYS, "DRIVE  
13 INCREMENTAL REVENUE THROUGH COMPOSITE APPLICATIONS." THAT WAS  
14 TO THEN SELL ANOTHER PRODUCT FROM SAP TO THAT CUSTOMER.

15 THEY HAD A PRODUCT CALLED NETWEAVER THAT WOULD HELP  
16 THEM INTEGRATE THEIR PRODUCTS WITH OTHER PRODUCTS. AND THAT'S  
17 AN INTEGRATION PRODUCT SO THAT WOULD BE ANOTHER LICENSE SALE FOR  
18 SAP AND ADDITIONAL REVENUE AND PROFITS BOTH FROM LICENSE AND  
19 THEN THE MAINTENANCE ON THAT PRODUCT.

20 AND THEN, ULTIMATELY, THE -- THE PAYOFF IS STEP  
21 THREE, WHICH IS UPGRADE PEOPLESOFT CUSTOMERS TO MYSAP ERP. AND  
22 THAT'S THE TOTAL CONVERSION OF THAT PRIOR CUSTOMER ON PEOPLESOFT  
23 TO THE SAP APPLICATION. AND THEN SAP EARNS BOTH THE LICENSE AND  
24 THE REVENUE AND PROFITS ON THAT.

25 Q. YOU CALL THAT LAST STEP THE PAYOFF. WHY?

1 A. BECAUSE ULTIMATELY THEN YOU'VE TAKEN A CUSTOMER THAT WAS AN  
2 ORACLE CUSTOMER AND TOTALLY CONVERTED IT TO SAP, AND SO THAT  
3 BECOMES BOTH ONGOING PRODUCT SALES, WHICH IS LICENSE, AND THEN  
4 THE -- THE IMPORTANT ANNUITY, WHICH IS THE MAINTENANCE WHICH  
5 YOU -- CAN GO ON FOR DECADES. IT'S VERY IMPORTANT.

6 Q. ALL RIGHT. LET'S GO ON, THEN, TO EXHIBIT 12 WHICH IS THE  
7 NEXT SLIDE.

8 (EXHIBIT PUBLISHED TO JURY.)

9 BY MR. PICKETT:

10 Q. THIS IS A DOCUMENT WE'VE SEEN A NUMBER OF TIMES. WHAT'S --  
11 IS THIS A SIGNIFICANT DOCUMENT?

12 A. YES, IT IS. IT'S SIGNIFICANT ON A VARIETY OF FRONTS. WE'VE  
13 TALKED ABOUT THE FACT THAT THIS WAS IN -- IT INVOLVED THE  
14 EXECUTIVE BOARD MEMBERS OF SAP, AND -- AND IT ACTUALLY SHOWS BY  
15 REVENUE CATEGORIES, TYPES OF REVENUES, MAINTENANCE, AND OTHER  
16 ADDITIONAL REVENUES, A PROJECTION THAT GOES OUT THROUGH 2007.  
17 SO FOR THREE YEARS. AND IT ACTUALLY SHOWS A PROJECTION OF  
18 CUSTOMERS TO RECEIVE MAINTENANCE, CUSTOMERS TO BE CONVERTED, AND  
19 THEN THE REVENUE VALUE THAT WAS PROJECTED BY SAP'S MANAGEMENT AT  
20 THAT TIME.

21 Q. NOW, THE -- THERE'S THREE COLORS ON THE GRAPH. SORT OF A --  
22 NOT GOOD WITH COLORS -- KIND OF A LAVENDER, MAYBE A LILAC AND A  
23 PEACH.

24 WHAT DO THOSE COLORS REPRESENT?

25 A. THERE'S THREE DIFFERENT WHAT I'LL CALL REVENUE CATEGORIES,

1 AND THE FIRST ONE, WHICH IS THE LAVENDER IS -- I THINK THAT'S  
2 LAVENDER, BUT -- THAT'S THE MAINTENANCE REVENUE. AND SO THAT  
3 MEANS THAT AS TOMORROWNOW PROVIDES THE MAINTENANCE, THAT'S THE  
4 REVENUE THAT THEY WILL EARN OVER THAT THREE-YEAR PERIOD.

5 IT THEN MOVES INTO SOMETHING THAT THEY REFER TO AS --  
6 AS CROSS-SELL, AND THAT'S AN ADDITIONAL REVENUE SOURCE. THAT'S  
7 THE NEXT COLOR THERE. AND THAT CROSS-SELL IS LIKE SELLING THE  
8 NETWEAVER PRODUCT, A LICENSE ON THAT, AND THEN REVENUE FOR  
9 MAINTENANCE ULTIMATELY ON THAT.

10 AND THEN LASTLY, WHAT'S CALLED UPSWITCH AND, AND  
11 UPSWITCH SAP'S PHRASE, SO WHEN THEY ULTIMATELY CONVERT CUSTOMER  
12 TO MYSAP, THAT'S THE REVENUE FROM -- FROM THAT SOURCE. AND  
13 WHAT'S IMPORTANT HERE -- NOT ONLY DO YOU SEE DIFFERENT  
14 CATEGORIES OF REVENUE, WHICH IS IMPORTANT FOR SAP AND ITS  
15 FINANCIAL RETURNS, THERE'S ALSO TREMENDOUS GROWTH BETWEEN YEARS.

16 SO BETWEEN THE FIRST YEAR AND THE SECOND YEAR, THE  
17 GROWTH THEY PROJECT IS 140 PERCENT. AND THEN I BELIEVE IT'S  
18 120 PERCENT AFTER THAT. SO EACH YEAR, THE REVENUES ARE ON AN  
19 UPWARD GROWTH CYCLE. SO IT ONLY GOES FOR THREE YEARS, BUT THE  
20 VALUE WILL CONTINUE ON INTO THE FUTURE, WHICH I'LL TALK ABOUT IN  
21 A MOMENT.

22 BUT IT SHOWS GROWTH. IT SHOWS A VARIETY OF REVENUES.  
23 AND IT SHOWS THE ABILITY TO CONVERT THE CUSTOMERS TO MYSAP.  
24 AND, ULTIMATELY, IT SHOWS 3,000 CUSTOMERS THAT WOULD TAKE  
25 MAINTENANCE FROM TOMORROWNOW USING THE SOFTWARE, AND THE VALUE

## DIRECT EXAMINATION OF PAUL MEYER

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1 OVER THE THREE YEARS OF REVENUE IS ABOUT \$900 MILLION.

2 SO IT'S AN IMPORTANT PROJECTION DOCUMENT DONE AT THE

3 TIME AND ACCEPTED BY THE EXECUTIVE BOARD.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

10 Q. ALL RIGHT. LET'S LOOK AT THE NEXT EXHIBIT, EXHIBIT 141,  
11 PLEASE.

12 WHAT DOES THIS TELL YOU ABOUT SAP'S THINKING AT THE  
13 TIME THEY SHOULD HAVE BEEN NEGOTIATING FOR A LICENSE?

14 A. THIS GOES TO FACTORS 2 AND 3. SO, ONE, THE IMPACT ON ORACLE  
15 FROM SAP'S PERSPECTIVE AND ALSO THE EXPECTATIONS POINT OUT UNDER  
16 GOAL -- I'LL POINT OUT OUR GOAL IS TO CONVERT THE MAJORITY OF  
17 THE PEOPLESOFT AND JD EDWARDS CUSTOMERS BASE TO SAP AND CONTAIN  
18 ORACLE'S POTENTIAL GROWTH IN THE NEXT-GENERATION APPLICATION  
19 MARKET. SO THAT'S THE GOAL.

20 AND THEN UNDER "STRATEGY," IT COMES BACK TO STEP ONE.  
21 BY OFFERING FULL MAINTENANCE AND SUPPORT, PEOPLESOFT AND JD  
22 EDWARDS SYSTEMS, AND THEN IT GOES ON AND SAYS, WITH FAVORABLE  
23 UPGRADE LICENSING TERMS TO SAP, NETWEAVER, THAT'S STEP TWO WHICH  
24 IS THE INTEGRATION PRODUCTS. AND, ULTIMATELY, STEP THREE'S  
25 MYSAP ERP. THAT'S THE CONVERSION TO SAP, THEIR APPLICATIONS.

1                   AND THEN IT SAYS, SAP WILL SIPHON OFF THE CASH FLOW  
2                   THAT ORACLE NEEDS TO BUILD OR ACQUIRE ITS NEXT-GENERATION  
3                   APPLICATIONS.    SO THAT WAS --

4                   AND THEN IT GOES ON AND SAYS, "SAP WILL ESTABLISH OR  
5                   REINVIGORATE RELATIONSHIPS WITH POTENTIALLY THOUSANDS OF NEW AND  
6                   EXISTING CUSTOMERS."   AND I THINK THEY HAD DOCUMENTED THERE WERE  
7                   4,000 JOINT CUSTOMERS THAT HAD SAP AND PEOPLESOFT, AND THEY WERE  
8                   GOING TO TARGET THAT GROUP.

9                   Q.   LET ME ASK YOU JUST ONE QUESTION IF I COULD INTERRUPT YOU  
10                  PLEASE.   UNDER "STRATEGY" WHERE IT STARTS, "BY OFFERING FULL  
11                  MAINTENANCE AND SUPPORT OF PEOPLESOFT AND JD EDWARDS SYSTEMS,"  
12                  WHAT DID THAT HAVE TO DO WITH THE NEGOTIATIONS THAT SHOULD HAVE  
13                  BEEN TAKING PLACE FOR A LICENSE?

14                 A.   WELL, THAT'S REALLY KEY.   BECAUSE WHEN IT SAYS "FULL  
15                  MAINTENANCE AND SUPPORT," THAT'S CALLED VENDOR-LEVEL SERVICE,  
16                  AND TO HAVE VENDOR-LEVEL SERVICE ON THE ORACLE PRODUCTS, YOU  
17                  NEED THE SOFTWARE AND THE MATERIALS THAT ARE COPYRIGHTED.   SO  
18                  THEY WOULD NEED THOSE MATERIALS AND COPYRIGHTED PROPERTIES TO  
19                  OFFER THAT -- THAT MAINTENANCE, THAT FULL MAINTENANCE SERVICE  
20                  WHICH WAS STEP ONE OF PROGRAM.

21                 Q.   ALL RIGHT.   AND THEN FINALLY, "KEY TACTICS," WHAT'S THE  
22                  SIGNIFICANCE OF SAP'S THINKING THERE?

23                 A.   WELL, THIS ONE IS VERY IMPORTANT, 'CAUSE ONE OF OUR THOUGHTS  
24                  YESTERDAY WAS THE IMPORTANCE OF TIMING.   AND THIS SHOWS HOW  
25                  FOCUSED SAP'S MANAGEMENT WAS ON THE TIME TO DO THIS.   IT WAS OF

1 THE ESSENCE. IT SAYS, "REACH OUT TO THE JOINT" -- SO IT SAYS,  
2 "JOINT SAP-PEOPLESOFT-JDE ACCOUNTS." IT SAYS, "WITHIN THE  
3 GLOBAL 1000 ESTABLISHED" -- I THINK IT'S 450, THEY HAD OF GLOBAL  
4 1000 WERE THEIR CUSTOMERS OVER THE NEXT 30 DAYS, WHICH IS  
5 FEBRUARY, AND AGGRESSIVELY CONVERT THEIR MAINTENANCE CONTRACTS  
6 TO SAP AND THEN FACILITATE ADOPTION -- IMMEDIATE ADOPTION OF  
7 NETWEAVER AND THE PLANNED ADOPTION OF MYSAP ERP AT PEOPLESOFT  
8 AND JDE INSTALLATIONS WITHIN THOSE ENTERPRISES.

9 AND SO IT SHOWS THAT THE NEXT 30 DAYS, THEY WANTED TO  
10 GO AFTER ALMOST 500 CUSTOMERS AND CONVERT THEM. SO IT SHOWS ME  
11 THAT THIS WAS VERY IMPORTANT TO MANAGEMENT AT THAT TIME, TO GET  
12 INTO THE MARKET, AND THEY NEEDED THE SOFTWARE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

23 Q. ALL RIGHT. LET'S LOOK AT EXHIBIT 24, NEXT.

24 (EXHIBIT PUBLISHED TO JURY.)

25

1 BY MR. PICKETT:

2 Q. IT'S A DOCUMENT WE'VE SEEN. WHAT DOES THIS -- HOW DOES THIS  
3 DOCUMENT RELATE TO THE NEGOTIATION OF THE LICENSE THAT SHOULD  
4 HAVE TAKEN PLACE?

5 A. THIS DOCUMENT WAS PRESENTED TO THE -- THE BOARD AT SAP ON  
6 JANUARY 20TH OF 2005. AND IT'S CONSISTENT WITH WHAT WE BEEN  
7 TALKING ABOUT THE LAST FEW MINUTES.

8 I THINK WHAT'S IMPORTANT IN THAT FIRST -- THAT FIRST  
9 PHRASE, IT SAYS, THE GOAL -- IT SAYS, "CONVERT APPROXIMATELY  
10 50 PERCENT OF THE PEOPLESOFT AND JD EDWARDS CUSTOMER  
11 INSTALLATIONS TO SAP." SO THAT'S THE CONVERSION.

12 AND I THINK WHAT'S EVEN MORE IMPORTANT NOW, IT SAYS,  
13 "100 PERCENT OF SHARED CUSTOMERS," AND THAT MEANS WHERE A  
14 CUSTOMER ALREADY HAS SAP IN ITS I.T. SHOP AND ALSO HAS  
15 PEOPLESOFT OR JD EDWARDS. SO BASICALLY A LOT OF TIMES,  
16 THERE'S -- IT'S A SHARED JOINT ACCOUNT. AND THIS ALLOWS SAP NOW  
17 TO TRY TO BRING THAT PEOPLESOFT APPLICATION, SAY FOR HUMAN  
18 RESOURCE, INTO THEIR BUSINESS. SO THAT'S AN IMPORTANT GOAL OF  
19 THAT CONVERSION.

20 AND IT GOES DOWN THE PAGE, TALKS ABOUT THREE OTHER  
21 OBJECTIVES, "DISRUPT ORACLE'S ABILITY TO PAY FOR THE ACQUISITION  
22 OUT OF CASH FLOW." THAT'S FACTOR TWO. IT SAYS, "SHRINK THEIR,"  
23 THAT'S ORACLE'S, "SHARE OF THE APPLICATION MARKET." THAT'S GOAL  
24 TWO.

25 AND THEN IT SAYS, "DISCREDIT THEIR EFFORTS" -- THAT'S

1 ORACLE AGAIN -- "DISCREDIT ORACLE'S EFFORTS TO CREATE A  
2 NEXT-GENERATION APPLICATION PLATFORM." SO THESE GO TO GOALS TWO  
3 AND THREE AND WOULD MAKE THE LICENSE MUCH MORE VALUABLE TO SAP.

4 Q. AND IN YOUR OPINION, WOULD SAP PAY FOR THE ACCESS TO  
5 SOFTWARE IN ORDER TO INITIATE AND ACHIEVE THESE GOALS?

6 A. YES, TO HAVE THE ABILITY TO -- TO CONVERT 50 PERCENT OF THE  
7 10,000 CUSTOMERS OR TO HAVE A HUNDRED PERCENT OF THE SHARED  
8 CUSTOMERS, THE 4,000, YES, THEY WOULD DO THAT.

9 Q. BE WORTH A LOT.

10 A. THAT'S CORRECT.

11 Q. ALL RIGHT. LET'S TAKE A LOOK AT ANOTHER DOCUMENT IN  
12 EVIDENCE, PLAINTIFFS' EXHIBIT 161.

13 (EXHIBIT PUBLISHED TO JURY.)

14 BY MR. PICKETT:

15 Q. WHAT'S THE RELEVANCE OF THIS DOCUMENT, MR. MEYER?

16 A. THIS DOCUMENT COMES BACK TO FACTOR 3, WHICH IS THE EXPECTED  
17 FINANCIAL BENEFITS OR GOALS. AND THIS IS JANUARY 25TH, 26TH.  
18 IT'S A MEETING WHERE THERE'S AN INTEGRATION BETWEEN TOMORROWNOW  
19 AND SAP. AND WHAT WAS IMPORTANT HERE WAS THERE WAS SOME  
20 COMMUNICATION IN THE INTEGRATION MEETING ABOUT THE POTENTIAL  
21 CUSTOMERS.

22 AND IT SAYS WITH SCENARIO 1, IT SAYS, "2000 CUSTOMERS  
23 IN 2009." AND THEN WHAT YOU'LL SEE, WHICH IS IMPORTANT TO THE  
24 RIGHT-HAND SIDE, THAT SAYS, "FIVE TIMES ORIGINAL TOMORROWNOW  
25 PLANNING." SO THAT INDICATES TO ME THAT SAP NOW IS GOING TO

1 TAKE TOMORROWNOW FROM BEING A SMALL OPERATION AND THEN PUSH IT  
2 AS PART OF SAFE PASSAGE TO BEING MUCH BIGGER OPERATION. IT'S A  
3 FIVE TIMES MULTIPLE IN TERMS OF EXPECTATIONS.

4 AND THEN IT SAYS, SCENARIO 2, THE EXPECTATIONS WOULD  
5 BE 4,000 CUSTOMERS IN 2009, AND, ONCE AGAIN, THE REFERENCE TO  
6 TOMORROWNOW AND A FIVE TIMES FACTOR.

7 AND I BELIEVE THAT MR. ZIEMEN TESTIFIED IN DEPOSITION  
8 THAT THE 2,000 PROJECTION WAS MORE CONSERVATIVE, AND THE 4,000  
9 WAS WHAT HE CALLED MORE UPBEAT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

9 Q. ALL RIGHT. NOW, BASED ON ALL THE EVIDENCE YOU REVIEWED,  
10 MR. MEYER, DID YOU CALCULATE SAP'S EXPECTED FINANCIAL GAINS FROM  
11 THE LICENSE, HOW MUCH THEY WOULD EXPECT TO GAIN FROM THIS  
12 LICENSE?

13 A. YES, I HAVE.

14 Q. AND HOW DID YOU DO THAT?

15 A. WELL, I DEVELOPED A FINANCIAL MODEL. AND FROM THAT, I WAS  
16 ABLE TO COME UP WITH CERTAIN FINANCIAL DATA THAT I'LL TALK TO  
17 YOU ABOUT AND SHOW YOU, AND THEN CAME UP WITH WHAT I'LL CALL  
18 THE -- SORT OF THE PRESENT VALUE OF -- OF THE GAINS THAT SAP  
19 WOULD -- WOULD COME INTO IF THEY WERE TO ACQUIRE THE SOFTWARE IN  
20 THIS NEGOTIATION. SO I HAVE A SLIDE THAT SHOWS THOSE REVENUE  
21 SOURCES.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

19 Q. AND SO HOW DID YOU BASE YOUR ESTIMATES IN YOUR FINANCIAL  
20 MODEL, THE 3,000, AND THEN THE CONVERSIONS TO MYSAP APPLICATIONS  
21 AND THE CROSS-SELLS?

22 A. I USED THEIR PROJECTIONS.

23 Q. SAP'S OWN PROJECTIONS?

24 A. THAT'S CORRECT.

25 Q. ALL RIGHT. GO AHEAD.

1 A. SO I STARTED WITH THEIR PROJECTIONS. I WENT TO THE  
2 ATTRITION RATES. AND THEN THE THIRD ROW THERE, I MULTIPLIED THE  
3 AVERAGE REVENUE PER CUSTOMER BASICALLY TIMES THE NUMBER OF  
4 CUSTOMERS.

5 AND SO FOR MAINTENANCE, IT WAS \$68,000 A YEAR.  
6 THAT'S THE AVERAGE YOU GET FOR EACH CUSTOMER THAT'S TAKING  
7 MAINTENANCE. AND THAT WAS PER SAP'S BUSINESS RECORDS. AND THEN  
8 FROM THERE, I WENT AND IT CAME UP WITH -- AND THEN ON THE  
9 RIGHT-HAND SIDE, I DEALT WITH -- WHEN THEY CONVERT A CUSTOMER,  
10 THEY MAKE \$358,000 IN A CONVERSION AND THEN FOR THE OTHER SALES  
11 WHICH IS THE CROSS-SELL ITEM, THEY MAKE \$86,000 PER CROSS-SELL.

12 SO I USED THOSE ITEMS TO COME UP WITH THE AVERAGE  
13 REVENUE PER YEAR AND THEN MULTIPLIED THAT TIMES THE NUMBER OF  
14 CUSTOMERS AND CAME UP WITH TOTAL REVENUE. AND SEE, THAT'S THE  
15 NEXT ROW. SO THAT'S YOUR CALCULATIONS THERE. AND AS YOU WORK  
16 DOWN, YOU THEN HAVE TO DEDUCT COSTS, AND I SAW FROM SAP'S  
17 FINANCIAL RECORDS THAT THEY BASICALLY WOULD HAVE PROFIT MARGINS  
18 OF 70 PERCENT. SO I DEDUCT COST OF 30 PERCENT, AND THAT LEAVES  
19 70 PERCENT THERE FOR THE PROFIT THAT -- THAT SAP WOULD MAKE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

15 (EXHIBIT PUBLISHED TO JURY.)

16 THE WITNESS: YES. THIS IS A SUMMARY, AND IT SHOWS  
17 UNDER THE THREE CALCULATIONS WHAT I CAME UP WITH.

18 AND THEN CALCULATION A, IS BASED ON THE 3,000  
19 MAINTENANCE CUSTOMERS THROUGH THE PERIOD OF TOMORROWNOW'S  
20 OPERATIONS. IN THAT PERIOD BASED ON WHAT WAS PROJECTED BY SAP,  
21 THERE WERE 2,250 CUSTOMERS THAT HAD THE CROSS-SELL, AND 1375  
22 WERE ACTUALLY CONVERTED TO SAP. AND THE EXPECTED VALUE UNDER  
23 THAT CALCULATION A WAS \$880 MILLION ON A PRESENT-VALUE BASIS.

24 AND THEN I -- ON THE RIGHT-HAND SIDE, I HAVE TWO  
25 OUTCOMES FROM THE CALCULATION B. ONE OF THEM WE JUST TALKED

1 ABOUT ON THE BOTTOM LEFT, THE \$1.22 BILLION. AND THAT WAS BASED  
2 ON 3,000 MAINTENANCE CUSTOMERS WITH 2,000 CONVERTING. AND I  
3 USED A REVENUE MULTIPLE THERE OF 4 AND CAME UP WITH  
4 \$1.2 BILLION.

5 AND THE RIGHT-HAND SIDE NUMBER ACTUALLY IS AN  
6 IMPORTANT NUMBER BECAUSE IT SHOWS THE FULL VALUE OF THE CUSTOMER  
7 CONVERSION. AND THAT'S ALSO BASED ON 3,000 MAINTENANCE  
8 CUSTOMERS, 2,000 CONVERT TO MYSAP. AND THEN THERE, I USED A  
9 MILLION DOLLARS PER CUSTOMER, WHICH REPRESENTS BASICALLY  
10 \$250,000 PER YEAR FOR 10 YEARS.

11 THAT'S MADE UP OF MAINTENANCE, CROSS-SELL, BASED ON  
12 HOW IT'S LOOKED AT BY SAP'S MANAGEMENT AND THE UPSWITCH. SO FOR  
13 EVERY CUSTOMER THAT SWITCHED OVER TO SAP, A QUARTER MILLION  
14 DOLLARS WOULD BE MADE PER YEAR. AND OVER TEN YEARS, WHEN I  
15 DISCOUNT THAT BACK, IT'S ABOUT A MILLION DOLLARS OF NET PRESENT  
16 VALUE TO HAVE THAT CONVERTED CUSTOMER, AND THAT'S THE  
17 \$2.7 BILLION.

18 SO MY RANGE OF BENEFITS TO SAP, BASED ON THEIR OWN  
19 PROJECTIONS, IS \$880 MILLION UP TO \$2.7 BILLION.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

5 Q. ALL RIGHT. LET'S TURN TO THE ORACLE SIDE AND WHAT FACTORS  
6 WOULD BE IMPORTANT TO ORACLE IN ITS THINKING SITTING ON THE  
7 OTHER SIDE OF LICENSE NEGOTIATION TABLE?

8 A. I HAVE A SLIDE ON THAT. IT'S SIMILAR TO THE STRUCTURE OF  
9 THE SAP SIDE. AND SO YOU'LL SAY THAT -- YOU'LL SEE THE SAME  
10 THREE NEGOTIATION FACTORS, AND I JUST SET THOSE UP ONCE AGAINST  
11 OR --

12 (EXHIBIT PUBLISHED TO JURY.)

13 THE WITNESS: THIS TIME, IT'S ORACLE'S GOALS. AND I  
14 FOCUSED ON THE PEOPLESOFT ACQUISITION. TWO IS THE RISK TO  
15 ORACLE OF ITS INVESTMENT IN PEOPLESOFT IF IT GIVES A LICENSE TO  
16 SAP. AND THEN LASTLY, ORACLE'S EXPECTED FINANCIAL IMPACTS. AND  
17 THOSE ARE JUST SOME HIGHLIGHTS FROM THE RESULTS OF MY ANALYSIS  
18 THAT BASICALLY THERE'S 9,920 MAINTENANCE REVENUE CUSTOMERS AS  
19 PART OF THE PEOPLESOFT ACQUISITION.

20 WITH THE ACQUISITION, THAT DOUBLES ORACLE'S  
21 ENTERPRISE MARKETSHARE FOR APPLICATIONS. THAT'S UNDER GOAL ONE.  
22 SO IT'S A VERY IMPORTANT ACQUISITION.

23 SECONDLY, THE UPFRONT PAID OF \$11 BILLION, INCLUDING  
24 THE SOFTWARE AND MATERIALS IN THIS CASE. AND WITH THIS LICENSE,  
25 A VERY IMPORTANT ISSUE IS THAT ORACLE WILL BE GIVING UP

1 EXCLUSIVE RIGHTS TO THOSE COPYRIGHTED MATERIALS, WHICH IS A BIG  
2 IMPACT ON VALUE.

3 AND THEN, ULTIMATELY, I DO SOME CALCULATIONS UNDER  
4 THE POSITION THAT ORACLE WOULD EXPECT TO -- TO LOSE THREE TIMES  
5 CUSTOMERS. AND THEN I DEMONSTRATE WHAT THE IMPACT OF ORACLE --  
6 ON ORACLE OF WHAT THAT IS AT THE TIME OF THE NEGOTIATION.

7 SO THIS IS THE STRUCTURE THAT I SET UP TO EVALUATE  
8 THEIR SIDE OF THE NEGOTIATION.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

2 Q. WHEN I ASKED MR. PHILLIPS WHEN WE WENT THROUGH THIS FIRST  
3 LAST THURSDAY, I ASKED HIM HOW WOULD THIS CHANGE IF YOU WERE  
4 GOING TO HAVE TO NEGOTIATE A LICENSE WITH SAP? AND HE SAID THE  
5 WHOLE -- EVERY FACTOR WOULD CHANGE. HOW -- WHAT DOES THIS TELL  
6 YOU ABOUT ORACLE'S THINKING GOING INTO A NEGOTIATION IF THEY HAD  
7 TO GIVE A LICENSE TO SAP?  
8 A. I THINK IT COMES BACK TO THE FACT THEY WOULD NEED CERTAINTY.  
9 THEY'D NEED AN UPFRONT PAYMENT. IT WOULD HAVE TO BE CHARGE  
10 ENOUGH TO TAKE AWAY THE STING OF GIVING UP THE \$11 BILLION  
11 EXCLUSIVE RIGHTS TO PEOPLESOFT PROPERTY.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

4 Q. ALL RIGHT. LET'S GO TO NEGOTIATION FACTOR NO. 3, WHAT  
5 ORACLE WOULD BE THINKING ABOUT THE FINANCIAL IMPACT ON IT OF  
6 SUCH A LICENSE.

7 YOU HAVE AN ANALYSIS OF THAT, MR. MEYER?

8 A. YES, I'VE GOT A CHART THAT SHOWS THAT QUICKLY SORT OF THE  
9 APPROACH I TOOK. AND IT'S SIMILAR TO THE APPROACH WITH SAP, BUT  
10 I REVERSED THE ROLES NOW, AND INSTEAD OF NOW CALCULATING THE  
11 GAINED SAP, I'M LOOKING AT THE IMPACT TO ORACLE AND I START ON  
12 THE LEFT-HAND SIDE.

13 I USE -- IN THIS CASE, I'M USING 3,000 EXPECTED  
14 MAINTENANCE CUSTOMERS TO BE LOST. AND THEN I'M GOING TO FIGURE  
15 OUT IN THAT PROCESS WITH THE BLUE AREA THERE WHAT'S GOING TO  
16 HAPPEN WITH RENEWAL RATES, AND THE EXPECTED ANNUAL REVENUES?

17 AND I'LL LOOK AT ORACLE'S PROFIT MARGINS. AND THEN  
18 ULTIMATELY I'LL SHOW YOU ON THIS RIGHT-HAND SIDE THERE THE  
19 EXPECTED FINANCIAL GAIN -- EXPECTED FINANCIAL IMPACT TO ORACLE  
20 IF THEY AGREE TO THIS LICENSE.

21 AND I DO THESE CALCULATIONS OVER A TEN-YEAR PERIOD  
22 BECAUSE, AS WE'VE BEEN TALKING ABOUT, THESE CUSTOMERS ONCE  
23 THEY'RE CONVERTED, THEY'RE WITH THE NEW PROVIDER OF THE SOFTWARE  
24 FOR A LONG TIME PERIOD OF TIME.

25 Q. NOW, WE SAW VARIOUS SAP PROJECTIONS OF THE BENEFITS THEY

1 WOULD GET BECAUSE -- WELL, WE SAW A LOT OF -- WE SAW MANY OF  
2 THOSE PROJECTIONS, THE BENEFIT OF THEM FROM DOING THIS PROGRAM  
3 THROUGH TOMORROWNOW. BUT ORACLE DIDN'T KNOW THAT ITS SOFTWARE  
4 WAS BEING TAKEN.

5 DID THEY HAVE ANY PROJECTIONS OF THE IMPACT OF SAP  
6 TAKING ITS SOFTWARE?

7 A. NO, THEY WEREN'T AWARE OF THE SOFTWARE BEING TAKEN, SO  
8 THERE'S NO PROJECTIONS THAT ARE AVAILABLE IN ORACLE'S RECORDS AT  
9 THE TIME. AND SO I WORKED FROM THE SAP MANAGEMENT EXPECTATIONS  
10 AND USED THOSE IN MY CALCULATIONS.

11 Q. THE 3,000 CUSTOMERS.

12 A. THAT'S CORRECT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

3 THE WITNESS: AND ONCE AGAIN, WE'RE FOCUSING ON NOW  
4 THE IMPACT ON ORACLE, SO THESE ARE POTENTIAL LOST CUSTOMERS THAT  
5 ARE CONVERTED TO SAP. I START THERE. AND THE TOP SIDE -- I  
6 ACTUALLY USE -- IN THE ORACLE MODEL, I USE THE SAP PROJECTIONS  
7 THAT I MENTIONED A MOMENT AFORE (SIC) -- BEFORE.

8 I FOCUSED ON TWO ITEMS. I USED BASICALLY THE 3,000  
9 MAINTENANCE CUSTOMERS ON THE TOP THERE THAT ARE LOST IN THE  
10 FIRST THREE YEARS, THREE AND A HALF YEARS. AND THEN I THEN LOOK  
11 AT THE IMPACT GOING FORWARD WITH 1375 CUSTOMERS CONVERTED AND UP  
12 TO 3,000. AND SO I RUN SOME DIFFERENT MODELS THERE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

16 (EXHIBIT PUBLISHED TO JURY.)

17 THE WITNESS: IS WHAT YOU HAVE HERE IS A SUMMARY  
18 SIMILAR TO WHAT I HAD FOR SAP. THIS IS THE FLIP SIDE. THIS IS  
19 THE ORACLE IMPACT. AND YOU'LL SEE THAT I'VE DONE THREE  
20 CALCULATIONS. THE FIRST CALCULATION WE JUST WALKED THROUGH,  
21 WHICH IS IN RED. THAT'S THE CALCULATION WITH 1,375 CUSTOMERS  
22 CONVERTING TO SAP. AND SO THE LOSS TO ORACLE IS \$1.36 BILLION.

23 THE SECOND CALCULATION IS BASICALLY IS 2,000  
24 CUSTOMERS CONVERTING TO SAP, AND THAT LOSS IS \$1.82 BILLION.  
25 AND ULTIMATELY, IF 3,000 CUSTOMERS WERE TO CONVERT AWAY AND GO

1 TO SAP, THAT LOSS TO ORACLE WOULD BE 2.46 BILLION.

2 SO THE -- SO THOSE ARE THE THREE CALCULATIONS THAT I  
3 CAME UP WITH AND THE -- THEY SHOW YOU THE IMPACT BASED ON THE  
4 NUMBER OF CONVERTED CUSTOMERS.

5 Q. MAINTENANCE CUSTOMERS.

6 A. THAT'S CORRECT.

7 Q. ALL RIGHT.

8 NOW, LET'S GET THESE PARTIES TO THIS NEGOTIATION  
9 TABLE FOR THE LICENSE. LOOKING AT WHAT'S IN SAP'S MIND, THE  
10 FACTORS RELEVANT TO THEM; LOOKING AT ORACLE'S SIDE, THE FACTORS  
11 RELEVANT TO THEM, HOW DID YOU DETERMINE THE AMOUNT OF A  
12 REASONABLE LICENSE FEE THAT ORACLE AS A WILLING SELLER, SAP AS A  
13 WILLING BUYER WOULD HAVE AGREED TO?

14 A. WELL, FOR ALL THE NUMBERS TOGETHER -- AND I NEED TO SET THIS  
15 CHART UP, BECAUSE IT -- IT'S REALLY -- PUTS BOTH SIDES TOGETHER  
16 WITH THEIR IMPACTS AND GAINS.

17 BASICALLY ON THE LEFT-HAND SIDE OF THE AXIS, YOU'LL  
18 SEE IT'S IN BILLIONS OF DOLLARS. THEN ON THE BOTTOM, I SORT OF  
19 PRESENT THE RESULTS OF THE THREE DIFFERENT CALCULATIONS. THE  
20 FIRST ONE, THERE'S THE 1,375 CUSTOMERS CONVERTED TO SAP. THE  
21 SECOND ONE IN THE MIDDLE IS THE 2,000 CONVERTED CUSTOMERS. AND  
22 ULTIMATELY ON THE FAR RIGHT-HAND SIDE, IT'S 3,000 CUSTOMERS  
23 CONVERTED TO SAP.

24 Q. AND JUST TO BE CLEAR, THAT IS B. IT SHOULD BE A B.

25 A. YEAH, THAT'S CORRECT.

1 (SIMULTANEOUS COLLOQUY.)

2 BY MR. PICKETT:

3 Q. 900,000,000 IS .9 BILLION?

4 A. YES, THAT IS CORRECT. THAT'S \$900 MILLION. SO WHAT YOU  
5 HAVE, IF YOU START FROM THE BOTTOM ON THE LEFT-HAND SIDE, WITH  
6 THE 1,375 CUSTOMERS CONVERTED, THAT GAIN TO SAP IS \$900 MILLION?

7 THE IMPACT TO ORACLE IS 1.4 BILLION, SO YOU GET A  
8 RANGE THERE. AND THEN WHEN YOU MOVE TO THE MIDDLE, YOU'LL SEE  
9 THE IMPACT IF 2,000 CUSTOMERS GO TO SAP, THE GAIN TO SAP'S  
10 1.2 BILLION. LOSS TO ORACLE GROWS TO 1.8 BILLION, THEN  
11 ULTIMATELY ON THE RIGHT-HAND SIDE, THE LOSS WITH 3,000 CUSTOMERS  
12 TO ORACLE'S 2.5 BILLION. AND THE GAIN TO SAP'S AT 2.7 BILLION.

13 SO I LOOKED AT THE RESULTS OF THAT AND THEN ALSO  
14 CONSIDERED ALL THE OTHER FACTORS WE TALKED ABOUT THE LAST DAY OR  
15 SO, AND -- FROM MY PERSPECTIVE, IN MY OPINION, I WOULD SET THAT  
16 THE -- THE VALUE OF FAIR MARKET LICENSE FOR THE PEOPLESOFT AND  
17 JDE SOFTWARE WOULD BE AT LEAST 1.5 BILLION.

18 I WOULD TARGET IT IN THE MIDDLE UNDER THE 2,000  
19 CUSTOMERS, CERTAINLY I FEEL IT'S REASONABLE IN LIGHT OF WHERE  
20 YOU GO WITH THE 3,000 CUSTOMER CALCULATIONS. AND I ALSO  
21 UNDERSTAND THAT SAP'S MANAGEMENT HAD OTHER HIGHER PROJECTIONS.  
22 BUT I FEEL AT 1.5 BILLION, AT LEAST, THEN THAT WOULD BE AN  
23 APPROPRIATE VALUE FOR THIS LICENSE AFTER ALL OF MY RESEARCH AND  
24 ANALYSIS AND -- AND CONSIDERATIONS.

25 Q. WHY IS IT AT LEAST 1.5 BILLION?

1 A. WELL, FROM MY PERSPECTIVE, IT'S -- IT'S BASED ON THE FACT  
2 THAT THERE WERE OBVIOUSLY PROJECTIONS THAT WENT MUCH HIGHER, AND  
3 THERE'S ALL THE OTHER CONSIDERATIONS, POTENTIALLY THE BIG IMPACT  
4 ON ORACLE'S ACQUISITION OF PEOPLESOFT AND THE FACT THAT  
5 \$11 BILLION WAS PAID AND THAT WAS FAIR MARKET VALUE FOR THAT  
6 COMPANY AND ALL THE INTELLECTUAL PROPERTY AT THAT TIME.

7 SO THAT PROVIDES WHAT I WOULD SAY IS THIS UPWARD  
8 PRESSURE ON SAYING IT'S AT LEAST 1.5 BILLION.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

12 Q. ALL RIGHT. LET ME ASK YOU THIS: DID YOU LOOK AT -- DID YOU  
13 LOOK AT CALCULATING IT UNDER THE WRONG METHOD, THE LOST  
14 PROFITS/INFRINGERS' PROFITS METHOD?

15 A. I DID A CALCULATION OF LOST PROFITS; THAT'S CORRECT.

16 Q. AND WHY DID YOU DO THOSE CALCULATIONS?

17 A. WELL, THERE WAS TWO REASONS. ONE, I WANTED TO KNOW WHAT THE  
18 RESULT WAS IN TERMS OF WHAT WERE THE LOST PROFITS AND WHAT WERE  
19 THE INFRINGERS' PROFITS. AND, SECONDLY, I MENTIONED A MOMENT  
20 AGO, FOR SOME OTHER CAUSE OF ACTION, IT WAS THE ONLY WAY THAT  
21 ONE COULD MEASURE. THAT WAS -- THE METHOD WAS LOST PROFITS.  
22 AND SO I'VE DONE A CALCULATION OF LOST PROFITS IN THE INFRINGER  
23 PROFITS.

24 Q. AND WHAT WERE THE RESULTS?

25 A. THE LOST PROFIT NUMBER IS \$120 MILLION. THAT'S THE LOST

1 PROFIT NUMBER. AND THEN THE INFRINGER (SIC) PROFIT'S NUMBER IS  
2 \$288 MILLION. AND THAT REFLECTS NOT ALL THE CUSTOMERS THAT --  
3 THAT WERE SAP CUSTOMERS AND ALSO TOMORROWNOW CUSTOMERS BUT A  
4 SUBSET, SO I THINK IT'S ABOUT 60-SOME CUSTOMERS ARE IN THE  
5 288 MILLION.

6 AND THEN THERE'S THREE CUSTOMERS, I THINK IN THAT  
7 GROUP OF THE 288,000,000 WHERE THERE'S SOME ISSUES STILL THAT  
8 SORT OF EXIST ABOUT THE ROLE OF TOMORROWNOW IN CONVERTING THOSE  
9 CUSTOMERS TO SAP.

10 AND SO IF I LOOK AT THE IMPACT OF THOSE THREE  
11 CUSTOMERS, I THINK THE NUMBER WOULD BE 236 MILLION. SO MY  
12 INFRINGER PROFIT'S (SIC) NUMBERS, 288 MILLION, AND THEN RANGES  
13 DOWN TO 236 MILLION DEPENDING ON THESE THREE CUSTOMERS.

14 AND SO THAT'S WHERE I'VE COME OUT WITH THOSE  
15 CALCULATIONS.

16 Q. SO IF I COMBINE THE 120 MILLION IN LOST PROFITS WITH THE 288  
17 MILLION IN INFRINGER'S PROFITS, WHAT DO WE GET?

18 A. I THINK IT'S 408,000,408.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

4 Q. NOW, THIS IS NOT FOR PEOPLESOFT. IT'S FOR SIEBEL AND, AND  
5 THE DATE IS DIFFERENT. RATHER THAN JANUARY 19, 2005, WE'RE UP A  
6 LITTLE OVER A YEAR AND A HALF, SEPTEMBER 29, 2006. WHAT IS --  
7 WHAT DOES THIS SHOW?

8 A. SAME STRUCTURE AS I USED BEFORE WITH PEOPLESOFT, BUT I LAY  
9 OUT NOW THE GOALS WITH -- WITH THE SIEBEL LICENSE. THIS IS FROM  
10 SAP'S PERSPECTIVE. AND, OBVIOUSLY, THE FIRST GOAL I SEE THERE,  
11 IT'S A GOAL TO CONVERT CUSTOMERS TO THE MYSAP CRM. THAT'S THE  
12 COMPETITIVE OFFERING THAT SAP HAS THAT COMPETES WITH SIEBEL.

13 AND THEN THERE'S A DOCUMENT I'LL SHOW YOU IN A -- A  
14 MOMENT THAT SAYS TOMORROWNOW IS ENABLER FOR FUTURE LICENSE  
15 REVENUE. SO IT'S IMPORTANT FROM THE PERSPECTIVE OF SAP AS A  
16 GOAL TO BE ABLE TO HAVE TOMORROWNOW PROVIDE SERVICE WHICH LEADS  
17 TO MORE REVENUE FOR SAP.

18 AND THEN YOU COME DOWN TO THE IMPACT ON ORACLE, AND  
19 THERE'S SOME INFORMATION THAT SHOWS THE IMPACT ON ORACLE BETWEEN  
20 110 MILLION AND 220 MILLION RELATED TO THE SIEBEL MAINTENANCE.

21 AND THEN, ULTIMATELY, THE SAP EXPECTED FINANCIAL  
22 GAINS, THERE'S SOME INFORMATION THAT THEY EXPECTED TO CONVERT  
23 200 CUSTOMERS BY 2008. AND I'VE DONE SOME CALCULATIONS LIKE THE  
24 OTHER ONES I'VE SHOWN YOU FOR PEOPLESOFT BUT NOW FOR SIEBEL  
25 PRODUCTS. AND THOSE ARE 97 MILLION TO 247 MILLION, AND THESE

1 ARE GAINS TO SAP.

2 Q. SO WE KNOW FROM SAP'S OWN DOCUMENTS AT THE TIME WHAT WOULD  
3 BE IN THEIR MIND AT THE NEGOTIATION TABLE?

4 A. THAT'S CORRECT.

5 Q. SO LET'S GO TO THE FIRST GOAL, GOAL ONE. ACTUALLY, WE'LL GO  
6 TO ALL THREE GOALS THIS TIME FOR THE SAKE OF SPEED. WHAT DOES  
7 THIS CHART SHOW WITH RESPECT TO GOAL ONE, FACTOR 1, WHAT SAP'S  
8 GOAL WAS, FACTOR 2, WHAT SAP THOUGHT THE IMPACT ON ORACLE WOULD  
9 BE, AND NO. 3, WHAT THEY THOUGHT THEY'D GAIN FROM IT?

10 A. WELL, THERE'S SEVERAL THINGS NEEDED TO POINTED OUT.  
11 OBVIOUSLY, THE FIRST ITEM THERE ON THE RIGHT-HAND SIDE, UNDER  
12 THIS OCTOBER 2005 DOCUMENT, IT SAYS THE OPPORTUNITY IS TO MOVE  
13 THE 300-PLUS SAP CUSTOMERS, SAP AND SIEBEL HAVE IN COMMON TO  
14 MIGRATE THEM TO MYSAP CRM.

15 SO THAT SHOWS ONCE AGAIN THE TARGETING BY SAP, LAYS  
16 OUT SOME OBJECTIVES THERE. KEY PERFORMANCE INDICATORS.

17 I THINK IF YOU COME DOWN, IT SAYS -- DOWN THERE IN  
18 THE SECOND BOX SAYS, "THE MAINTENANCE OFFERING" -- IT SAYS "A  
19 KEY PART OF THE SAFE PASSAGE PROGRAM AND PROVIDED BY TOMORROWNOW  
20 CAN BE USED AS ENABLER FOR FUTURE LICENSE REVENUE." SO THAT  
21 SHOWS HOW TOMORROWNOW FOR SIEBEL CAN HELP SAP EARN OTHER  
22 REVENUES.

23 AND I THINK IN A MOMENT, WE'LL TALK MORE ABOUT THIS  
24 BUT THERE'S A DOCUMENT THAT SAYS OVER THE LONG TERM, EVERY 1  
25 DOLLAR OF TOMORROWNOW STAND-ALONE REVENUE THIS YEAR IN 2006

1 REPRESENTS \$18 OF ORIGINALLY EXPECTED ORACLE REVENUE SO THIS  
2 JUST SHOWS THE IMPACT THAT TOMORROWNOW HAS ON ORACLE'S BUSINESS.  
3 SO THOSE ARE ALL IMPORTANT CONSIDERATIONS.

TEXT REMOVED - NOT RELEVANT TO MOTION

18 Q. THIS IS EXHIBIT 958. WHAT DOES THIS SHOW, MR. MEYER?

19 A. THIS WAS A DOCUMENT THAT WAS PREPARED IN OCTOBER 2005. I  
20 THINK MR. ZIEMEN AND MR. WELZ SAW THIS DOCUMENT. IT WAS  
21 PRESENTED TO MR. OSWALD, ONE OF THE EXECUTIVE BOARD MEMBERS.

22 AND IT SAYS THAT -- IN THAT FIRST SORT OF AREA THAT'S  
23 HIGHLIGHTED, IT SAYS, "THE SIEBEL CUSTOMER BASE CONSISTS OF  
24 4,000 CUSTOMERS." AND THEN SAYS, "INCLUDING A LARGE NUMBER OF  
25 JOINT EXHIBIT SAP/SIEBEL CUSTOMERS AND PRESENTS A HUGE MARKET

1 OPPORTUNITY." SO THAT'S IMPORTANT TO UNDERSTAND SAP'S GOALS  
2 AND -- AND POTENTIAL GAINS.

3 AND THEN THE -- IT GOES ON AND SAYS, THE NEXT BOX,  
4 "THE MAINTENANCE OFFERING -- A KEY PART SAFE PASSAGE PROGRAM AND  
5 PROVIDED BY TOMORROWNOW -- CAN BE USED AS ENABLER FOR FUTURE  
6 LICENSE REVENUE, TO GROW MAINTENANCE CONTRACT VOLUME TAKEN AWAY  
7 FROM ORACLE AND TO GENERATE ADDITIONAL MAINTENANCE REVENUE FOR  
8 SAP."

9 SO ONCE AGAIN, GOES TO WHY IT WOULD BE A VALUABLE  
10 LICENSE FOR SAP.

11 Q. RIGHT. CLEARLY GOING TO HAVE TO GET A NEW SET OF GLASSES  
12 HERE, GIVEN THAT SLIDE. BUT LET'S GO ON TO ANOTHER PAGE OF THIS  
13 SLIDE. SAME DOCUMENT.

14 (EXHIBIT PUBLISHED TO JURY.)

15 BY MR. PICKETT:

16 Q. AND WHAT DOES THIS SHOW IN TERMS OF SAP'S PLANNING FOR THE  
17 SIEBEL ACQUISITION BY ORACLE?

18 A. WELL, THIS IS THEIR BUSINESS PLANNING AS PART OF THE  
19 BUSINESS CASE. AND THIS ONE WOULD SHOW THAT OVER THE PERIOD  
20 THROUGH 2008 -- SO THIS IS 2006 THROUGH 2008, THERE WOULD BE 200  
21 CUSTOMERS THAT WOULD BE CONVERTED. SO IT'S INDICATIVE ONCE  
22 AGAIN OF THE EXPECTATIONS OF SAP.

23 Q. AND THAT'S -- IS THAT THE NUMBER YOU USED IN YOUR  
24 CALCULATIONS?

25 A. THAT'S CORRECT.

1 Q. THEIR OWN NUMBER?

2 A. THAT'S CORRECT.

3 Q. ALL RIGHT. DID YOU CALCULATE THE IMPACT -- I'M SORRY. LET  
4 ME GO TO THE NEXT SLIDE, EXHIBIT 37.

5 (EXHIBIT PUBLISHED TO JURY.)

6 BY MR. PICKETT:

7 Q. AND YOU MENTIONED THIS. WHAT DOES THIS SHOW? WHAT'S THE  
8 SIGNIFICANCE OF THIS?

9 A. THIS IS A DOCUMENT THAT WAS AUTHORED BY MR. NELSON AT  
10 TOMORROWNOW, AND IT WAS AUTHORED IN 2006. AND IT MENTIONS THAT  
11 OVER THE LONG TERM, EVERY ONE DOLLAR OF TOMORROWNOW STAND-ALONE  
12 REVENUE THIS YEAR REPRESENTS \$18 OF ORIGINALLY EXPECTED ORACLE  
13 REVENUE FROM THEIR MISGUIDED ACQUISITION STRATEGY.

14 SO IT REFERENCES BACK TO ORACLE'S ACQUISITION OF  
15 PEOPLESOFT. AND BASICALLY THE WAY IT WORKS IS THAT FOR EVERY  
16 DOLLAR OF TOMORROWNOW REVENUE, BECAUSE THEY'RE AT HALF THE PRICE  
17 OF ORACLE, IT'D BE \$2 TO ORACLE AND THEN THAT'S \$2 OF  
18 MAINTENANCE. AND IT'S A TEN-YEAR LOOK. SO IT'S TWO TIMES THE  
19 NEXT NINE YEARS.

20 SO THAT \$1 OF TOMORROWNOW NOW SERVICE REVENUE IN YEAR  
21 ONE TAKES AWAY \$2 FROM ORACLE IN YEAR ONE, AND THEN THERE'S A  
22 LOSS FOR THE NEXT NINE YEARS TO ORACLE IS TO THAT'S THE \$18.

23 AND SO YOU SEE THE LEVERAGE IN THE MINDSET OF  
24 TOMORROWNOW THAT IN THIS CASE, MR. NELSON'S COMMUNICATING TO THE  
25 MANAGEMENT AT SAP, SAYING WE MAKE \$1, IMPACTS ORACLE \$18 BECAUSE

1       THEY LOSE THAT MAINTENANCE FOR A TEN-YEAR PERIOD.

2                   SO IT'S PRETTY SIGNIFICANT ON IMPACT.

TEXT REMOVED - NOT RELEVANT TO MOTION

## TEXT REMOVED - NOT RELEVANT TO MOTION

3 Q. ALL RIGHT. LET'S GO TO THE THIRD FACTOR. HOW MUCH SAP  
4 THOUGHT IT WOULD MAKE BY TAKING THE SIEBEL PROPERTY FROM ORACLE.  
5 HOW DID YOU CALCULATE THAT?

6 A. I USED A SIMILAR MODEL AS TO HOW I DID THE CALCULATIONS FOR  
7 PEOPLESOFT, SO IT'S THE SAME STRUCTURE. AND I THINK HERE, WE'RE  
8 JUST SHOWING THE RESULTS OF THE CALCULATION. THIS ONE'S FOR THE  
9 200 MAINTENANCE CUSTOMERS I MENTIONED A MOMENT AGO THAT WOULD BE  
10 CONVERTED TO SAP.

11 AND SO YOU'LL SEE THAT SAME REVENUE CATEGORIES YOU  
12 HAVE ON THE LEFT-HAND SIDE THERE, MAINTENANCE REVENUE. YOU HAVE  
13 THE ADDITIONAL PRODUCT SALES OF THE CROSS-SELL. AND THEN YOU  
14 HAVE THE CONVERTED CUSTOMERS, THE UPSWITCH, AND THEN YOU'LL SEE  
15 THE THREE CUSTOMER NUMBERS, 200, 130, AND 200.

16 I PUT THOSE VALUES IN TO THE MODEL AND CAME UP WITH  
17 EXPECTED REVENUE THAT WOULD BE GAINED, DEDUCTED THE COSTS IT  
18 WOULD TAKE TO TEN REVENUE, AND THEN YOU'LL SEE THE PROFITS THERE  
19 ON THE NEXT COLUMN.

20 AND THEN BASICALLY, THEN, DID A SIMILAR CALCULATION  
21 AS I DID FOR THE PEOPLESOFT GAINS TO SAP AND CAME UP WITH A  
22 FUTURE VALUE THERE TO SAP. AND, ULTIMATELY, YOU'LL SEE THAT THE  
23 TOTAL VALUE AS OF JANUARY -- OR AS OF SEPTEMBER 2006, THE TIME  
24 OF THE NEGOTIATION, WOULD BE \$96.7 MILLION TO SAP. THAT'S THEIR  
25 EXPECTED GAIN.

1 Q. AND THAT'S ONE CALCULATION. DID YOU MAKE SOME OTHERS?

2 A. YES, I BASICALLY HAVE A SUMMARY THAT SHOWS I DID THE SAME  
3 TYPE OF APPROACH AS WITH PEOPLESOFT, SO IF WE GO OVER HERE --

4 (EXHIBIT PUBLISHED TO JURY.)

5 THE WITNESS: -- I USED FOR THE SIEBEL GAINS, THE  
6 SIMILAR SET OF CUSTOMERS THAT WERE LOST UNDER TWO SORT OF  
7 CALCULATIONS. WE JUST SAW THE \$97 MILLION THERE, ONCE AGAIN,  
8 WITH 200 CUSTOMERS CONVERTING. AND THEN ON THE RIGHT-HAND SIDE,  
9 I LOOKED AT THE FULL VALUE OF THOSE CUSTOMERS LEAVING, WHICH  
10 INCLUDES BOTH THE -- IN THIS CASE, THE GAIN OF MAINTENANCE  
11 REVENUE, THE GAIN OF CROSS-SELL, AND THE GAIN OF UPSWITCH  
12 CUSTOMERS TO SAP, WHICH MAKES IT ABOUT \$247 MILLION, ONCE AGAIN  
13 USING THAT \$1 MILLION VALUE PER CUSTOMER. SO THAT'S THE OUTCOME  
14 ON THE SIEBEL GAIN SIDE.

TEXT REMOVED - NOT RELEVANT TO MOTION

18 Q. ALL RIGHT. LET'S GO, THEN, TO THE ORACLE SIDE OF THE TABLE.  
19 WE'VE DONE SAP. THIS IS FOR SIEBEL. LET'S GO TO THE ORACLE  
20 SIDE.

21 WHAT FACTORS WOULD HAVE BEEN IMPORTANT TO ORACLE  
22 ENTERING INTO THAT NEGOTIATION?

23 (EXHIBIT PUBLISHED TO JURY.)

24 THE WITNESS: WELL, YOU'LL SEE THE GOALS THERE. ONCE  
25 AGAIN, THIS IS IN THEIR SIDE OF THE NEGOTIATION. AND THE GOALS

1       HERE WERE LOOKING AT ORACLE'S GOAL FOR THE SIEBEL ACQUISITION,  
2       WHICH WAS 4,000 ADDITIONAL CUSTOMERS AND THAT MAINTENANCE  
3       REVENUE.

4                   AND ONCE AGAIN, HERE, ORACLE BECAME THE LEADER IN THE  
5       MARKET AREA OF THE CRM SOFTWARE.    SO ORACLE BECAME MARKET LEADER  
6       WITH THE ACQUISITION OF SIEBEL AND, AND THAT WAS VERY IMPORTANT  
7       TO ORACLE.

8                   THEN I GO DOWN AND I ADDRESS THE RISK OF THAT  
9       INVESTMENT AND THEN ULTIMATELY THE EXPECTED IMPACTS ON ORACLE.  
10      YOU'LL SEE THAT THE SIEBEL ACQUISITION WAS \$6 BILLION, INCLUDED  
11      THE SOFTWARE AND SUPPORT MATERIALS.   WITH THIS LICENSE, YOU'D  
12      GIVE UP THE EXCLUSIVE RIGHTS AND THE IMPACT USING SAP'S  
13      PROJECTION OF 200 MAINTENANCE CUSTOMERS, I COME UP WITH SOME  
14      CALCULATIONS THERE ALSO.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

6                   THE WITNESS: WELL, I SET UP THE SAME STRUCTURE AS  
7 YOU SAW BEFORE. IN THIS CASE, I LOOKED AT THE LOST POTENTIAL  
8 CUSTOMERS TO ORACLE, LOOK AT THE VALUES THAT ORACLE WOULD HAVE  
9 HAD THERE FOR ITS REVENUES AND ITS MARGINS AND DID A SIMILAR  
10 CALCULATION OVER THE TEN-YEAR PERIOD OF HAVING A CUSTOMER  
11 CONVERT AWAY OFF THE ORACLE PLATFORM.

12   (EXHIBIT PUBLISHED TO JURY.)

13 BY MR. PICKETT:

14 Q. AND WHAT DO THE CALCULATIONS RESULT IN?

15 A. THE CALCULATION HERE SHOWS 200 MAINTENANCE CUSTOMERS THAT  
16 ARE CONVERTED AWAY AFTER OCTOBER 2008. YOU'LL SEE THE  
17 MAINTENANCE REVENUE THERE, BASE OF 200 CUSTOMERS. YOU'LL SEE  
18 THE -- THE REVENUE THAT'S GOING TO BE LOST, LESS THE COSTS AND  
19 THE PROFITS OF \$93 MILLION. AND THEN THE FUTURE IMPACT ON THAT  
20 OF \$71 MILLION. AND SO THE TOTAL EXPECTED IMPACT IS  
21 \$164 MILLION.

22 Q. ALL RIGHT. LET'S PUT THE TWO SIDES TOGETHER, ONLY THIS TIME  
23 FOR SIEBEL.

24                   LOOKING AT THE SAP SIDE, WHAT'S THEIR THINKING;

25                   LOOKING AT THE ORACLE SIDE, WHAT'S THEIR THINKING? WHAT YOU DID

1 CONCLUDE THAT A REASONABLE LICENSE BETWEEN A WILLING SELLER  
2 WILLING BUYER WOULD BE?

3 (EXHIBIT PUBLISHED TO JURY.)

4 THE WITNESS: BASICALLY, I SET THE STRUCTURE UP HERE  
5 WITH SAP'S EXPECTED GAINS AND ORACLE'S POTENTIAL IMPACTS AND  
6 CONSIDERED THE OTHER FACTORS WE'VE TALKED ABOUT. AND FROM MY  
7 PERSPECTIVE, THE LICENSE WOULD BE AT LEAST \$100 MILLION.

8 BY MR. PICKETT:

9 Q. AGAIN, AT LEAST \$100 MILLION?

10 A. AT LEAST \$100 MILLION.

11 Q. AND WHY "AT LEAST"?

12 A. ONCE AGAIN, FOR ALL THE OTHER FACTORS, AND PARTICULARLY WITH  
13 THE IMPORTANCE OF THE SIEBEL ACQUISITION AND SPENDING THE  
14 \$6 BILLION FOR THAT COMPANY AND THE SOFTWARE, FROM MY  
15 PERSPECTIVE WOULD BE AT LEAST \$100 MILLION.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

5 Q. AND WHAT WOULD THAT LICENSE COVER, THE ORACLE DATABASE  
6 LICENSE THAT SAP WOULD NEED?

7 A. IT WOULD COVER THE CUSTOMERS THAT WERE BENEFITING FROM  
8 THAT -- USING THAT DATABASE LICENSE FOR THE PERIODS OF TIME WHEN  
9 THEY BENEFITED. SO I HAD INFORMATION ABOUT WHEN THOSE CUSTOMERS  
10 WERE FIRST SERVICED BY TOMORROWNOW. AND THEN I RUN THAT  
11 CALCULATION FROM THOSE DATES OUT THROUGH OCTOBER 2008.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

19 Q. ALL RIGHT. WELL, THEN LET'S -- LET'S LOOK AT HOW YOU  
20 MEASURED THE VALUE OF THE DATABASE LICENSE.

21 (EXHIBIT PUBLISHED TO JURY.)

22 BY MR. PICKETT:

23 Q. THIS IS SLIDE 70. WHAT DO YOU SHOW HERE?

24 A. HERE, I JUST HAVE SORT OF A STRUCTURE TOP TO BOTTOM OF A  
25 COUPLE OF THINGS THAT I WENT THROUGH AND CONSIDERED TO COME UP

1 WITH THE OVERALL LICENSE.

2 ULTIMATELY, I STARTED WITH UNDERSTANDING ORACLE'S  
3 DATABASE LICENSING PRACTICES. AND I DID THAT BECAUSE I WANTED  
4 TO UNDERSTAND IF ORACLE HAD EVER LICENSED ITS DATABASE SOFTWARE  
5 IN THESE KINDS OF CIRCUMSTANCES. AND I FOUND OUT THEY NEVER  
6 HAVE. THEY'D NEVER LICENSED THE DATABASE SOFTWARE TO A  
7 COMPETITOR TO OFFER HEAD-TO-HEAD COMPETITION IN PROVIDING  
8 MAINTENANCE SERVICES LIKE TOMORROWNOW WAS DOING, SO THIS WOULD  
9 BE A FIRST-TIME-EVER THING.

10 SO FROM THAT PERSPECTIVE, I WANTED TO UNDERSTAND THAT  
11 PROCESS, AND I TALKED TO MR. ALLISON A COUPLE TIMES FROM ORACLE.  
12 I BELIEVE HE TESTIFIED IN THE TRIAL LAST WEEK.

13 Q. ON FRIDAY.

14 A. THAT'S CORRECT. AND I READ HIS TESTIMONY, AND IT WAS  
15 CONSISTENT WITH WHAT HE TOLD ME IN THE PAST ABOUT THE ORACLE  
16 DATABASE SOFTWARE AND WHY THIS WOULD BE SORT OF A UNIQUE  
17 LICENSING, BECAUSE THEY JUST DON'T LICENSE COMPETITORS TO  
18 COMPETE LIKE THIS.

19 Q. WAS HIS TESTIMONY TO THE JURY THE SAME AS HIS STATEMENTS TO  
20 YOU PRIOR TO YOUR DOING THIS ANALYSIS?

21 A. YES, SIR.

22 Q. ALL RIGHT. IN OUR STEP TWO -- SO HE GAVE YOU THE DATABASE  
23 LICENSES PRACTICES AS HE DESCRIBED THEM ON FRIDAY?

24 A. THAT'S CORRECT.

25 Q. AND THEN STEP TWO IS WHAT?

1 A. THERE WAS AN ISSUE ABOUT THE -- THE SERVER CONFIGURATION OF  
2 TOMORROWNOW BECAUSE THE WAY ORACLE PRICES OUT THE DATABASE  
3 LICENSE, IT'S BASED ON THE SIZE OF THE SERVER. AND SO WE HAD  
4 THAT INFORMATION FROM TOMORROWNOW'S RECORDS.

5 AND IN THAT PROCESS, WE WERE ULTIMATELY -- CAME TO  
6 UNDERSTAND I BELIEVE IT WAS SIX PROCESSORS, AND THEY CHARGE FOR  
7 THE SOFTWARE BASED ON THE NUMBER OF PROCESSORS. SO WE WERE ABLE  
8 TO COME UP WITH A CALCULATION OF -- OF SIX PROCESSORS TIMES A  
9 VALUE TO COME UP WITH THE TOTAL PRICING.

10 SO IT WAS IMPORTANT TO UNDERSTAND THE HARDWARE  
11 CONFIGURATION OF TOMORROWNOW.

12 Q. YOU HAD TO UNDERSTAND THE HARDWARE CONFIGURATION TOMORROWNOW  
13 USED IN ORDER TO UNDERSTAND HOW THE PRICES WOULD APPLY?

14 A. THAT'S CORRECT.

15 Q. ALL RIGHT. LET'S GO TO STEP THREE. WHAT IS THAT?

16 A. AND THEN STEP THREE, WE HAD TO COME UP WITH A PRICE. AND SO  
17 IT TURNED OUT IT WAS SIX PROCESSORS AT \$40,000 PER PROCESSOR.

18 SO FOR THIS DATABASE LICENSE, IT WOULD BE \$240,000  
19 PAID, AND THEN THERE WOULD BE ANNUAL MAINTENANCE AT ABOUT  
20 \$52,000 A YEAR, SO THAT'S SORT OF THE PRICE FOR EACH OF THE  
21 DATABASE LICENSES.

22 Q. FOR EACH OF THE LICENSES THAT -- CUSTOMER DATABASE THAT  
23 TOMORROWNOW WAS ACCESSING?

24 A. THAT'S RIGHT. SO FOR EACH CUSTOMER ULTIMATELY THAT'S IN THE  
25 CALCULATION, THEY WOULD NEED A DATABASE LICENSE AT \$240,000 A

1 YEAR PLUS MAINTENANCE.

2 Q. AND WHAT WAS YOUR NEXT STEP FOR THE NUMBER OF CUSTOMERS WHO  
3 BENEFITED?

4 A. THAT WAS TO DETERMINE HOW MANY BENEFITING CUSTOMERS -- AND I  
5 HAD INFORMATION ABOUT THAT. AND I BELIEVE I HAVE A SLIDE THAT  
6 SHOWS THAT SOMEWHERE, THAT COUNT OF CUSTOMERS.

7 (EXHIBIT PUBLISHED TO JURY.)

8 THE WITNESS: AND SO WE KNEW FROM SIMILAR RESPONSES  
9 BY SAP IN DISCOVERY THAT 71 CUSTOMER ENVIRONMENTS HAD BEEN  
10 CREATED ON THE TOMORROWNOW SERVERS. SO WHEN THOSE ENVIRONMENTS  
11 WERE CREATED ON THE TOMORROWNOW SERVERS, THEY THEN ACCESSED  
12 ORACLE'S DATABASE. AND SO THOSE CUSTOMERS WOULD NEED A LICENSE  
13 TO ORACLE'S DATABASE SOFTWARE.

14 AND THEN WE WERE ABLE TO DETERMINE THAT THERE WERE  
15 FIXES THAT WERE DEVELOPED ON THE 71 CUSTOMER ENVIRONMENTS  
16 THAT -- THAT WERE USING THE DATABASE SOFTWARE. SO THAT SECOND  
17 GROUP IS BASICALLY WHAT'S CALLED CONFIRMED CROSS-USE WITH ORACLE  
18 LOCAL DATABASE ENVIRONMENTS. AND THAT'S THE NEXT 43 CUSTOMERS.

19 AND THEN THE LAST GROUP IS JUST CUSTOMERS OF  
20 TOMORROWNOW THAT HAD THE HUMAN RESOURCE APPLICATION AND THAT  
21 NUMBER BASICALLY ASSUMES THAT THOSE CUSTOMERS TOOK -- TOOK  
22 BENEFITS FROM THE FIXES AND UPDATES THAT CAME OUT OF THE FIRST  
23 TWO GROUPS, SO THE TOTAL IS 172 CUSTOMERS THAT WOULD NEED A  
24 SEPARATE DATABASE LICENSE FROM THE PERSPECTIVE OF THIS -- THIS  
25 NEGOTIATION.

1 Q. AND HOW MUCH DID YOU CONCLUDE THE DATABASE LICENSE FEE WOULD  
2 BE?

3 A. THE -- HERE'S THE CALCULATION. IT'S PRETTY SEPARATE  
4 FORWARD.

5 (EXHIBIT PUBLISHED TO JURY.)

6 THE WITNESS: I MENTIONED A MOMENT AGO THERE WERE 172  
7 CUSTOMERS. EACH ONE WOULD TAKE A LICENSE AT \$240,000. THE  
8 ANNUAL MAINTENANCE RUNS 52,800, AND THEN THE TIME PERIOD IS FROM  
9 THE TIME EACH OF THE CUSTOMERS BECAME A TOMORROWNOW CUSTOMER  
10 THROUGH OCTOBER 2008. AND THEN WHEN YOU DO THE MATH OF THAT,  
11 IT'S \$55.6 MILLION. THAT'S THE TOTAL FOR THE DATABASE LICENSE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

5 Q. THE FIRST LICENSE, THE PEOPLESOFT LICENSE WE'VE CALLED IT,  
6 INCLUDES THE JD EDWARDS SOFTWARE. YOU SAY THAT'S AT LEAST  
7 1.5 BILLION?

8 A. THAT'S CORRECT.

9 Q. AND IS IT IMPORTANT -- WELL, THERE WE GO.

10 (EXHIBIT PUBLISHED TO JURY.)

11 BY MR. PICKETT:

12 Q. IS IT IMPORTANT THAT IT'S AT LEAST IN YOUR VIEW -- I MEAN,  
13 YOU'RE NOT AT 1.5 BILLION. YOU'RE "AT LEAST," RIGHT?

14 A. I -- THAT'S CORRECT. AND I THINK FROM THE CHARTS WE SHOWED  
15 TODAY AND THE RESULTS OF MY CALCULATIONS, THERE'S CERTAINLY  
16 REASON TO HAVE THE VALUE HIGHER. BUT I FELT THAT THIS WAS A  
17 REASONABLE PLACE TO BE. AND I'M COMFORTABLE WITH "AT LEAST,"  
18 AND CERTAINLY ONE COULD -- COULD COME UP WITH COME UP WITH VERY  
19 SOUND LOGIC TO HAVE A HIGHER AMOUNT.

20 Q. ALL RIGHT. AND WE SEE THE SIEBEL AND THE DATABASE. SO IN  
21 YOUR OPINION, MR. MEYER, THE TOTAL DAMAGES IN THIS CASE ARE AT  
22 LEAST 1.655 -- SIX HUNDRED THOUSAND? YOU CAN PROBABLY SAY THAT  
23 NUMBER BETTER THAN I.

24 A. MAYBE NOT, BUT IT'S \$1,655,600,000, WOULD BE THE DAMAGES.  
25 AT LEAST THAT AMOUNT; THAT'S CORRECT.

TEXT REMOVED - NOT RELEVANT TO MOTION

25 Q. OKAY. SO THE TWO ASPECTS OF THE FIRST METHOD ARE ORACLE'S

1 LOST SUPPORT PROFITS, RIGHT?

2 A. ON LOST PROFITS.

3 Q. YES.

4 A. YEAH, THAT WAS ONE PIECE.

5 Q. WE'RE IN THE REAL WORLD, NOT IN THE HYPOTHETICAL WORLD YET.  
6 WE'LL COME TO THE HYPOTHETICAL WORLD.

7 MR. PICKETT: OBJECTION, YOUR HONOR. HIS  
8 CHARACTERIZING THE MEASURES -- ALTERNATIVE MEASURES OF DAMAGES  
9 AS "REAL WORLD" AND, I THINK, "HYPOTHETICAL WORLD" IS NOT  
10 APPROPRIATE. UNDER THE LAW, AS YOUR HONOR HAS PREVIOUSLY RULED  
11 IN THIS CASE, THESE ARE -- BOTH METHODS ARE ACCEPTABLE FOR  
12 ACTUAL DAMAGES.

13 THE COURT: COUNSEL, I WILL INSTRUCT THE JURY AS TO  
14 THE LAW.

15 OBJECTION OVERRULED.

16 BY MR. MITTELSTAEDT:

17 Q. OKAY. SO ONE ASPECT OF IT IS ORACLE'S LOST SUPPORT PROFITS,  
18 RIGHT?

19 A. THAT'S ONE CALCULATION.

20 Q. AND THOSE ARE THE ORACLE CUSTOMERS WHO LEFT ORACLE BECAUSE  
21 OF TOMORROWNOW AND OBTAINED MAINTENANCE OR SUPPORT SERVICES FROM  
22 TOMORROWNOW?

23 A. THAT'S CORRECT.

24 Q. AND THE OTHER PART OF THIS CALCULATION ARE THE PROFITS THAT  
25 SAP GAINED FROM CUSTOMERS WHO LEFT ORACLE AND BOUGHT SOFTWARE

1 FROM SAP AS A RESULT OF TOMORROWNOW'S INFRINGEMENT, CORRECT?

2 A. THAT'S CORRECT.

3 Q. AND WE CALL THOSE -- LET'S JUST CALL THOSE SOFTWARE PROFITS  
4 OF SAP. AND THEN I'LL PUT "MEYER," "M," AND "CLARKE,"  
5 MR. CLARKE BEING SAP'S EXPERT. AND LET'S FOCUS ON THE --  
6 YOU'D --

7 YOU CALCULATED SUPPORT PROFITS FOR TWO TIME PERIODS,  
8 THE TOMORROWNOW TIME PERIOD AND THEN A LONGER TIME OUT TO 2015;  
9 IS THAT CORRECT?

10 A. RIGHT, TO REFLECT THE ONGOING IMPACT.

11 Q. AND THE -- LET'S TAKE YOUR NUMBER FOR THE TOMORROWNOW  
12 PERIOD. THAT NUMBER WAS WHAT, IF YOU RECALL?

13 A. I BELIEVE FOR THE PLAINTIFF IN THE ACTION RIGHT NOW,  
14 \$36 MILLION.

15 Q. YOUR NUMBER?

16 A. RIGHT. 36 MILLION THROUGH TOMORROWNOW PERIOD, RIGHT?

17 Q. OKAY. WASN'T IT ACTUALLY ABOUT 82 MILLION?

18 A. NO. I THINK ALL WE'RE TALKING ABOUT NOW IS OIC IS THE ONLY  
19 PLAINTIFF LEFT IN THE CASE, SO IT'S 36.

20 Q. AND MR. CLARKE CAME UP WITH ABOUT THE SAME NUMBER, RIGHT?

21 A. I DON'T THINK THAT'S CORRECT. I THINK HIS COMPARABLE  
22 NUMBER -- I HAVE MY WORK PAPERS -- IS, LIKE, 19 MILLION.

23 Q. OKAY. OKAY. YOU SAY 19 MILLION, I'M GOING TO PUT ABOUT  
24 32 MILLION.

25 A. THAT WOULD NOT BE CORRECT, THOUGH.

1 Q. OKAY.

2 A. SO HIS NUMBER -- IF WE'RE TALKING ABOUT THE PLAINTIFF, AS I  
3 UNDERSTAND IT THAT'S STILL IN THE LAWSUIT, HIS NUMBER IS 19  
4 MILLION, AND MY NUMBER'S 36 MILLION THROUGH OCTOBER 2008 AND  
5 121 MILLION THROUGH 2015.

TEXT REMOVED - NOT RELEVANT TO MOTION

1 Q. OKAY. SO YOU SAY IT'S 36 FOR THE SHORTER TIME PERIOD, 120  
2 FOR THE LONGER TIME PERIOD?

3 A. 121.

TEXT REMOVED - NOT RELEVANT TO MOTION

5 OKAY. LET'S COME DOWN TO THE SOFTWARE PROFITS OF SAP  
6 AS A RESULT OF THE INFRINGEMENT. WHAT -- WHAT NUMBER DO YOU  
7 COME UP WITH THERE?

8 A. I MENTIONED TWO NUMBERS TODAY. I BELIEVE I MENTIONED  
9 288 MILLION. AND I MENTIONED, I THINK, 236.

10 Q. OKAY. AND WHAT NUMBER DOES MR. CLARKE COME UP?

11 A. I BELIEVE HIS NUMBER -- AND YOU GAVE IT TO US IN THE  
12 OPENINGS -- I THINK HE'S DOWN TO TWO CUSTOMERS. AND I THINK  
13 IT -- I THINK I HAVE IT IN HERE.

14 ONE MOMENT. (REVIEWING DOCUMENTS.)

15 BELIEVE RIGHT NOW, IT'S TWO CUSTOMERS. WITH  
16 INTEREST, \$2.3 MILLION.

17 (CONTINUED NEXT PAGE; NOTHING OMITTED.)

18

19

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TEXT REMOVED - NOT RELEVANT TO MOTION

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25

1 BY MR. MITTELSTAEDT:

2 Q. OKAY.

3 SO YOUR TOTAL, YOUR TOTAL FOR THOSE TWO CATEGORIES  
4 RANGES FROM WHAT, A LOW OF ABOUT IT 272 TO A HIGH OF ABOUT  
5 400 MILLION; IS THAT RIGHT?

6 A. IT WAS 400 OR 408, BUT WHATEVER. IT'S CLOSE ENOUGH.

7 Q. OKAY. AND MR. CLARKE'S, AS YOU SAY, IS ABOUT 21,  
8 22 MILLION?

9 A. 21, THAT'S FINE.

10 Q. OKAY.

11 MR. MITTELSTAEDT: CAN WE GIVE THIS A NUMBER JUST  
12 FOR THE RECORD?

13 THE COURT: ALL RIGHT. WE WILL CALL IT NEXT IN  
14 ORDER.

15 DO WE HAVE A NEXT IN ORDER?

16 THE CLERK: THEIR LIST IS LIKE THIS BIG  
17 (INDICATING).

18 MR. MITTELSTAEDT: WE WILL DO IT AT THE BREAK.

19 THE COURT: LET'S JUST GIVE IT A LETTER. HOW ABOUT  
20 DEFENDANTS' B FOR NOW.

21 (DEFENDANTS' EXHIBIT B MARKED FOR  
22 IDENTIFICATION)

23 BY MR. MITTELSTAEDT:

24 Q. OKAY.

25 AND, SIR, YOUR CALCULATIONS THAT WE HAVE JUST GONE

1 OVER VERY BRIEFLY ARE BASED ON THE NUMBER OF ACTUAL CUSTOMERS  
2 THAT -- IN THE FIRST CATEGORY, THE ACTUAL CUSTOMERS WHO WENT  
3 FROM ORACLE SUPPORT TO TOMORROWNOW SUPPORT AS A RESULT OF  
4 TOMORROWNOW, CORRECT?

5 A. THAT'S CORRECT.

6 Q. AND THE SECOND CATEGORY ARE THE COMPANIES THAT WENT FROM  
7 ORACLE TO SAP TO BUY SOFTWARE AS A RESULT OF TOMORROWNOW,  
8 CORRECT?

9 A. IT WOULD BE THE -- WHATEVER IS REPORTED BY SAP. BUT IT'S  
10 ADDITIONAL REVENUES AND PROFITS THAT WERE GAINED BY WORKING IN  
11 CONJUNCTION WITH THE TOMORROWNOW OFFERING. SO IT'S THAT  
12 COMBINED OFFERING.

13 Q. OKAY.

14 AND TO COME UP WITH THOSE FIGURES, YOU LOOKED AT  
15 SOME OF THE CUSTOMERS AND YOU DECIDED, AS BEST YOU COULD BASED  
16 ON THE AVAILABLE EVIDENCE, WHY A CUSTOMER LEFT ORACLE FOR  
17 TOMORROWNOW AND WHY A CUSTOMER LEFT ORACLE FOR SAP, RIGHT?

18 A. IN A GENERAL SENSE, THAT'S CORRECT.

19 Q. OKAY.

20 LET ME ADD TO THAT CHART THE NUMBER OF CUSTOMERS  
21 THAT, BASED ON YOUR WORK, ARE IN THE FIRST CATEGORY. THE ONES  
22 THAT LEFT ORACLE FOR SUPPORT BY TOMORROWNOW AS A RESULT OF  
23 TOMORROWNOW.

24 WHAT NUMBER DID YOU COME UP WITH, NUMBER OF  
25 CUSTOMERS?

1 A. THAT HAVE LEFT. SO IF WE ARE JUST TALKING NOW ABOUT THE  
2 REMAINING PLAINTIFF, IN MY LOST PROFIT NUMBER OF 36, I HAVE 253  
3 CUSTOMERS.

4 Q. 253 CUSTOMERS.

5 AND MR. CLARKE HAS A SOMEWHAT LOWER NUMBER?

6 A. I BELIEVE IT'S AROUND 170. SOME OF THE CUSTOMERS HAVE --  
7 THERE'S COMBINATIONS, WHATNOT, BUT SAY 170.

8 Q. THE DIFFERENCE BETWEEN YOU AND MR. CLARKE IS OVER, WHAT IS  
9 THAT, 70, 80 CUSTOMERS, AND THE DIFFERENCE BETWEEN THE TWO OF  
10 YOU ON THOSE CUSTOMERS IS THEIR MOTIVATION FOR LEAVING ORACLE;  
11 WAS IT BECAUSE OF TOMORROWNOW OR WERE THEY GOING TO LEAVE  
12 ORACLE ANYWAY, RIGHT?

13 A. IF I FOLLOW THAT, MR. CLARKE EXCLUDES ANOTHER WHATEVER, 80  
14 CUSTOMERS, BELIEVING THAT THEY WOULD HAVE LEFT ORACLE FOR A  
15 VARIETY OF REASONS THAT HE'S COME UP WITH THAT I DO NOT ACCEPT.

16 I HAVE LOOKED AT HIS EXCLUSIONS, I DON'T THINK THEY  
17 ARE SUPPORTED, BUT HE WOULD SAY THAT HE HAS RATIONALE FOR WHY  
18 THEY LEFT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

15                   MY REAL POINT IS THE DIFFERENCE BETWEEN YOU AND  
16 MR. CLARKE IS OVER WHICH -- ON THIS SUPPORT PROFITS ONE, IS  
17 WHETHER THESE, THESE 80 OR SO CUSTOMERS, BETWEEN THE TWO OF  
18 YOU, WHETHER THOSE CUSTOMERS LEFT ORACLE BECAUSE OF TOMORROWNOW  
19 OR LEFT FOR SOME OTHER REASON, RIGHT?

20 A.     THAT'S ONE DIFFERENCE.   THERE'S OTHER DIFFERENCES.   HE  
21 DOESN'T BELIEVE THERE'S IMPACT AFTER OCTOBER 2008 AND HE'S  
22 ABSOLUTELY WRONG ABOUT THAT BECAUSE WHEN A CUSTOMER LEAVES, IT  
23 DOESN'T COME BACK, YOU BREAK THE SERVICE, YOU LOSE THE  
24 RELATIONSHIP.

25                   SO WE HAVE OTHER DIFFERENCES.   HE HAS A MUCH LOWER

1 PROFIT MARGIN. HE HAS AN EXTRAORDINARILY HIGH ATTRITION RATE.

2 SO WE HAVE OTHER DIFFERENCES ALSO.

3 Q. SIR, I AM JUST TALKING ABOUT THE NUMBER OF CUSTOMERS.

4 A. ON NUMBER OF CUSTOMERS, THAT'S CORRECT.

TEXT REMOVED - NOT RELEVANT TO MOTION

13 Q. SIR, YOU ACTUALLY DID THAT CALCULATION TWO WAYS. YOU DID  
14 ONE WAY THROUGH THE END OF TOMORROWNOW AND THEN A SEPARATE  
15 CALCULATION FOR OUT THROUGH 2015, CORRECT?

16 A. IT'S THE SAME CALCULATION. YOU JUST ADD THE ADDITIONAL  
17 YEARS IN FOR THE BROKEN SERVICE.

18 Q. YOU DID IT TWO WAYS. YOU DID IT DURING THE TOMORROWNOW  
19 PERIOD AND THEN YOU EXTENDED THAT OUT UNTIL 2015, CORRECT?

20 A. I DON'T UNDERSTAND YOUR QUESTION. I HAVE TWO CALCULATIONS  
21 AND I'VE ALREADY DESCRIBED THAT.

22 Q. ONE CALCULATION GOES FOR THE TOMORROWNOW TIME PERIOD,  
23 RIGHT?

24 A. ONE CALCULATION HAS A SUBTOTAL BASICALLY OF THE  
25 TOMORROWNOW TIME FRAME AND ONE GOES FROM OCTOBER 2008 ON

1 THROUGH, I THINK IT'S MAY OF 2015.

2 Q. WHETHER YOU CALL IT A SUBTOTAL OR A SEPARATE WAY, YOUR  
3 36 MILLION IS FOR THE TOMORROWNOW TIME PERIOD, THOSE THREE OR  
4 SO YEARS, CORRECT?

5 A. I WOULD AGREE WITH THAT.

6 Q. THANK YOU.

7 AND MR. CLARKE USED THAT SAME TIME PERIOD, CORRECT?

8 A. WELL, MR. CLARKE'S ENTIRE CALCULATION IS FOR THAT TIME  
9 FRAME. I AGREE WITH THAT.

10 Q. MR. CLARKE USED THAT SAME TIME PERIOD, CORRECT?

11 A. I DON'T FOLLOW YOUR QUESTION.

12 HE CUT IT OFF IN OCTOBER 2008.

13 Q. AS YOU DID IN THIS FIRST CALCULATION, CORRECT?

14 A. IN ONE OF THE CALCULATIONS AS PART OF MY PRESENTATION, I  
15 SHOW A CUTTING OFF AT THAT POINT IN TIME.

16 Q. OKAY.

17 NOW LET'S GO TO THE SOFTWARE PROFITS OF SAP. THAT'S  
18 ALSO REFERRED TO AS INFRINGERS' PROFITS, CORRECT?

19 A. THAT'S RIGHT. THAT'S THE PROFITS THAT THE INFRINGERS HAD  
20 MADE FROM USING, IN THIS CASE, THE SOFTWARE OF TOMORROWNOW OR  
21 OF PEOPLESOFT.

22 Q. AND HOW MANY CUSTOMERS IS YOUR 288 MILLION BASED ON?

23 A. I BELIEVE IT'S ABOUT 66. LET ME CHECK THAT FOR YOU.

24 I THINK THERE WERE 86 TOTAL, AND I EXCLUDED 20, SO  
25 THERE'S 66 CUSTOMERS IN THE INFRINGERS' PROFIT CALCULATION.

1 Q. AND THOSE ARE, YOU SAY, THERE ARE 66 CUSTOMERS WHO LEFT  
2 ORACLE BOUGHT SOFTWARE FROM SAP AS A RESULT OF TOMORROWNOW?

3 A. NO. THAT'S NOT THE POSITION.

4 THESE ARE 66 CUSTOMERS WHERE BASICALLY TOMORROWNOW  
5 AND SAP HAVE TEAMED UP TO BENEFIT SAP. SO IT'S -- THESE ARE, I  
6 GUESS SOMEONE CALLS -- THEY ARE PROFITS THAT RELATE TO USING  
7 THE ILLEGAL SOFTWARE.

8 Q. BUT IF YOU CONCLUDED THAT A CUSTOMER LEFT ORACLE AND CHOSE  
9 TO BUY SOFTWARE FROM SAP UNRELATED TO TOMORROWNOW. IN OTHER  
10 WORDS -- LET'S TAKE AN EXAMPLE.

11 A CUSTOMER THAT NEVER GOT MAINTENANCE FROM  
12 TOMORROWNOW. IT JUST WENT -- THAT CUSTOMER JUST WENT FROM  
13 ORACLE AND DECIDED FOR WHATEVER REASON TO SWITCH TO SAP.

14 YOU WOULDN'T INCLUDE THAT CUSTOMER IN YOUR 66, IN  
15 YOUR CALCULATION OF INFRINGERS' PROFITS, CORRECT?

16 A. I AM NOT CERTAIN I FOLLOW THAT QUESTION. I NEED YOU TO  
17 BREAK THAT DOWN.

18 THIS IS A CUSTOMER THAT DIDN'T USE TOMORROWNOW?

19 Q. CORRECT.

20 A. WAS A PART OF SAFE PASSAGE?

21 Q. CORRECT.

22 A. SO PART OF SAFE PASSAGE?

23 Q. SURE.

24 A. IF IT WAS PART OF SAFE PASSAGE, THEN THAT WOULD BE IN THE  
25 288, THAT'S CORRECT.

## CROSS EXAMINATION OF PAUL MEYER

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1 Q. LET'S TAKE A CUSTOMER WHO IS BUYING SOFTWARE FROM ORACLE,  
2 IT DECIDES BECAUSE IT'S TAKEN OVER BY ANOTHER COMPANY, THE  
3 OTHER COMPANY BEING AN SAP COMPANY -- CUSTOMER, AND THAT  
4 CUSTOMER DECIDES TO SWITCH TO SAP AND THEN GETS SUPPORT FROM  
5 TOMORROWNOW FOR AN INTERIM PERIOD, BUT THEY HAD ALREADY MADE  
6 THE DECISION TO GO TO SAP UNRELATED TO TOMORROWNOW.

7 WOULD YOU INCLUDE OR EXCLUDE THEM FROM THE 66?

8 A. IT WOULD -- I THINK YOU'RE SORT OF -- THESE ARE MADE UP, I  
9 THINK, FACTS YOU ARE PRESENTING RIGHT NOW?

10 I JUST WANT TO MAKE SURE I UNDERSTAND YOUR QUESTION.  
11 BECAUSE IT COULD BE IN OR IT MAY NOT BE IN, IT DEPENDS. IF IT  
12 WAS PART OF SAFE PASSAGE, IT WOULD BE IN.

13 IF IT WASN'T, IT POTENTIALLY COULD BE OUT. BECAUSE,  
14 AS YOU KNOW, WHAT I DID, I WENT THROUGH THE 86, PULLED 20 OUT,  
15 CAME TO THE 66. THE 66, 35 WERE PART OF SAFE PASSAGE. AND THE  
16 OTHER GROUP OF 31 WERE CUSTOMERS WHERE MR. CLARKE HAD SOME  
17 REASON TO EXCLUDE THAT I FELT IT WASN'T VALID.

18 SO MY 66 HAS TWO PIECES. 35 ARE SAFE PASSAGE. I AM  
19 VERY CONVINCED THAT THOSE ARE CERTAINLY RELATED TO TOMORROWNOW.  
20 THE OTHER 31, THERE JUST WASN'T COMPELLING INFORMATION FROM  
21 MR. CLARKE, AND I FELT, OKAY, I RESPONDED TO HIS CALCULATION,  
22 AND AS PART OF THE 66, IT WILL STAY IN HERE FOR NOW.

23 Q. WE WILL COME TO SAFE PASSAGE. BUT FOR NOW, YOU KNOW SAP  
24 GOT A LOT OF CUSTOMERS WHO SWITCHED FROM ORACLE DURING THE  
25 TOMORROWNOW PERIOD OVER AND ABOVE 66 THAT HAD NOTHING TO DO

1 WITH TOMORROWNOW, CORRECT?

2 A. I UNDERSTAND THAT CUSTOMERS DID COME TO SAP WHERE  
3 TOMORROWNOW DID NOT PROVIDE SERVICE. I UNDERSTAND THAT.

4 Q. YOU DIDN'T INCLUDE THOSE IN YOUR 66, IN YOUR CALCULATION  
5 OF INFRINGERS' PROFITS, DID YOU?

6 A. IT DEPENDS ON THE CIRCUMSTANCES. FOR THE MOST PART, I  
7 WOULD NOT, BUT IF THEY WERE -- IF THERE WAS A TOMORROWNOW  
8 OFFERING, THEN I WOULD INCLUDE THEM.

9 Q. IN ANY EVENT, FOR NOW, YOU -- AS YOU CALCULATE IT, THE  
10 ACTUAL PROFITS GAINED BY SAP AS A RESULT OF THE TOMORROWNOW  
11 INFRINGEMENT BASED ON SOFTWARE CUSTOMERS THAT SWITCHED, THIS,  
12 WHAT WE ARE TALKING ABOUT IS INFRINGERS' PROFITS IS BASED ON 66  
13 CUSTOMERS, CORRECT?

14 A. 66, RIGHT. THAT'S MY CURRENT CALCULATION. I MENTIONED  
15 THE 236, BUT THAT'S THE BASE CALCULATION. I AGREE WITH THAT.

16 Q. AND MR. CLARKE SAYS THERE ARE ONLY TWO CUSTOMERS IN THAT  
17 CATEGORY, CORRECT?

18 A. HE'S DOWN TO TWO NOW. THAT'S CORRECT.

19 Q. OKAY.

20 LET'S GO TO THE -- ACTUALLY, LET ME JUST ASK YOU  
21 THIS TO CLARIFY. YOU TALKED ABOUT THE SIEBEL CUSTOMERS AND  
22 WHAT A HUGE OPPORTUNITY THAT WAS FOR SAP AND TOMORROWNOW.

23 DO YOU REMEMBER THAT?

24 A. THAT'S CORRECT.

25 Q. HOW MANY SIEBEL CUSTOMERS ACTUALLY SWITCHED TO TOMORROWNOW

1 FOR SUPPORT?

2 A. I DON'T HAVE THE EXACT NUMBER. I BELIEVE IT'S IN THE

3 RANGE OF TEN OR SO.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

7 Q. SO YOUR POSITION IN THIS CASE IS WE MUST, IN THIS  
8 HYPOTHETICAL NEGOTIATION, NOT LOOK INTO THE FUTURE PASSED  
9 JANUARY 2005 TO SEE HOW MANY CUSTOMERS TOMORROWNOW ACTUALLY  
10 GOT. IS THAT YOUR POSITION?

11 A. BASED ON MY 30 YEARS OF ANALYSIS AND ALL THE DOCUMENTS AND  
12 ALL THE INVOLVEMENT OF THE EXECUTIVE BOARD MEMBERS OF SAP AND  
13 THESE CIRCUMSTANCES OF THIS CASE, THAT IS CORRECT.

14 Q. SO NO MONDAY MORNING QUARTERBACKING, NO HINDSIGHT TO HELP  
15 US OUT; THAT'S YOUR POSITION?

16 A. THAT'S MY POSITION ABOUT THE FAIR MARKET VALUE OF THE  
17 LICENSE.

18 Q. OKAY.

19 AND YOU KNOW THAT IF YOU DID LOOK FORWARD, IT WOULD  
20 PUT DOWNWARD PRESSURE ON THIS HYPOTHETICAL ROYALTY BECAUSE  
21 TOMORROWNOW WAS UNSUCCESSFUL, GETTING ONLY 358 OF THE 3,000  
22 CUSTOMERS YOU KEEP TALKING ABOUT, CORRECT?

23 A. WE NEED TO ADD TO YOUR QUESTION THE LAWSUIT WAS FILED AND  
24 SAP WASN'T SUCCESSFUL IN ITS EXECUTION. THAT'S WHY WE DON'T  
25 WANT TO LOOK FORWARD BECAUSE SAP DID NOT EXECUTE AS PLANNED, A

1 LAWSUIT WAS FILED RIGHT WHEN THEY WERE HAVING ADDITIONAL  
2 OPPORTUNITIES, RIGHT WHEN THEY'VE ACTUALLY GONE AFTER THE  
3 SIEBEL WORKS, SO THE WORLD CHANGED FOR SAP'S PERSPECTIVE WITH  
4 THE LAWSUIT AND ALSO OTHER MANAGEMENT DIRECTIVES.

TEXT REMOVED - NOT RELEVANT TO MOTION

21 Q. DO YOU AGREE THAT IF YOU DID CONSIDER THOSE NUMBERS, IT  
22 WOULD PUT DOWNWARD PRESSURE ON THE ROYALTY THAT YOU COME UP  
23 WITH?

24 A. WELL, IF YOU ARE ASKING ME IF I LOOK AT THE TIME 358  
25 CUSTOMERS VERSUS THE PROJECTIONS, YES, IT WOULD. I HAVE NOT

1 DONE THAT ANALYSIS AND WOULDN'T THINK IT'S APPROPRIATE, BUT  
2 THE -- THOSE ARE THE ACTUAL CUSTOMERS.

TEXT REMOVED - NOT RELEVANT TO MOTION

8 Q. SIR, JUST FOR STARTERS, LET'S GO QUESTION BY QUESTION.

9 HAVE YOU USED THE BOOK OF WISDOM IN OTHER CASES?

10 A. I HAVE OTHER ASSIGNMENTS IN PATENT CASES WHERE, AS I  
11 MENTIONED A MOMENT AGO, IF THERE'S AN EMERGING TECHNOLOGY AND  
12 THERE'S NOT INFORMATION AVAILABLE, AND THE PATENT HOLDER WOULD  
13 BE UNDULY IMPACTED BY NOT LOOKING FORWARD, I WOULD LOOK AT  
14 SITUATION -- I WOULD LOOK AT A DATE IN THE FUTURE.

15 I MENTIONED THAT IN MY DEPOSITION. SOMETIMES IT'S  
16 SETTLEMENT AGREEMENTS OR THINGS LIKE THAT. SO IT DOES HAPPEN,  
17 BUT IT'S CIRCUMSTANCE BASED.

18 Q. AND THE BOOK OF WISDOM REFERS TO USING INFORMATION, ACTUAL  
19 INFORMATION AFTER THE TIME OF THE HYPOTHETICAL NEGOTIATION,  
20 CORRECT?

21 A. THERE ARE SITUATIONS WHERE INFORMATION IS LOOKED PASSED  
22 THE HYPOTHETICAL, AND PARTICULARLY IN PATENT CASES IF IT IS A  
23 CERTAIN CIRCUMSTANCE.

24 Q. OKAY.

25 DID YOU USE THIS BOOK OF WISDOM, LOOKING AT EVENTS

1 AFTER THE HYPOTHETICAL LICENSE IN ANY PARTICULAR CASE? HAVE  
2 YOU DONE THAT YOURSELF?

3 A. YOU ARE SAYING OUTSIDE OF THIS CASE? YOU ARE SAYING IN  
4 OTHER CASES?

5 Q. YES.

6 A. YES.

7 I MENTIONED IN MY DEPOSITION, I HAVE HAD PATENT  
8 CASES IN THE PAST WHERE I HAVE LOOKED AT INFORMATION IN THE  
9 FUTURE BASED ON THE CIRCUMSTANCES OF THOSE CASES. IN EMERGING  
10 TECHNOLOGY, TECHNOLOGY HADN'T BEEN COMBINED WITH ANOTHER  
11 TECHNOLOGY. THERE WAS NO INFORMATION AVAILABLE, AND IT MADE  
12 SENSE.

13 MAYBE MY OPPONENT HAD USED THAT DATA, SO I HAD TO  
14 RESPOND TO THE OPPONENT. THAT HAPPENED SOMETIMES WHERE THEY GO  
15 FIRST, SO YOU'RE RESPONDING TO THEIR REPORT AND THE DATA THEY  
16 BRING IN AS OPPOSED TO HYPOTHETICAL. SO IT HAPPENS BASED ON  
17 CIRCUMSTANCES.

18 Q. DID YOU USE POST-NEGOTIATION EVENTS, THE BOOK OF WISDOM,  
19 IN THE INFOMATICS (SIC) CASE?

20 A. I WOULD HAVE TO GO BACK AND LOOK AT THAT, AND MAYBE HAVE  
21 A -- I UNDERSTAND THAT CASE. AND IT WAS A VERY DIFFERENT CASE.  
22 AND I WOULD HAVE TO GO BACK AND LOOK AT THAT.

23 MR. MITTELSTAEDT: MAY I REFRESH HIS RECOLLECTION?

24 THE COURT: YES.

25 MR. MITTELSTAEDT: THIS ONE I DO HAVE A COPY FOR

1 YOUR HONOR.

2 AND MAY I APPROACH?

3 THE COURT: YES.

4 (DOCUMENT HANDED TO WITNESS.)

5 BY MR. MITTELSTAEDT:

6 Q. THIS IS THE TRANSCRIPT OF YOUR COURT TESTIMONY BEFORE  
7 JUDGE LAPORTE IN 2007 IN INFOMATICA AGAINST BUSINESS OBJECTS.

8 JUST LOOKING AT THE COVER SHEET HERE, DO YOU RECALL  
9 THAT CASE, SIR?

10 A. YES. IT RELATED TO A PATENT USE LICENSE ON ETL SOFTWARE.

11 Q. AND CAN YOU TELL US WHAT ETL SOFTWARE IS?

12 A. I THINK IT RELATES TO EXTRACT, TRANSLATE AND LOAD. AND I  
13 BELIEVE THE -- IT RELATES TO GATHERING INFORMATION AND MOVING  
14 IT AROUND IN SOFTWARE SYSTEMS.

15 AND THIS CASE RELATED TO A SMALL FEATURE IN ONE OF  
16 THE SOFTWARE PROGRAMS. IT RELATED TO NOT COPYRIGHTS, BUT THE  
17 VALUE OF THIS PATENT OR THESE PATENTS THAT INFOMATICA WAS  
18 ASSERTING AGAINST BUSINESS OBJECTS.

19 Q. AND IF YOU COULD GO TO PAGE 1738, PLEASE, AT LINE 17. AND  
20 YOU WILL SEE --

21 A. WHAT LINE WAS THAT?

22 Q. 17.

23 A. THANK YOU.

24 Q. YOU WILL SEE THE DATE OF THE HYPOTHETICAL NEGOTIATION  
25 THERE WAS APRIL 2001?

1 A. OKAY.

2 Q. YOU SEE THAT?

3 A. YES.

4 Q. AND THEN THE NEXT QUESTION YOU WERE ASKED, WHETHER IT IS  
5 PROPER FOR EXPERTS TO LOOK NOT JUST AT EVENTS AROUND THE TIME,  
6 BUT EVENTS GOING ALL THE WAY FORWARD INTO THE FUTURE?

7 DO YOU SEE THAT QUESTION?

8 A. YES.

9 Q. AND THEN YOU SAID:

10 "THERE'S WHAT YOU KNOW AT THE TIME AND ALSO  
11 SOMETHING REFERRED TO AS BOOK OF WISDOM."

12 DO YOU SEE THAT?

13 A. YES.

14 Q. AND THEN YOU SAY:

15 "AND YOU WANT TO BE AWARE OF WHAT HAPPENS IN THE  
16 FUTURE TO MAKE SURE YOU GET THE PROPER RESULT AT  
17 THE TIME OF THE HYPOTHETICAL. SO WE ARE SORT OF  
18 USING SOME MONDAY MORNING QUARTERBACKING AND  
19 HINDSIGHT TO HELP US. BUT WE'RE ABLE TO DO THAT  
20 IF YOU DO IT IN A WAY THAT'S REASONABLE."

21 DO YOU SEE THAT?

22 A. YES, I DO.

23 Q. AND THEN THE NEXT QUESTION:

24 "SO, DR. O'BRIAN," WAS HE YOUR OPPOSING EXPERT IN  
25 THAT CASE?

1 A. YES.

2 Q. (READING)

3 "WAS DR. O'BRIAN CORRECT IN HIS ANALYSIS WHEN HE  
4 LOOKED AT EVENTS GOING FORWARD USING HINDSIGHT?"

5 AND YOU SAID: "YES. WHAT I SAW WHAT HE DID.

6 TO THE EXTENT HE LOOKED FROM 2002 FORWARD, I

7 BELIEVE THAT WAS PROPER. AND I ALSO DID THAT,

8 SO WE BOTH CONSIDERED -- WE MAY HAVE GOTTEN

9 DIFFERENT RESULTS, BUT WE BOTH CONSIDERED FUTURE

10 EVENTS."

11 DO YOU SEE THAT?

12 A. YES.

13 Q. AND THAT WAS YOUR TESTIMONY IN THAT CASE?

14 A. RIGHT. BASED ON DR. O'BRIAN'S ANALYSIS. THAT'S CORRECT.

15 Q. OKAY.

16 NOW, IN THIS CASE -- WAS INFOMATICS (SIC) THE ONLY

17 CASE WHERE YOU USED SUBSEQUENT EVENTS WHEN YOU TESTIFIED IN THE

18 CASES YOU'VE MENTIONED?

19 A. NO. AS I MENTIONED IN MY DEPOSITION, IN PATENT CASES AT

20 TIMES, IT DOES MAKE SENSE TO DO IT BASED ON THE CIRCUMSTANCES

21 OF THOSE CASES.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

17 Q. WELL, WHEN MR. ELLISON SAID POTENTIAL LOSSES COULD BE 30  
18 TO 50 PERCENT, YOU TRIED TO DIRECT HIM DOWN TO JUST SAYING  
19 30 PERCENT, DIDN'T YOU?

20 A. I WAS TALKING AROUND 30 PERCENT AND WANTED HIS THOUGHTS.  
21 AND HE SAID 30 TO 50.

22 Q. BUT YOU SORT OF REINED HIM IN TO GET HIM BACK DOWN TO  
23 30 PERCENT, TO THE LOWER END, RIGHT?

24 A. I AM NOT SURE I REINED HIM IN, BUT I THINK THAT'S WHERE WE  
25 ENDED UP.

TEXT REMOVED - NOT RELEVANT TO MOTION

15 Q. WELL, BUT THEY DID KNOW THAT TOMORROWNOW WAS OWNED BY SAP  
16 AT THAT POINT, RIGHT?

17 A. THAT'S CORRECT.

18 Q. THEY KNEW THAT TOMORROWNOW WAS OFFERING HALF PRICE  
19 SERVICES WITHOUT UPGRADES, RIGHT?

20 A. THAT'S CORRECT.

21 Q. AND THEY KNEW HOW MANY CUSTOMERS TOMORROWNOW HAD OR DIDN'T  
22 HAVE, OR THEY COULD TELL THAT FROM THEIR OWN CUSTOMERS, RIGHT?

23 A. WHAT'S THIS NEXT PIECE? WHAT'S YOUR QUESTION? THEY KNEW  
24 WHAT?

25 Q. THEY KNEW HOW MANY OF THEIR CUSTOMERS, IF ANY, HAD LEFT

1 ORACLE TO GO TO TOMORROWNOW?

2 A. THEY HAD HAD INFORMATION, A LITTLE BIT ABOUT THAT, MAYBE  
3 NOT TOTAL VISIBILITY, BUT SOME ABOUT THAT.

4 Q. OKAY. SO HOWEVER TOMORROWNOW WAS DELIVERING SUPPORT  
5 SERVICES, WHETHER IN COMPLIANCE WITH THE COPYRIGHT LAWS, IN  
6 COMPLIANCE WITH ORACLE'S LICENSES OR NOT, ORACLE COULD SEE THE  
7 IMPACT IN THE MARKETPLACE, RIGHT?

8 A. NO, THAT'S NOT CORRECT BECAUSE IT IS TWO MONTHS OUT.  
9 THESE ARE 12-MONTH SERVICE CONTRACTS. SO IF SOMEONE IS UNDER  
10 MAINTENANCE RIGHT NOW, THEY WON'T EVEN THINK ABOUT SWITCHING  
11 POTENTIALLY FOR A PERIOD OF, YOU KNOW, THREE, SIX, 12 MONTHS,  
12 THERE'S A RAMP-UP PERIOD.

13 THEN ALSO YOU HAVE A SITUATION WHERE ORACLE DIDN'T  
14 KNOW THE LEVEL OF SERVICE, VENDOR LEVEL OF SERVICE USING THEIR  
15 SOFTWARE OR IS IT SOME OTHER LESSER SERVICE.

16 SO, THESE EARLY DOCUMENTS REALLY DON'T TELL YOU MUCH  
17 ABOUT WHAT ORACLE COULD CAN BE ANTICIPATING IF THEY REALLY KNEW  
18 THE TRUE FACTS OF WHAT WAS TAKEN.

19 Q. YOU ARE NOT SAYING ALL OF THE MAINTENANCE CONTRACTS ARE ON  
20 A CALENDAR YEAR BASIS, ARE YOU?

21 A. I AM NOT SAYING THAT.

22 Q. AND YOU ARE AGREEING THAT ORACLE COULD SEE THE RESULTS OF  
23 TOMORROWNOW IN THE MARKETPLACE, SUCH AS THEY WERE, RIGHT?

24 A. I WOULD AGREE THAT THEY WOULD BEGIN TO GET A BETTER  
25 FEELING OF THAT OVER TIME. I WOULD AGREE WITH THAT.

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CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, TUESDAY, NOVEMBER 9, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR



DIANE E. SKILLMAN, CSR, RPR, FCRR

WEDNESDAY, NOVEMBER 10, 2010

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

|                            |   |                           |
|----------------------------|---|---------------------------|
| ORACLE CORPORATION, ET AL. | ) | JURY TRIAL                |
|                            | ) |                           |
| PLAINTIFFS,                | ) | NO. C 07-01658 PJH        |
|                            | ) |                           |
| VS.                        | ) | VOLUME 7                  |
|                            | ) |                           |
| SAP AG, ET AL.,            | ) | PAGES 1188 - 1420         |
|                            | ) |                           |
| DEFENDANTS.                | ) | OAKLAND, CALIFORNIA       |
| _____                      | ) | FRIDAY, NOVEMBER 12, 2010 |

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:           BINGHAM MUCCUTCHEN LLP  
                                  THREE EMBARCADERO CENTER  
                                  SAN FRANCISCO, CALIFORNIA 94111-4607

BY: ZACHARY J. ALINDER,  
      HOLLY A. HOUSE,  
      GEOFFREY M. HOWARD,  
      DONN P. PICKETT, ATTORNEYS AT LAW

                                  BOIES, SCHILLER & FLEXNER LLP  
                                  1999 HARRISON STREET, SUITE 900  
                                  OAKLAND, CALIFORNIA 94612

BY: DAVID BOIES,  
      STEVEN C. HOLTZMAN, ATTORNEYS AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY:           RAYNEE H. MERCADO, CSR NO. 8258  
                                  DIANE E. SKILLMAN, CSR NO. 4909

RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

TEXT REMOVED - NOT RELEVANT TO MOTION

5 Q. LET'S SEE IF WE CAN AGREE ON WHAT SAFE PASSAGE WAS, THEN.  
6 SAFE PASSAGE HAD THREE COMPONENTS, CORRECT?

7 A. I WOULD AGREE WITH THAT. THREE MAJOR COMPONENTS.

8 Q. THREE MAJOR COMPONENTS?

9 A. THAT'S CORRECT.

10 Q. AND ONE ASPECT OF SAFE PASSAGE WAS THAT PEOPLESOFT CUSTOMERS  
11 COULD, IN EFFECT, TRADE IN THEIR PEOPLESOFT SOFTWARE FOR SAP  
12 SOFTWARE AND RECEIVE UP TO A 75 PERCENT CREDIT FOR IT, CORRECT?

13 A. I BELIEVE THAT WAS STEP THREE; THAT'S CORRECT.

14 Q. THAT WAS ONE OF THE COMPONENTS, CORRECT?

15 A. THAT WAS ONE OF THE THREE.

16 Q. OKAY. AND PEOPLESOFT CUSTOMERS COULD DO THAT WITHOUT  
17 GETTING ANY SUPPORT SERVICES FROM TOMORROWNOW, CORRECT?

18 A. IN THE PROGRAM, IT COULD WORK THAT WAY.

19 Q. IN OTHER WORDS, A CUSTOMER -- A PEOPLESOFT CUSTOMER WANTING  
20 TO SWITCH TO SAP SOFTWARE COULD CONTINUE TO GET MAINTENANCE OR  
21 SUPPORT ON THE PEOPLESOFT SOFTWARE FROM ORACLE, RIGHT?

22 A. IT COULD WORK THAT WAY.

23 Q. OKAY. AND YOU SAW EVIDENCE THAT IT DID WORK THAT WAY FOR  
24 SOME CUSTOMERS, CORRECT?

25 A. I'D AGREE WITH THAT.

1 Q. YOU WOULD?

2 A. I WOULD AGREE WITH THAT.

3 Q. AND ANOTHER ASPECT OF THE SAFE PASSAGE WAS THAT PEOPLESOFT  
4 CUSTOMERS COULD GET SUPPORT FOR THE PEOPLESOFT SOFTWARE FROM  
5 TOMORROWNOW, RIGHT?

6 A. THAT WAS ONE OF THE COMPONENTS, STEP ONE; THAT'S CORRECT.

7 Q. AND THEY COULD DO THAT WITHOUT EVER BUYING ANY SOFTWARE FROM  
8 SAP, CORRECT?

9 A. I AGREE WITH THAT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

24 Q. OKAY. AND ON THE FIRST ONE, PX12, YOU'VE ALREADY AGREED  
25 THAT THE REFERENCE TO 3,000 -- 3,000 MAINTENANCE CUSTOMERS IS

1 STATED IN THE DOCUMENT TO BE AN ASSUMPTION, CORRECT?

2 A. I REFERENCE IT WAS AN ASSUMPTION, THAT'S RIGHT, OF THAT  
3 BUSINESS PLAN.

4 Q. OKAY. AND YOU DON'T KNOW HOW THE ANALYSIS WAS DONE BY THE  
5 AUTHOR OF THAT DOCUMENT TO COME UP WITH THOSE ASSUMPTIONS, DO  
6 YOU?

7 A. I WOULDN'T KNOW EXACTLY HOW MR. ZIEMEN WORKED IT OUT. HE'S  
8 THE SUPPORT, BUT I WOULDN'T KNOW EXACTLY HIS METHODOLOGY.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

3 Q. OKAY. AND THE NEXT ONE IS -- THE NEXT DOCUMENT YOU REFER TO  
4 IS A PHONE CONFERENCE BETWEEN SAP AND SOME FINANCIAL ANALYST ON  
5 JANUARY 19, CORRECT?

6 A. I WOULD SAY WITH THE PUBLIC, YES, BUT IT'S A -- INCLUDES  
7 ANALYSTS.

8 Q. OKAY. AND IN THAT PHONE CONFERENCE, NO ONE SAID -- NO ONE  
9 ON SAP'S SIDE SAID THE NUMBER OF CUSTOMERS THEY EXPECTED TO  
10 CONVERT, DID THEY?

11 A. WE SHOULD BREAK THAT DOWN.

12 Q. WE'RE TALKING ABOUT THE PHONE CONFERENCE, AND YOU'VE LOOKED  
13 AT THE TRANSCRIPT OF THAT, RIGHT?

14 A. YES.

15 Q. AND THAT'S THE DOCUMENT YOU CITE THERE, PX23, CORRECT?

16 A. YES.

17 Q. NOW, DID -- AND MR. AGASSI WAS ONE OF THE PEOPLE WHO SPOKE  
18 ON BEHALF OF SAP, CORRECT?

19 A. CORRECT.

20 Q. IN THAT CALL, HE DECLINED TO GIVE A NUMBER OF CUSTOMERS THAT  
21 MIGHT SWITCH, RIGHT? HE WAS ASKED BY SOMEBODY ON THE PHONE  
22 CALL, AND HE DECLINED TO GIVE A NUMBER, CORRECT?

23 A. WE SHOULD BREAK THAT DOWN. HE GAVE A LONG DISCUSSION ABOUT  
24 THAT QUESTION.

25 Q. BUT MY QUESTION TO YOU, SIR, IS, DID MR. AGASSI -- DO YOU

1 REMEMBER MR. AGASSI WAS ASKED A QUESTION ABOUT HOW MANY  
2 CUSTOMERS MIGHT SWITCH?

3 DO YOU REMEMBER THAT?

4 A. YES.

5 Q. AND HE DECLINED TO GIVE AN ANSWER TO THAT, CORRECT?

6 A. HE GAVE A LONG ANSWER ABOUT THAT QUESTION, AND WE CAN GO  
7 READ THAT DOCUMENT.

8 Q. DID HE GIVE A NUMBER?

9 A. THAT'S UP TO THE READER OF THE DOCUMENT. I'VE READ THE  
10 DOCUMENT, AND I BELIEVE HE GAVE A NUMBER. BUT WE SHOULD GO BACK  
11 AND LOOK AT THAT DOCUMENT, PAGE 25, 24.

12 Q. WHAT NUMBER DID HE GIVE?

13 A. HE BASICALLY SAID THE 4,000 COMMON CUSTOMERS FIT INTO TWO  
14 COMMON CUSTOMER SCENARIOS, AND THOSE CUSTOMERS NEED TO MAKE THE  
15 RIGHT CHOICE NOW, AND THAT RIGHT CHOICE IS TO COME INTO MYSAP.

16 Q. WHAT --

17 A. THAT'S WHAT HE SAYS.

18 Q. WHAT NUMBER DID HE GIVE AS TO THE NUMBER OF PEOPLESOFT  
19 CUSTOMERS THAT HE THOUGHT MIGHT SWITCH?

20 A. HE'S BASICALLY SAYING IT'S THE TWO COMMON CUSTOMER SCENARIOS  
21 WITHIN THE 4,000 JOINT ACCOUNTS.

22 Q. SO WHAT NUMBER IS THAT?

23 A. IT'S SOMEWHERE AROUND 4,000.

24 Q. OKAY. IF YOU'D TURN TO YOUR DEPOSITION AT PAGE 826, YOUR  
25 HONOR.

## CROSS EXAMINATION OF PAUL MEYER

Page 1231

1 YOUR HONOR, I'D LIKE TO IMPEACH HIM AT 826.

2 MR. PICKETT: 826?

3 MR. MITTELSTAEDT: YES.

4 (PAUSE IN THE PROCEEDINGS.)

5 MR. MITTELSTAEDT: JUST A SEC.

6 (PAUSE IN THE PROCEEDINGS.)

7 MR. MITTELSTAEDT: LINE -- PAGE 827, LINES 11 THROUGH  
8 23.

9 THE COURT: YOU CAN JUST READ THAT.

10 MR. MITTELSTAEDT:

11 "Q. I DIDN'T ASK YOU WHAT YOU'RE TALKING

12 ABOUT. I'M ASKING YOU IF IT'S YOUR

13 INTERPRETATION OF THIS DOCUMENT THAT THE SAP

14 REPRESENTATIVES ACTUALLY STATED A NUMBER OF

15 CUSTOMERS THAT THEY REALISTICALLY EXPECTED WOULD

16 MIGRATE FROM ORACLE TO SAP UNDER THE SAFE

17 PASSAGE PROGRAM?"

18 OBJECTION.

19 "AND THE ANSWER IS, NO, ISN'T IT? THEY NEVER

20 STATED THAT IN THERE."

21 OBJECTIONS.

22 "AND YOUR ANSWER, "IF THE QUESTION IS DID THEY

23 PROVIDE ONE SPECIFIC NUMBER, THEY DID NOT."

24 BY MR. MITTELSTAEDT:

25 Q. THAT WAS YOUR TESTIMONY, SIR?

1 A. YES, AND IT'S CONSISTENT.

2 Q. SO LET'S LOOK AT THE DOCUMENT, PX23. PAGE 23.

3 (EXHIBIT PUBLISHED TO JURY.)

4 (PAUSE IN THE PROCEEDINGS.)

5 THE WITNESS: IS THAT IN THESE BINDERS?

6 BY MR. MITTELSTAEDT:

7 Q. PX23. YES.

8 A. OKAY. BE ONE MOMENT. I JUST WANT TO SEE --

9 MR. MITTELSTAEDT: PAGE 22, START AT 22.

10 THE WITNESS: (REVIEWING DOCUMENTS.)

11 MR. MITTELSTAEDT: AND LET'S HIGHLIGHT --

12 Q. DO YOU HAVE IT, SIR?

13 A. YES, SIR.

14 Q. OKAY. IF YOU LOOK AT PAGE 23 -- OR EXCUSE ME, 22, THE  
15 QUESTION BY MR. ANDREWS --

16 (EXHIBIT PUBLISHED TO JURY.)

17 BY MR. MITTELSTAEDT:

18 Q. YOU SEE "HOW MANY OF THOSE 4,000 MIXED ENVIRONMENT CUSTOMERS  
19 YOU THINK THAT YOU CAN EXPECT TO MIGRATE OVER TO SAP?"

20 YOU SEE THE QUESTION?

21 A. YES.

22 Q. OKAY. AND THEN OVER ON THE NEXT PAGE.

23 (EXHIBIT PUBLISHED TO JURY.)

24 BY MR. MITTELSTAEDT:

25 Q. UP AT THE TOP, HE SAYS, "I THINK WE HAVE SO MANY ANALYSTS ON

1 THE LINE RIGHT NOW, I WOULD LOVE TO SEE SOME OF THE SPREADSHEETS  
2 THAT ARE GOING TO RUN THAT WILL STIMULATE WHAT HAPPENS TO THIS  
3 MARKET, AND I THINK I'M GOING TO LET YOU GUYS DO YOUR JOB ON  
4 PREDICTING HOW MANY OF THOSE CUSTOMERS WILL ACTUALLY MAKE" IT --  
5 "MAKE THE RIGHT CHOICE AND GO INTO SAFE PASSAGE."

6 DO YOU SEE THAT?

7 A. YES.

8 Q. AND THEN HE GOES ON TO SAY, "THERE ARE CUSTOMERS THAT RUN  
9 SAP IN THE CORPORATE OFFICE WITH JD EDWARDS IN SOME SMALL  
10 MANUFACTURING SITE, AND CUSTOMERS THAT WERE ON SAP FINANCIALS  
11 AND SO FORTH."

12 AND THEN HE SAYS, "I THINK THEY WILL MAKE THE RIGHT  
13 CHOICE. THERE'S NO BETTER CHOICE FOR THEM THAN TO USE THIS  
14 OPPORTUNITY TO CONSOLIDATE."

15 DO YOU SEE THAT?

16 A. WELL, WE REALLY SHOULD READ THAT WORD BY WORD ALONG WITH  
17 PAGE 25. THAT'S WHAT HE REALLY SAYS. THIS IS NOT THE KIND OF  
18 THING YOU CAN READ LIKE THAT AND COME TO A SUMMARY. I'VE READ  
19 THIS 25 TIMES, AND I CAN EXPLAIN TO THE JURY IF YOU WANT ME TO.

20 Q. WHAT I WANT YOU TO -- LET ME JUST ASK YOU THIS: WE'RE IN  
21 AGREEMENT THAT HE NEVER GAVE THEM A SINGLE NUMBER AS TO HIS  
22 PREDICTION ON HOW MANY CUSTOMERS WOULD SWITCH, CORRECT?

23 A. WE'RE IN AGREEMENT THAT HE DID NOT GIVE A SPECIFIC NUMBER.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

14 Q. OKAY. SO LET'S GO TO NO. 6, "DEPOSITION TESTIMONY OF  
15 MR. AGASSI." AND YOU SAY EXPECTED -- UNDER YOUR HEADING  
16 "EXPECTED GAINS," "60 PERCENT OF PEOPLESOFT/JD EDWARDS  
17 CUSTOMERS," CORRECT?

18 A. THAT'S CORRECT.

19 Q. OKAY. DID YOU READ MR. AGASSI'S DEPOSITION ALL THE WAY  
20 THROUGH?

21 A. YES.

22 Q. OKAY. AND DID YOU READ AT PAGE 316 WHERE HE TALKED ABOUT  
23 THE 50 PERCENT GOAL BEING AN ASPIRATIONAL GOAL? DO YOU REMEMBER  
24 THOSE WORDS?

25 A. I'D HAVE TO SEE THAT TRANSCRIPT. DO YOU HAVE THAT FOR ME?

## CROSS EXAMINATION OF PAUL MEYER

1 MR. MITTELSTAEDT: MAY WE PUT IT ON THE BOARD, YOUR  
2 HONOR?

3 THE COURT: SURE.

4 (EXHIBIT PUBLISHED TO JURY.)

5 BY MR. MITTELSTAEDT:

6 Q. OKAY. SO THIS IS MR. AGASSI'S TESTIMONY AT PAGE 315 AND  
7 316.

8 CAN YOU MAKE THAT BIGGER?

9 (EXHIBIT PUBLISHED TO JURY.)

10 MR. MITTELSTAEDT:

11 "Q. AND THE GOAL WAS TO CONVERT  
12 APPROXIMATELY 50 PERCENT OF THE PEOPLESOFT/JD  
13 EDWARDS CUSTOMERS INSTALLATIONS TO SAP?"

14 AND HIS ANSWER IS --

15 (EXHIBIT PUBLISHED TO JURY.)

16 BY MR. MITTELSTAEDT:

17 Q. "YES, BUT AS YOU'VE TOLD ME JUST A FEW MINUTES AGO, YOU  
18 THOUGHT THAT SAP COULD DO BETTER THAN THAT?"

19 "NO, I THINK IT COULD DO 50 PERCENT.

20 "IT COULD ONLY DO 50 PERCENT IN YOUR VIEW?

21 "NO, I SAID IT COULD DO THAT GOAL. WE DIDN'T  
22 REACH THAT GOAL.

23 "UNDERSTOOD, BUT AT THAT TIME, JANUARY 2005, THE  
24 GOAL WAS TO GET HALF THE CUSTOMERS, RIGHT?

25 "YES, THAT WAS THE STATED GOAL IN THE

1 PRESENTATION.

2 "Q. DID YOU HAVE IN MIND AT THE TIME THAT  
3 SAP COULD DO --

4 "A. COULD DO BETTER THAN THIS? NO, I  
5 THOUGHT THAT WAS AN ASPIRATIONAL GOAL."

6 DOES THAT REMIND YOU THAT WHEN MR. AGASSI WAS TALKING  
7 ABOUT THIS DOCUMENT, HE REFERRED TO AS AN ASPIRATIONAL GOAL?

8 A. YES, BUT HE GAVE OTHER TESTIMONY ABOUT THIS ALSO.

9 Q. OKAY. AND IN YOUR CHART, YOU'RE NOT -- YOU DON'T SAY  
10 ANYTHING ABOUT THIS DOCUMENT -- I MEAN, THIS TESTIMONY, WHERE HE  
11 REFERS TO IT (SIC) AN ASPIRATIONAL GOAL, DO YOU?

12 A. NO, BUT I -- LATER ON, HE SAYS 60 PERCENT.

13 Q. AND WHEN HE SAYS 60 PERCENT, HE'S TALKING ABOUT WHAT MIGHT  
14 HAPPEN IF ORACLE PERFORMED BADLY, RIGHT?

15 A. I AGREE WITH THAT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

17 Q. YOU TESTIFIED ON MONDAY THAT COURTS HAVE ACCEPTED YOUR  
18 OPINIONS OR ACCEPTED YOU IN NUMEROUS CASES, CORRECT?

19 A. YES, I BELIEVE I BEEN IN 70 CASES, AND I'VE ALWAYS BEEN ABLE  
20 TO TESTIFY TO MY OPINIONS BY THE COURTS. THEY'VE ALLOWED MY  
21 TESTIMONY TO GO TO THE JUDGES AND THE JURIES.

22 Q. WELL, IN THE BOEING CASE, THE COURT AGREED WITH YOU THAT IT  
23 SHOULD BE A RUNNING ROYALTY, CORRECT?

24 A. THE COURT AGREED WITH A LOT OF MY TESTIMONY, AND ONE WAS THE  
25 RUNNING ROYALTY.

## CROSS EXAMINATION OF PAUL MEYER

1 Q. OKAY. AND THE COURT DISAGREED WITH OTHER PARTS OF YOUR  
2 TESTIMONY, CORRECT?

3 A. IT DISAGREED WITH ONE PART OUT OF THE THREE MAJOR OPINIONS.  
4 IT DIDN'T LIKE THE RATE I USED, BUT IT ACCEPTED THE OTHER PARTS  
5 OF MY TESTIMONY.

6 Q. WELL, IN FACT, THE COURT FOUND THAT YOU PICKED A RATE THAT  
7 WAS THREE TIMES TOO HIGH, CORRECT.

8 A. THE COURT BELIEVED THERE WAS AN ESTABLISHED ROYALTY AND  
9 PICKED A RATE THAT WAS ONE-THIRD OF MY RATE.

10 Q. OKAY. AND THAT'S BECAUSE THERE WERE A NUMBER OF LICENSES  
11 WHERE THIS SAME PATENT HAD BEEN LICENSED AT 1.25 PERCENT,  
12 CORRECT?

13 A. THAT WAS THE COURT'S OPINION; THAT'S CORRECT.

14 Q. AND THE COURT FOUND THAT YOU SHOULD HAVE USED THOSE LICENSES  
15 INSTEAD OF THE ONES YOU ACTUALLY USED, RIGHT?

16 A. THAT'S CORRECT.

17 Q. AND THE ONES YOU ACTUALLY USED WERE 48 LICENSES THAT WERE  
18 PICKED FOR YOU BY BOEING'S LAWYERS, RIGHT?

19 A. NO, THAT'S NOT CORRECT. THEY WERE 48 LICENSES THAT  
20 REPRESENTED THE LICENSING-OUT HISTORY OF BOEING OVER TEN YEARS  
21 FOR ALL THEIR THIRD-PARTY LICENSES FOR VARIOUS TECHNOLOGIES.

22 Q. OKAY. BUT THOSE LICENSES WERE SELECTED FOR YOU BY THE  
23 BOEING LAWYERS, CORRECT?

24 A. THE BOEING INTELLECTUAL PROPERTY GROUP PROVIDED ME WITH THAT  
25 INFORMATION; THAT'S CORRECT. AND THE JUDGE DIDN'T LIKE THAT.

1 THE JUDGE THOUGHT WE SHOULD HAVE DONE A ROYALTY -- BUT I  
2 ACCEPTED BOEING'S INPUTS ON THE VALUE OF THEIR TECHNOLOGY.

3 Q. AND THE COURT FOUND THAT YOU HAD MADE LITTLE ATTEMPT,  
4 CERTAINLY NOT ENOUGH, TO ANALYZE WHETHER THOSE PATENTS WERE  
5 SIMILAR TO THE PATENT AT ISSUE IN THAT CASE, CORRECT?

6 A. I'LL AGREE WITH THAT.

7 Q. OKAY.

8 AND THE COURT FOUND THAT YOU WERE -- YOU SAID IN THAT  
9 CASE, YOUR APPROACH WAS CONSERVATIVE, RIGHT?

10 A. YES, IN LIGHT OF CONTRIBUTION TO THE INTERNATIONAL SPACE  
11 STATION, IT WAS A VERY CONSERVATIVE ROYALTY THAT WAS ULTIMATELY  
12 PUT FORWARD AND ALSO ONE AGREED TO BY THE JUDGE.

13 Q. BUT, ACTUALLY, THE COURT FOUND THAT YOUR APPROACH WAS NOT  
14 CONSERVATIVE BUT WAS CAPRICIOUS, CORRECT?

15 A. THAT'S NOT CORRECT. THE JUDGE ACCEPTED MY ROYALTY BASE,  
16 ACCEPTED MY OVERALL PERSPECTIVE ON THE RESULT, AND JUST DIDN'T  
17 LIKE THAT EXACT RATE I PICKED. SO TWO OUT OF MY THREE OPINIONS  
18 THE COURT ACCEPTED.

19 Q. AND -- WELL, AND HE -- AND HE REJECTED YOUR ROYALTY RATE AS  
20 THREE TIMES TOO HIGH, CORRECT?

21 A. I'VE ALREADY SAID THAT; THAT'S CORRECT.

22 Q. AND HE FOUND THAT YOUR APPROACH ON THIS ROYALTY RATE WAS  
23 CAPRICIOUS, CORRECT?

24 A. WE CAN LOOK AT HIS LANGUAGE, BUT HE WAS PRETTY AGGRESSIVE IN  
25 HIS LANGUAGE; THAT'S CORRECT.

1 Q. OKAY. AND HE FOUND THAT YOUR OPINION WAS TOO SPECULATIVE TO  
2 STAND?

3 A. THAT'S NOT CORRECT. ONCE AGAIN, WE SHOULD TELL THE JURY,  
4 THERE'S A ROYALTY BASE, THERE'S A ROYALTY RATE, AND THERE'S A  
5 RESULT. HE ACCEPTED MY ROYALTY BASE OF \$1.2 BILLION. HE USED,  
6 I THINK, A ROYALTY RATE OF ONE AND A QUARTER PERCENT, AND THE  
7 OVERALL FINDING OF \$17 MILLION. HE AGREED THAT MY METHODOLOGY,  
8 COMPARING THAT TO THE BENEFITS TO THE GOVERNMENT OF SAVING  
9 COSTS, HE AGREED WITH THAT. SO HE AGREED WITH TWO OUT OF MY  
10 THREE OPINIONS.

11 AND HE AWARDED \$17 MILLION PLUS INTEREST, \$28 MILLION  
12 TO BOEING IN THAT CASE. AND THE CLIENT WAS VERY -- THEY FELT  
13 THEIR TECHNOLOGY WAS PROPERLY VALUED AT 28 MILLION.

14 Q. OKAY. BUT ON YOUR ROYALTY RATE, THE COURT FOUND THAT YOUR  
15 OPINION WAS TOO SPECULATIVE TO STAND, CORRECT?

16 A. HE -- JUDGE ALLEGRA DID SAY THAT HE DIDN'T LIKE THE ROYALTY  
17 RATE, AND HE USED THE LANGUAGE THAT YOU HAVE.

18 Q. AND HE SAID IT BORE LITTLE RELATIONSHIP TO WHAT A WILLING  
19 BUYER AND A WILLING SELLER WOULD USE IN THE REAL WORLD TO  
20 NEGOTIATE A ROYALTY RATE, CORRECT?

21 A. I DON'T HAVE IT IN FRONT OF ME, BUT IF THAT'S WHAT YOU HAVE  
22 IN THE OPINION, HE SAID A FEW THINGS LIKE THAT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

4 Q. THE RESELLER AGREEMENT BETWEEN ORACLE AND SAP, IS THAT A  
5 PAID UPFRONT LICENSE?

6 A. NO, IT'S NOT.

7 Q. THANK YOU.

8 THAT AGREEMENT REQUIRES THE FILING OF ROYALTY  
9 REPORTS, AND IT GIVES ORACLE AUDIT RIGHTS, CORRECT?

10 A. LIKE TO SEE THE AGREEMENT. IT'S -- THEY PAY ORACLE FOR  
11 THEIR DATABASE SO THEY CAN SELL IT FOR ORACLE.

12 Q. OKAY. MY QUESTION IS, DOES IT INCLUDE AUDIT RIGHTS.

13 A. I'D LIKE TO SEE THE CONTRACT. I HAVE NOT LOOKED AT  
14 AGREEMENT IN MANY MONTHS, AND IT'S A RESELL AGREEMENT, SO IF YOU  
15 WANT TO GO THROUGH ALL THE CLAUSES, WE CAN DO THAT. BUT YOU'RE  
16 ASKING QUESTIONS AND I HAVE NOT SEEN THAT IN MANY MONTHS.  
17 YOU'RE NOT SHOWING ME ANYTHING, SO I'D LIKE TO SEE.

18 Q. SO IS THE ANSWER "I DON'T KNOW"? THE QUESTION IS, DOES THAT  
19 AGREEMENT INCLUDE AUDIT RIGHTS?

20 A. I'D HAVE TO LOOK AT THE AGREEMENT.

21 Q. AS YOU SIT THERE TODAY -- YOU'VE SEEN THE AGREEMENT BEFORE,  
22 CORRECT?

23 A. IT'S BEEN MONTHS, BUT I HAVE SEEN THE AGREEMENT BEFORE.

24 Q. AND YOU LOOKED AT THAT AGREEMENT TO SEE IF THAT WOULD BE

25 A -- IN ANY WAY COMPARABLE TO THE LICENSE THAT YOU'RE TRYING TO

1 PUT A VALUE ON HERE IN THE HYPOTHETICAL NEGOTIATION, CORRECT?

2 A. I REVIEWED THE AGREEMENT.

3 Q. FOR THAT PURPOSE.

4 A. WELL, THAT'S NOT CORRECT. I KNOW WHAT A RESELLER AGREEMENT  
5 IS. I BEEN DOING THIS FOR 20 YEARS, AND RESELLER AGREEMENTS ARE  
6 NOT COMPARABLE. I LOOKED AT IT JUST TO MAKE CERTAIN THAT WAS  
7 THE CASE, BUT RESELLER AGREEMENTS ARE NOT WHAT WE'RE DOING HERE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

14 Q. OKAY. AND I WANT TO TALK TO YOU A LITTLE BIT ABOUT HOW YOU  
15 VALUED THAT LICENSE FOR TOMORROWNOW'S USE OF THE DATABASE.

16 YOU TALKED WITH AN ORACLE EMPLOYEE, MR. ALLISON,  
17 CORRECT?

18 A. RIGHT. ONE OF THE -- ONE OF THE MEMBERS OF THE ORACLE'S  
19 MANAGEMENT; THAT'S CORRECT.

20 Q. AND DID YOU HEAR HIS TESTIMONY IN COURT?

21 A. NO, BUT I'VE READ IT.

22 Q. OKAY. AND YOU KNOW HE TESTIFIED THAT THERE WAS NO STANDARD  
23 LICENSE THAT WOULD COVER TOMORROWNOW'S USE. CORRECT?

24 A. WELL, LET'S BREAK THE WORD DOWN, "STANDARD," BECAUSE THERE'S  
25 LOTS OF "STANDARD" WORDS USED AROUND THIS WHOLE ISSUE OF THE

1 DATABASE.

2 BUT I THINK THAT -- HE SAID WAS THERE WASN'T A  
3 LICENSE -- THAT ORACLE'S NEVER GIVEN A LICENSE LIKE THAT, SO IF  
4 WE'RE TALKING ABOUT -- IS THAT WHAT YOU MEAN BY "STANDARD"?

5 Q. AND HE SAID IT WAS A UNIQUE SITUATION, CORRECT?

6 A. HE SAID THIS WAS A VERY UNIQUE SITUATION; THAT'S CORRECT.

7 Q. AND HE NEVER PROVIDED YOU ANY REAL-WORLD TRANSACTION WHERE  
8 THE LICENSE WAS ACTUALLY SIGNED BY A CUSTOMER AND PAID FOR BY A  
9 CUSTOMER THAT HE SAID WAS COMPARABLE IN THIS CASE, CORRECT?

10 A. I DON'T FOLLOW THAT QUESTION.

11 Q. DID HE PROVIDE YOU ANY REAL-WORLD TRANSACTION COMPARABLE TO  
12 THIS CASE?

13 A. NO, HE SAID THIS HAS NEVER HAPPENED BEFORE. NO ONE'S EVER  
14 HAD A LICENSE LIKE THIS FROM ORACLE TO COMPETE LIKE THIS.

15 Q. AND YOU HAVE NOT SEEN COMPARABLE AGREEMENT, CORRECT?

16 A. WAIT. SO ARE YOU ASKING IF I SEEN AT ORACLE WHERE THEY'VE  
17 GONE OUT AND GIVEN A DATABASE LICENSE TO THEIR BIGGEST  
18 COMPETITOR TO GO OUT AND PROVIDE COMPETING SERVICES ON PRODUCTS  
19 LIKE THIS?

20 I DON'T BELIEVE THAT'S EVER HAPPENED IN THE HISTORY  
21 OF ORACLE. I DON'T THINK THEY EVER INTEND TO ISSUE A LICENSE  
22 LIKE THAT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

6 Q. IF MR. ALLISON SUGGESTED 50 PERCENT LESS, YOU WOULD HAVE  
7 ACCEPTED IT, CORRECT?

8 A. NO, HE PROVIDED ME A FRAMEWORK.

9 Q. SIR, IF MR. ALLISON HAD SUGGESTED 50 PERCENT LESS, YOU WOULD  
10 HAVE ACCEPTED IT, CORRECT?

11 A. I DON'T FOLLOW THAT QUESTION. IF YOU'RE ASKING, DID I  
12 FOLLOW HIS THOUGHTS ON HOW ORACLE WOULD PRICE THE LICENSE, YES,  
13 I DID. BUT HE GAVE ME THE ENTERPRISE EDITION. FROM THERE, I  
14 COULD GO DO THE CALCULATIONS. HE PROVIDED THE FORM OF THE  
15 PRICING. IT WOULD BE THE ENTERPRISE EDITION DATABASE LICENSE  
16 PER CUSTOMER. THEN I COULD DO THE -- I COULD THEN DO THE  
17 CALCULATIONS.

18 Q. OKAY. I'D LIKE TO IMPEACH THE WITNESS WITH HIS TESTIMONY AT  
19 PAGE 819 OF HIS DEPOSITION, LINE 9 TO 21.

20 THE COURT: ALL RIGHT.

21 BY MR. MITTELSTAEDT:

22 Q. QUESTION -- AND THIS IS YOUR DEPOSITION. YOU REMEMBER WHEN  
23 YOUR DEPOSITION WAS TAKEN IN THIS CASE, CORRECT, SIR?

24 A. YES.

25 Q. YOU WERE UNDER OATH?

1 A. THAT'S CORRECT.

2 Q. DID YOUR BEST TO TELL THE TRUTH?

3 A. YES.

4 Q. QUESTION:

5 "IF MR. ALLISON WOULD HAVE TOLD YOU THAT YOU  
6 COULD PRICE THE EXACT SAME LICENSE HE DESCRIBED TO  
7 YOU AT 50 PERCENT OF THAT COST, WOULD YOU HAVE  
8 ACCEPTED THAT?

9 "A. BASED ON MY UNDERSTANDING OF THE  
10 SITUATION, SINCE THIS WAS SO HIGHLY FOCUSED ON  
11 THE PARTICULARS OF THE CASE AND BECAUSE IT WAS  
12 FOCUSED ON A LICENSE THAT IS NOT GRANTED OF THIS  
13 NATURE BY ORACLE, I WOULD HAVE HAD TO DEFER TO  
14 MR. ALLISON TO PROVIDE THAT INPUT. AND IF HE  
15 FELT THAT WAS THE WAY IT WOULD BE STRUCTURED, I  
16 WOULD HAVE ACCEPTED THAT IN TERMS OF THE  
17 STRUCTURE OF THE LICENSE.

18 "Q. AND IN TERMS OF THE PRICING?

19 "A. THE STRUCTURE, WHICH LEADS TO THE  
20 PRICING, THAT'S CORRECT."

21 THAT'S THE TESTIMONY YOU GAVE.

22 A. I JUST TOLD THE JURY THE SAME THING, THAT'S RIGHT.

23 Q. SIR, IS THAT THE TESTIMONY YOU GAVE?

24 A. ABSOLUTELY. ABSOLUTELY.

25 Q. AND IF MR. ALLISON SUGGESTED TWICE THE PRICE TO YOU, YOU

## CROSS EXAMINATION OF PAUL MEYER

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1 HAD -- YOU WOULD HAVE ACCEPTED THAT AS WELL, CORRECT?  
2 A. IF HE SAID THERE WAS A LICENSE AT ORACLE THAT WAS TWICE THAT  
3 PRICE THAT HE THOUGHT THAT WOULD BE HOW THIS KIND OF VERY UNIQUE  
4 LICENSE WOULD HAVE BEEN STRUCTURED, I WOULD HAVE ACCEPTED THAT.  
5 YES, I AGREE WITH THAT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

25 Q. OKAY. I WANT TO ASK YOU JUST A COUPLE OF QUESTIONS ABOUT

1 THE LOST SUPPORT PROFITS. AND THESE ARE THE PEOPLESOFT  
2 CUSTOMERS WHO WERE AT ORACLE, AND THEN THEY WENT OVER TO  
3 TOMORROWNOW FOR SUPPORT FOR THEIR ORACLE OR PEOPLESOFT SOFTWARE,  
4 CORRECT?

5 A. YES.

6 Q. AND WHAT YOU WERE TRYING TO DO -- YOU KNOW THE TOTAL NUMBER  
7 OF TOMORROWNOW CUSTOMERS FROM PEOPLESOFT WAS 358, CORRECT?

8 A. YES.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

25 Q. OKAY. LET'S USE -- IF WE USE A DIFFERENT NUMBER. LET'S SAY

## CROSS EXAMINATION OF PAUL MEYER

1 IN YOUR CALCULATION, INSTEAD OF 3,000, WE USE 358. AND WE USE  
2 86; 358 BEING ALL THE CUSTOMERS THAT WENT TO TOMORROWNOW, AND  
3 86, ALL THE CUSTOMERS WHO BOUGHT ANYTHING FROM SAP WHILE THEY  
4 WERE A TOMORROWNOW CUSTOMER. SO WE TAKE THOSE TOP NUMBERS.

5 YOUR ROYALTY CALCULATION WOULD BE CONSIDERABLY LOWER,  
6 WOULDN'T IT?

7 A. THE CUSTOMERS ARE ONLY ONE FACTOR THAT GOES INTO THE ENTIRE  
8 ANALYSIS. BUT IF WE WERE TO CHANGE THAT FACTOR, WE'D HAVE TO GO  
9 BACK AND DO THE ANALYSIS AND ALL THE OTHER THINGS THAT WENT INTO  
10 THE DETERMINATION -- I'VE SPENT A COUPLE DAYS TESTIFYING  
11 ABOUT -- YOU WOULD THEN DO THAT ANALYSIS, AND I DESCRIBED IT IN  
12 DEPOSITION OVER THREE DAYS HOW THAT WOULD HAPPEN.

13 Q. OKAY.

14 BUT CAN YOU ANSWER "YES" OR "NO"? IF YOU USE THOSE  
15 ACTUAL NUMBERS, YOUR ROYALTY CALCULATION WOULD BE CONSIDERABLY  
16 LOWER, WOULDN'T IT, "YES" OR "NO"?

17 A. IF YOU PUT THOSE NUMBERS IN THE CALCULATIONS AND CONSIDERED  
18 EVERYTHING ELSE, I AGREE THE NUMBERS WOULD GO DOWN.

19 Q. HAVE YOU RUN YOUR MODEL WITH THOSE ACTUAL NUMBERS?

20 A. NO, IT WAS NOT RELEVANT TO ME.

21 Q. DO YOU HAVE ANY IDEA WHAT THE OUTCOME WOULD BE?

22 A. I'VE NOT RUN THAT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

10 Q. NOW, LET ME GO BACK FOR JUST A MOMENT TO A HYPOTHETICAL THAT  
11 SAP'S COUNSEL ASKED YOU TO ASSUME AT ONE POINT ON TUESDAY. HE  
12 ASKED YOU TO ASSUME THAT THE PARTIES -- THAT ORACLE'S EXECUTIVES  
13 HAD TOLD YOU SOMEHOW THAT THEY WOULD ONLY LOSE 358 CUSTOMERS.

14 IS THERE ANY EVIDENCE WHATSOEVER THAT ORACLE WOULD  
15 HAVE HAD THAT EXPECTATION IN JANUARY 2005?

16 A. NO, JUST -- IT'S JUST NOT PART OF THE ANYTHING AT ALL.  
17 THERE WOULD JUST -- ORACLE HAD NO IDEA ABOUT THE USE OF THE  
18 SOFTWARE BY SAP, AND -- AND THERE'S NO INFORMATION AT ALL THAT  
19 I'VE SEEN, AND IT'S JUST NOT -- IT'S JUST A NONSTARTER. DOESN'T  
20 EXIST.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

16 Q. FINALLY, CAN SAP CHANGE THE FACT THAT ITS EXECUTIVE BOARD  
17 DECIDED IN JANUARY 2005 TO TAKE A RISK OF SERIOUS LIABILITY?

18 A. NO. THEY HAVE TO ACCEPT THAT, AND THAT'S PART OF THE  
19 CALCULATION OF WHAT THEY WOULD PAY AT THE TIME FOR THIS  
20 VALUABLE SOFTWARE FROM ORACLE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

23 Q. NOW, YOU WERE ASKED SOME QUESTIONS ABOUT THIS DOCUMENT.

24 DO YOU REMEMBER THAT?

25 A. YES.

1 Q. AND THIS IS THE DOCUMENT THAT DESCRIBES THE BUSINESS  
2 OPPORTUNITY. AND IT SAYS IN THE UPPER LEFT-HAND CORNER,  
3 "ASSUMPTIONS", RIGHT?

4 A. YES.

5 Q. AND THESE ARE ASSUMPTIONS MADE BY THE PERSON WHO PREPARED  
6 THIS, MR. ZIEMEN, PRESUMABLY, RIGHT?

7 A. HE DID THE BUSINESS CASE, THAT'S CORRECT.

8 Q. YOU SAID, "WELL, IT WENT TO THE BOARD," RIGHT?

9 A. THAT'S CORRECT. IT WENT TO THE EXECUTIVE BOARD.

10 Q. BUT EVEN WHEN IT WENT TO THE BOARD, IT WAS STILL  
11 ASSUMPTIONS, RIGHT?

12 A. IT WAS PRESENTED THIS WAY.

13 Q. AS AN ASSUMPTION, RIGHT?

14 A. EXACTLY HOW IT IS PRESENTED.

15 Q. AS AN ASSUMPTION?

16 A. EXACTLY THIS WAY. IT SAYS "ASSUMPTIONS" RIGHT THERE.

17 Q. OKAY.

18 AND AN ASSUMPTION THAT GOES TO THE BOARD IS STILL AN  
19 ASSUMPTION, RIGHT?

20 A. I DON'T UNDERSTAND WHAT THAT QUESTION MEANS.

21 THE BOARD RECEIVED THIS DOCUMENT AS IT'S PRESENTED.

22 Q. DO YOU REMEMBER IN THE BOEING CASE, THE COURT SAID THAT  
23 BECAUSE YOUR BASELINE WAS LITTLE MORE THAN CONJECTURE, IT  
24 MATTERS LITTLE HOW YOU APPLIED THE OTHER GEORGIA-PACIFIC  
25 FACTORS BECAUSE PLUS OR MINUS A GUESS IS, AFTER ALL, STILL A

1 GUESS.

2 DO YOU REMEMBER THAT?

3 A. I RECALL READING THE JUDGE'S DECISION.

4 Q. DO YOU REMEMBER READING THAT PART OF IT?

5 A. I JUST SAID THAT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

19 Q. JUST A COUPLE OF QUESTIONS, SIR.

20 YOU DON'T KNOW WHAT ANALYSIS, IF ANY, WAS DONE TO  
21 COME UP WITH THE ASSUMPTIONS IN THAT DOCUMENT YOU'VE BEEN  
22 LOOKING AT, DO YOU?

23 A. THE ROADMAP?

24 Q. CORRECT.

25 A. AS I MENTIONED A WHILE BACK, I CAN'T SPEAK TO THE DETAILED

1 ASSUMPTIONS.

2 Q. YOU DON'T KNOW WHERE THE ASSUMPTIONS CAME FROM, DO YOU?

3 A. THAT'S CORRECT.

4 Q. THE DOCUMENT YOU WERE LOOKING AT WAS A DOCUMENT THAT WAS  
5 USED TO JUSTIFY SPENDING \$10 MILLION FOR TOMORROWNOW, CORRECT?

6 A. WHAT DOCUMENT IS THAT?

7 Q. THE DOCUMENT YOU'VE BEEN LOOKING AT. THE ONE WITH THE  
8 ASSUMPTIONS.

9 A. NO. THAT DOCUMENT IS THE BEGINNING OF THE PLANNING OF  
10 SAFE PASSAGE WHICH WAS GOING TO BE RELEASED ON JANUARY 19TH,  
11 2005, THE DAY AFTER ORACLE ANNOUNCED THE PEOPLESOFT COMBINATION  
12 THAT WAS GOING TO BE A MULTIBILLION GO-TO-MARKET STRATEGY.  
13 THAT'S WHAT THAT DOCUMENT IS.

14 Q. WAS THAT DOCUMENT USED TO FIGURE OUT WHAT A ROYALTY WOULD  
15 BE OR TO SPEND BILLIONS OF DOLLARS?

16 A. THAT DOCUMENT WAS USED TO LAUNCH MASSIVE RESOURCES  
17 DEDICATED TO SAP'S MARKETING AND SELLING AND APPROACHING 10,000  
18 CUSTOMERS. IT'S A VERY IMPORTANT DOCUMENT.

19 Q. IS IT YOUR POSITION THAT SAP WOULD NOT HAVE DONE ANY  
20 FURTHER, MORE RIGOROUS ANALYSIS IF IT WAS SITTING DOWN WITH SAP  
21 AND -- EXCUSE ME, IF IT WAS SITTING DOWN WITH ORACLE, AND  
22 ORACLE OR YOU WERE ASKING IT TO SPEND BILLIONS OF DOLLARS FOR  
23 SOMETHING, YOU ARE SAYING, YOU ARE SAYING SAP WOULD NOT DO MORE  
24 RIGOROUS ANALYSIS THAN THE ASSUMPTIONS THAT WERE ON THAT BOARD?

25 IS THAT YOUR POSITION?

1 A. I'M SAYING THEY WOULD TAKE ALL THOSE PROJECTIONS AND THEY  
2 WOULD PLACE THAT AGAINST THE \$11 BILLION ORACLE HAD JUST SPENT  
3 FOR THE SAME PROPERTY. THE FAIR MARKET VALUE OF THAT PROPERTY  
4 WAS IN THAT TRANSACTION AND THAT WAS BILLIONS OF DOLLARS. THEY  
5 WOULD HAVE THAT INFORMATION.

6 Q. THAT'S NOT MY QUESTION.

7 ARE YOU SAYING THAT IN YOUR VIEW, SAP WOULD NOT DO  
8 ANY FURTHER OR MORE RIGOROUS ANALYSIS THAN WHAT YOU SAW UP ON  
9 THAT BOARD IF THEY WERE SITTING DOWN TO NEGOTIATE WHAT YOU SAY  
10 IS A MULTIBILLION DOLLAR DEAL?

11 A. I WOULD SAY THEY WOULD DO THE SAME AMOUNT OF INFORMATION  
12 THEY WOULD CONSIDER AS THEY DID TO LAUNCH SAFE PASSAGE AND TO  
13 RECOMMIT ALL THESE RESOURCES. THAT'S WHAT THEY WOULD DO. THEY  
14 WOULD DO THE SAME KIND OF ANALYSIS.

15 Q. THEY WOULD JUST HAVE A PIECE OF PAPER LIKE THAT THAT SAID  
16 "ASSUMPTIONS"; IS THAT WHAT YOU ARE SAYING?

17 A. THERE'S ALL THE BACKUP TO IT. THESE DOCUMENTS HAVE LOTS  
18 OF BACKUP.

19 Q. I THOUGHT YOU JUST TOLD ME THAT YOU DON'T KNOW WHAT WORK  
20 WAS DONE TO SUPPORT THOSE ASSUMPTIONS; ISN'T THAT CORRECT?

21 A. I DON'T HAVE ALL THE DETAIL ON THAT, BUT --

22 Q. DON'T HAVE ANY OF THE DETAIL.

23 A. I MENTIONED MR. ZIEMEN, I DON'T HAVE THE DETAIL THAT HE  
24 PUT TOGETHER.

25 Q. AND YOU DON'T KNOW IF HE PUT TOGETHER ANY DETAIL OR IF HE

1 JUST MADE THOSE ASSUMPTIONS; ISN'T THAT CORRECT?

2 A. I KNOW THOSE ASSUMPTIONS WERE ACCEPTED BY THE BOARD --

3 Q. I DIDN'T ASK YOU WHO ACCEPTED THEM.

4 I ASKED YOU, DO YOU KNOW IF MR. ZIEMEN DID ANY WORK  
5 TO COME UP WITH THOSE ASSUMPTIONS OR WHETHER THEY WERE JUST  
6 WHAT THEY SAY THEY ARE, ASSUMPTIONS?

7 DO YOU KNOW THAT?

8 A. I DON'T HAVE THE DETAIL.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

5 Q. WHAT CONCLUSION WERE YOU ABLE TO REACH ABOUT TOMORROWNOW'S  
6 DOWNLOADING OF ORACLE'S MATERIALS?

7 A. WELL, THE CONCLUSION I REACHED IS THAT TOMORROWNOW RELIED  
8 ON MASS DOWNLOADING OF ORACLE SOFTWARE AND SUPPORT MATERIALS  
9 FROM THE ORACLE WEBSITE, AN IMPROPER ACCESS TO THAT SITE IN  
10 REGARDS TO TERMS OF USE AND LICENSING.

11 Q. AND DO YOU HAVE A DEMONSTRATIVE TO HELP YOU EXPLAIN WHAT  
12 YOU FOUND IN TERMS OF THE VOLUME OF DOWNLOADING?

13 A. YES, I DO.

14 MR. HOWARD: LET'S PUT THAT UP ON THE SCREEN,  
15 PLEASE.

16 (SLIDE DISPLAYED ON SCREEN.)

17 BY MR. HOWARD:

18 Q. THAT IS AT TAB 1 OF YOUR BINDER, SIR. THAT IS PLAINTIFFS'  
19 DEMONSTRATIVE 11.

20 WHAT DOES THIS SHOW US?

21 A. WELL, WHEN WE LOOKED AT THE DOWNLOADS, WE FOUND OVER  
22 10 MILLION ORACLE FILES HAD BEEN DOWNLOADED BY TOMORROWNOW.  
23 THAT'S WHAT HAPPENED TO BE THERE WHEN WE DID OUR INVESTIGATION  
24 AND REACHED INTO TOMORROWNOW'S SERVERS AND SYSTEMS TO SEE WHAT  
25 THEY HAD. IT WAS OVER FIVE TERABYTES IN SIZE.

1           SO IF WE PRINTED OUT A SINGLE TERABYTE OF PAPER --  
2 ANOTHER WAY TO EXPLAIN A TERABYTE -- IF WE LAY THAT PAPER END  
3 TO END, A SINGLE TERABYTE WOULD CIRCLE THE GLOBE IN  
4 DOUBLE-SIDED PRINTOUTS ONE AND THREE QUARTERS TIMES. THAT'S  
5 WHAT THE GLOBES REPRESENT IS THE AMOUNT OF DATA THAT WAS  
6 DOWNLOADED BY TOMORROWNOW REPRESENTS NEARLY NINE CIRCLES AROUND  
7 THE GLOBE OF PRINTED DATA DOUBLE-SIDED.

8 Q.   DOES THIS REPRESENT ALL OF THE DOWNLOADS THAT TOMORROWNOW  
9 EVER TOOK FROM ORACLE'S WEBSITE?

10 A.   NO. THIS REPRESENTS THE LOWER BOUNDS. THERE'S SOME  
11 REASONS WHY.

12           ONE WE KNOW BASED ON TESTIMONY THAT AT LEAST A  
13 MILLION FILES WERE DOWNLOADED DURING THE DEVELOPMENT OF TITAN,  
14 AND THAT THOSE MILLION FILES WERE DELETED.

15           SECOND, WE DIDN'T DECOMPRESS EVERY ONE OF THESE  
16 FILES. A LOT OF THEM WERE IN A COMPRESSED FORMAT. SO THE  
17 NUMBER CAN ONLY GO UP FROM THAT.

18           AND, THIRD, WE DIDN'T GET TO SEE EVERY SYSTEM.  
19 THERE WERE MACHINES PRODUCED TO MANDIANT THROUGH THIS  
20 INVESTIGATION AFTER I HAD SUBMITTED MY SUPPLEMENTAL REPORT.  
21 AND THEY HAD HUNDREDS OF THOUSANDS OF DOWNLOADS ON THOSE  
22 SYSTEMS, BUT WE SIMPLY COULDN'T TALLY THEM UP IN TIME TO PUT  
23 THEM IN OUR REPORT. SO THIS REPRESENTS THE LOWER BOUNDS.

24           MR. HOWARD: THANK YOU. YOU CAN TAKE THAT DOWN NOW.

25    ///

1 BY MR. HOWARD:

2 Q. MOVING FROM DOWNLOADS TO COPIES OF ORACLE'S ENTERPRISE  
3 APPLICATION SOFTWARE AND DATABASE SOFTWARE, DID TOMORROWNOW  
4 HAVE COPIES OF THAT SOFTWARE AS WELL ON ITS SYSTEMS?

5 A. YES, THEY DID.

6 Q. HOW DID THE AMOUNT OF THE SOFTWARE APPLICATION COPIES AND  
7 THE DATABASE SOFTWARE COPIES COMPARE TO THE AMOUNT OF THE  
8 DOWNLOADS THAT YOU FOUND?

9 A. BY SIZE, REALIZE THAT THE COPIES OF ORACLE APPLICATION  
10 SOFTWARE AND ORACLE DATABASE SOFTWARE, THERE'S STILL THOUSANDS  
11 OF FILES.

12 BY SIZE, THERE WAS FIVE TERABYTES OF DATA FOR THE  
13 DOWNLOADS. THERE WAS OVER TWICE THAT, OR OVER TEN TERABYTES OF  
14 DATA FOR THE ORACLE APPLICATION SOFTWARE AND THE ORACLE  
15 DATABASE SOFTWARE BY VOLUME. IT'S A CONSIDERABLE AMOUNT.

16 Q. WHAT KINDS OF ENTERPRISE APPLICATION SOFTWARE COPIES AND  
17 DATABASE SOFTWARE COPIES DID YOU FIND ON TOMORROWNOW'S SYSTEMS?

18 A. WELL, I THINK AT THE HIGHEST LEVEL WE SAW PEOPLESOFT, JDE,  
19 SIEBEL AND ORACLE DATABASE PRODUCTS.

20 THEN YOU COME DOWN A RUNG, THERE'S SOME PRODUCTS  
21 SUCH AS THE FINANCIALS, HRMS, THERE'S STUDENT ADMINISTRATION,  
22 EPM, CRM, PEOPLE TOOLS. WE ESSENTIALLY FOUND, I THINK, ALL OF  
23 THE SOFTWARE THAT WAS RELEVANT TO THE FOURTH AMENDED COMPLAINT  
24 IN THIS CASE. IT WAS ALL THERE.

25 Q. WHEN YOU SAY "JDE", YOU MEAN J.D. EDWARDS?

1 A. I MEAN J.D. EDWARDS, WORLD, AND ONE WORLD OR ENTERPRISE  
2 ONE.

3 Q. SO THOSE ARE TWO DIFFERENT PRODUCT LINES UNDER  
4 J.D. EDWARDS?

5 A. YES.

6 Q. HOW MANY COPIES OF ORACLE'S ENTERPRISE APPLICATION  
7 SOFTWARE AND ORACLE'S DATABASE SOFTWARE DID YOU FIND?

8 A. WELL, THERE WAS ABOUT 7,100 OR MORE COPIES OF ORACLE  
9 APPLICATION SOFTWARE AND ORACLE DATABASE SOFTWARE. I MADE A  
10 DEMONSTRATIVE TO GO THROUGH THESE NUMBERS.

11 MR. HOWARD: LET'S PUT THAT UP, PLEASE.

12 (SLIDE DISPLAYED ON SCREEN.)

13 BY MR. HOWARD:

14 Q. WHAT DOES THIS SHOW?

15 A. WELL, THIS SHOWS THAT IN THE CD BINDERS, AND THERE'S 727  
16 COPIES OF ORACLE APPLICATION SOFTWARE, ORACLE DATABASE  
17 SOFTWARE.

18 WHAT THESE CD BINDERS WERE IS WHEN TOMORROWNOW  
19 LANDED A NEW CLIENT OR OBTAINED A NEW CLIENT, THEY HAD AN  
20 ON-BOARDING PROCESS. DURING THAT ON-BOARDING PROCESS, THEY  
21 COLLECTED PHYSICAL COPIES OF ORACLE APPLICATIONS SOFTWARE AND  
22 ORACLE DATABASE SOFTWARE, AND THEY PUT IT INTO BINDERS.

23 AND WHEN WE WENT THROUGH THOSE BINDERS, THERE WAS --  
24 ACTUALLY, MERRILL LEGAL SOLUTIONS WAS AGREED BY BOTH SIDES TO  
25 GO THROUGH THE BINDERS AND DO AN INVENTORY OF THOSE BINDERS.

1 WE FOUND 727 COPIES OF ORACLE APPLICATION SOFTWARE AND ORACLE  
2 DATABASE SOFTWARE. THAT WAS A STARTING POINT FOR THE CREATION  
3 OF ENVIRONMENTS.

4 FROM THERE, THE ORACLE APPLICATION SOFTWARE AND  
5 ORACLE DATABASE SOFTWARE WAS COPIED TO THE CD JUKEBOX. THE CD  
6 JUKEBOX WAS HARD DRIVES. THEY WERE TAKING THE INSTALL MEDIA,  
7 THE PHYSICAL DISKS SET OF TOMORROWNOW THAT THEY WERE COLLECTING  
8 FROM THEIR CUSTOMERS, AND THEN FOR THE MOST PART, THEY WOULD  
9 PUT THEM ON AN INTERMEDIATE STORAGE AREA CALLED THE CD JUKEBOX.  
10 AND THEN FROM THERE, THEY WOULD MAKE THE ENVIRONMENTS THAT WILL  
11 GO OVER IN THE NEXT SLIDE.

12 Q. ARE THESE NUMBERS IN DISPUTE?

13 A. NO, THEY ARE NOT.

14 Q. DEFENDANTS HAVE AGREED TO THEM?

15 A. IT IS MY UNDERSTANDING THAT IN THE STIPULATION DATED  
16 SEPTEMBER 29TH OF THIS YEAR, THAT THESE NUMBERS WERE AGREED TO  
17 AS BEING THE AT LEAST THIS MANY COPIES WERE IN THE CD BINDERS  
18 AND THE CD JUKEBOX.

19 MR. HOWARD: LET'S GO TO YOUR NEXT SLIDE.

20 (SLIDE DISPLAYED ON SCREEN.)

21 BY MR. HOWARD:

22 Q. WHAT DOES THIS SHOW US?

23 A. THIS SHOWS THE NUMBER OF ENVIRONMENTS THAT EXISTED OVER  
24 TIME AT TOMORROWNOW. THERE'S 6,189 PEOPLESOFT ENVIRONMENTS  
25 THAT EXISTED OVER TIME THERE; 29 J.D. EDWARDS ENVIRONMENTS; 31

1 SIEBEL ENVIRONMENTS; AND 39 ORACLE DATABASE COPIES.

2 THESE ARE ALL NUMBERS THAT DEFENDANTS AGREE WITH.

3 Q. NOW, YOU'VE USED THE TERM "ENVIRONMENT" HERE. CAN YOU  
4 EXPLAIN WHAT THAT IS?

5 A. I THINK THE SIMPLEST WAY TO DEFINE AN ENVIRONMENT IS IT'S  
6 AN INSTALLATION OF ORACLE APPLICATION SOFTWARE OR ITS  
7 CORRESPONDING DATABASE. EITHER OR.

8 Q. NOW YOU SAID THAT THE DEFENDANTS HAVE AGREED WITH THESE  
9 NUMBERS AS WELL AND YOU'VE MENTIONED A STIPULATION. LET'S LOOK  
10 AT THAT BRIEFLY.

11 THAT'S IN YOUR BINDER AT TAB 4.

12 MR. HOWARD: YOUR HONOR, THAT'S JOINT TRIAL  
13 EXHIBIT 2. IT IS ALSO IN THE JURY NOTEBOOKS TITLED "TRIAL  
14 STIPULATION AND ORDER NUMBER THREE." THAT'S THE FOURTH  
15 DOCUMENT IN THE JURY'S NOTEBOOK.

16 BY MR. HOWARD:

17 Q. AND, MR. MANDIA, IF I CAN TURN YOUR ATTENTION TO WHAT I  
18 BELIEVE THE BOTTOM OF PAGE 3, PARAGRAPH 16.

19 AND IT'S UP ON THE BOARD.

20 (DOCUMENT DISPLAYED ON SCREEN.)

21 A. UH-HUH.

22 Q. DO THOSE NUMBERS THERE HAVE MEANING TO YOU?

23 A. WELL, THESE NUMBERS WERE DERIVED FROM THE MANDIANT REPORT.

24 Q. AND IT SAYS THERE THAT EACH OF THOSE COPIES THAT YOU  
25 FOUND, THE DEFENDANTS HAVE STIPULATED TO, EACH OF THEM

- 1     CONSTITUTE AN INFRINGEMENT OF ONE OR MORE OF THE STIPULATED
- 2     REGISTERED WORKS?
- 3     A.     YES.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

2 Q. NOW, HOW WELL DO THESE NUMBERS, THESE COPIES THAT YOU  
3 FOUND REPRESENT ALL OF THE COPIES OF ORACLE SOFTWARE THAT  
4 TOMORROWNOW EVER HAD ON ITS SYSTEMS OF APPLICATIONS SOFTWARE  
5 AND DATABASE SOFTWARE?

6 A. AGAIN, IT'S A LOWER BOUNDS. YOU CAN ONLY FIND WHAT YOU  
7 CAN FIND. MANDIANT DID NOT GET TO REVIEW EVERY SYSTEM AT  
8 TOMORROWNOW. WE DIDN'T GET TO LOOK AT ALL THE DIFFERENT FIELD  
9 OFFICES. WE FOCUSED OUR INVESTIGATION ON BRYAN, TEXAS.

10 Q. WERE YOU ABLE TO REVIEW SOME OF THE 26,000 INSTANT MESSAGE  
11 CHATS THAT THE DEFENDANTS PRODUCED AFTER YOU SUBMITTED YOUR  
12 SUPPLEMENTAL REPORT?

13 A. I DID REVIEW SOME.

14 Q. I WANT YOU TO HAVE THOSE IN MIND.

15 YOU UNDERSTAND THAT SAP ACQUIRED TOMORROWNOW IN  
16 JANUARY OF 2005?

17 A. YES.

18 Q. TAKING INTO ACCOUNT THE INSTANT MESSAGE CHATS THAT YOU'VE  
19 REVIEWED AND YOUR ONLY ANALYSIS, WHAT DID YOU OBSERVE ABOUT THE  
20 NATURE OF TOMORROWNOW'S DOWNLOADING PRIOR TO JANUARY OF 2005  
21 COMPARED TO AFTER?

22 A. WE DON'T HAVE EXACT NUMBERS OF DOWNLOADS THAT OCCURRED  
23 DURING THAT TIME FRAME, BUT WHAT WE DO KNOW IS THAT TITAN WAS  
24 DEVELOPED AFTER JANUARY OF 2005.

25 AND, TITAN, TO REFRESH YOUR RECOLLECTION, IS A MASS

1     DOWNLOADING TOOL.  IT WAS MADE BY TOMORROWNOW TO GET ORACLE  
2     SOFTWARE AND SUPPORT MATERIALS FASTER.  THAT WAS ITS PRIMARY  
3     PURPOSE.

4             SO IT'S LIKELY, BECAUSE TITAN WAS DEVELOPED AFTER  
5     JANUARY 1ST, 2005, AND IT ENHANCED THE SPEED AT WHICH  
6     TOMORROWNOW COULD OBTAIN ORACLE SOFTWARE AND SUPPORT MATERIALS,  
7     THAT THE DOWNLOADING ONLY INCREASED.

8     Q.     COMPARING THE SAME TWO TIME PERIODS, BEFORE JANUARY OF  
9     2005 AND AFTER, WHAT DID YOU OBSERVE ABOUT THE AMOUNT OF COPIES  
10    OF ORACLE'S ENTERPRISE APPLICATION SOFTWARE AT TOMORROWNOW?

11    A.     WELL, THERE WERE MORE COPIES MADE, MORE ENVIRONMENTS MADE  
12    AFTER JANUARY 1ST, 2005 THAN BEFORE.

13    Q.     NOW, CAN YOU EXPLAIN WHAT YOU MEAN BY "CROSS USE"?

14    A.     CROSS USE, IN THE BEST WAY TO EXPLAIN IS, IT'S USING  
15    SOMEONE ELSE'S -- BASICALLY, YOU ARE RECEIVING SOMETHING THAT  
16    WAS BUILT IN SOMEONE ELSE'S SOFTWARE OR YOUR SOFTWARE IS  
17    ACTUALLY USED TO BENEFIT SOMEBODY ELSE.

18             IT'S A MISALIGNMENT OF THE SOFTWARE USED TO CREATE  
19    SOMETHING FOR SOMEBODY ELSE.  CASE IN POINT WOULD BE CUSTOMER A  
20    SOFTWARE BEING USED TO BENEFIT CUSTOMERS B, C OR D.

21    Q.     NOW, COMPARING THESE SAME TWO TIME PERIODS, BEFORE  
22    JANUARY 2005 AND AFTER JANUARY 2005, WHAT DID YOU OBSERVE ABOUT  
23    THE AMOUNT OF CROSS USE, THAT IS, USING ONE CUSTOMER'S SOFTWARE  
24    TO CREATE FIXES FOR OTHER CUSTOMERS?

25    A.     FOR THE FIXES THAT PREDOMINATED AFTER JANUARY 1ST OF 2005,

1 THE CROSS USE ACTUALLY GOES UP FROM PRIOR TO JANUARY OF 2005 TO  
2 AFTERWARDS. IT WAS APPROXIMATELY 90 PERCENT PRIOR TO  
3 JANUARY 1ST OF 2005 AND GOES UP TO 94 PERCENT OVER TIME.

4 WHAT THAT MEANS IS IF I RECEIVED A FIX FROM  
5 TOMORROWNOW, THERE WAS A 94 PERCENT CHANCE OR MORE THAT  
6 SOMEBODY ELSE'S SOFTWARE WAS USED TO DEVELOP THAT FIX OR MY  
7 SOFTWARE IS USED TO DEVELOP THAT FIX BUT OTHER FOLKS BENEFITED  
8 FROM IT.

9 Q. AND HOW ARE YOU USING THE TERM "FIX"?

10 A. A FIX IS JUST AN UPDATE. IT'S A CODE, IT COULD BE OTHER  
11 THINGS, BUT IT IS JUST AN UPDATE OR A FIX TO SOFTWARE.

12 Q. NOW, WHAT DID YOU OBSERVE ABOUT TOMORROWNOW'S CROSS USE OF  
13 ONE CUSTOMER'S LOGIN CREDENTIALS FOR CUSTOMER CONNECTION TO  
14 DOWNLOAD FOR ANOTHER CUSTOMER?

15 A. I THINK WE HAVE A SPECIFIC EXAMPLE SHOWING THAT THERE WAS  
16 CROSS USE OF CREDENTIALS, MEANING WHEN SOFTWARE IS BEING  
17 DOWNLOADED FROM ORACLE'S WEBSITE, IT'S SUPPOSED TO BE  
18 DOWNLOADED -- IF YOU ARE DOWNLOADING ON BEHALF OF CUSTOMER A,  
19 YOU ARE SUPPOSED TO USE CUSTOMER A'S USER ACCOUNT AND PASSWORD  
20 AND ONLY DOWNLOAD THOSE FILES FOR CUSTOMER A AND THEN ONLY USE  
21 THEM FOR CUSTOMER A'S BENEFIT. BUT WE SAW CROSS USE WHERE THE  
22 CREDENTIAL IS BEING USED -- RATHER MISHANDLED.

23 Q. WOULD YOU TURN TO TAB 5 IN YOUR BINDER, PLEASE?

24 AND THAT'S AT INSTANT MESSAGE CHAT BETWEEN SHELLEY  
25 NELSON AND ROD RUSSELL DATED APRIL 17, 2007.

1 DO YOU KNOW WHO SHELLEY NELSON IS?

2 A. YES.

3 Q. WHO IS SHE?

4 A. SHELLEY NELSON IS THE VP OF GLOBAL SUPPORT FOR TOMORROWNOW  
5 AND SHE'S THE WIFE OF ANDREW NELSON, WHO IS THE CEO OF  
6 TOMORROWNOW OR WHO WAS THE CEO.

7 Q. IS SHE RELATED TO GREG NELSON, THE CHIEF INFORMATION  
8 OFFICER?

9 A. I BELIEVE THEY ARE RELATED.

10 Q. NOW, WHAT IS THE DATE OF THIS CHAT?

11 A. THIS INSTANT MESSAGE IS DATED APRIL 17TH OF 2007.

12 Q. IS THAT BEFORE OR AFTER ORACLE BROUGHT THIS LAWSUIT?

13 A. THIS IS APPROXIMATELY A MONTH AFTER THE LAWSUIT. THE  
14 LAWSUIT WAS FILED, I BELIEVE, ON MARCH 22ND, 2007.

15 Q. WHAT DOES THIS CHAT MEAN TO YOU?

16 A. MY INTERPRETATION OF THIS CHAT, AS YOU SEE, RODERIC  
17 RUSSELL AT 4:01:53 SAY:

18 "DO YOU HAVE A SECOND FOR A QUESTION? I NEED TO  
19 RESEARCH A FIX THAT WAS GIVEN TO A CLIENT BY  
20 ORACLE AND I NEED TO FIND A CLIENT WITH A  
21 CURRENT MAINTENANCE END DATE SO I CAN LOGIN TO  
22 CUSTOMER CONNECTION."

23 THAT'S HOW CUSTOMER CONNECTION WORKED. IF YOU HAD A  
24 MAINTENANCE AGREEMENT WITH ORACLE, YOUR USER ID AND PASS PHRASE  
25 WOULD WORK WITH ORACLE, BUT OVER TIME, IF YOU STOPPED DOING

1 MAINTENANCE WITH ORACLE, YOUR CREDENTIAL WOULD NO LONGER WORK  
2 ON ORACLE'S CUSTOMER CONNECTION SITE.

3 SO WHAT RODERIC RUSSELL IS ASKING IS, I NEED A  
4 CUSTOMER'S USER ID AND PASS PHRASE THAT IS STILL ON ORACLE'S  
5 MAINTENANCE SO I CAN LOGIN TO THE CUSTOMER CONNECTION SITE TO  
6 RESEARCH SOMETHING.

7 AND THE ANSWER WITHIN 25, 30 SECONDS, I DO MY MATH,  
8 30 SECONDS IS FROM SHELLEY NELSON, WHO IS REPRESENTED AS  
9 TNWIFETEX IS "ROBERT HALF, BEAR STEARNS."

10 THERE'S YOUR CUSTOMER CONNECTION ID. NOT ONLY DOES  
11 SHE NOT SHOW AN INTEREST IN WHAT CUSTOMER ARE YOU ABOUT TO  
12 SUPPORT, MR. RUSSELL, BUT SHE ALSO GIVES HIM TWO OPTIONS.  
13 ROBERT HALF OR BEAR STEARNS.

14 THIS IS A VERY COMMON PATTERN WE SAW IN THESE  
15 INSTANT MESSAGES WHERE THERE'S INDIVIDUALS AT TOMORROW SAYING,  
16 I NEED A WORKABLE AND WORKING CREDENTIAL SO I CAN LOGIN TO DO  
17 THINGS FOR WHOEVER THEY HAD TO HELP.

18 Q. THANK YOU.

19 MR. HOWARD: YOU CAN TAKE THAT DOWN.  
20 BY MR. HOWARD:

21 Q. MR. MANDIA, I WANT YOU TO FOCUS ON A DIFFERENT TIME PERIOD  
22 NOW. WE HAVE TALKED ABOUT THE LAWSUIT BEING FILED IN MARCH OF  
23 2007.

24 WHAT DID YOU OBSERVE ABOUT THE NATURE OF  
25 TOMORROWNOW'S DOWNLOADING BEFORE MARCH OF 2007 COMPARED TO

1 AFTER?

2 A. THE DOWNLOADING FROM TOMORROWNOW'S BRYAN IP ADDRESS IS  
3 ULTIMATELY STOPPED WITHIN A MONTH OF THE LAWSUIT.

4 Q. DID OTHER DOWNLOADING CONTINUE?

5 A. THERE ARE SOME INSTANT MESSAGES THAT SUGGEST THAT SOME  
6 OTHER DOWNLOADING CONTINUED.

7 Q. IS THIS ONE THAT WE JUST SAW ONE OF THOSE?

8 A. IT SHOWS THAT CREDENTIALS ARE BEING SHARED, BUT WE DID NOT  
9 SEE A CORRESPONDING DOWNLOAD FROM THE BRYAN IP ADDRESSES FOR  
10 THAT CONNECTION.

11 Q. HOW ABOUT THE COPYING OF ORACLE'S ENTERPRISE SOFTWARE  
12 APPLICATIONS? HOW DOES THAT COMPARE BEFORE MARCH OF 2007, WHEN  
13 ORACLE BROUGHT THE LAWSUIT, AND AFTER?

14 A. I LOOKED INTO THIS, AND ONE OF THE THINGS I NOTICED WAS  
15 FROM MARCH 22, WHEN THE LAWSUIT WAS FILED, TO ABOUT APRIL OF  
16 2008, TOMORROWNOW CREATED A MINIMUM OF 563 ADDITIONAL  
17 ENVIRONMENTS. SO THEY CONTINUED TO MAKE ENVIRONMENTS AFTER THE  
18 LAWSUIT.

19 Q. AND HOW ABOUT CROSS USE; DID THAT CHANGE FROM BEFORE MARCH  
20 OF 2007 TO AFTER MARCH OF 2007?

21 A. OF THE FIXES THAT I REVIEWED, AND I REVIEWED OVER  
22 90 PERCENT OF THEM, THE CROSS USE REMAINED THE SAME DURING THAT  
23 TIME FRAME, MEANING THE CROSS USE BEING DONE IN 2006 AND 2007  
24 WAS VIRTUALLY IDENTICAL.

25 Q. IS THAT THE SAME 94 PERCENT RATE THAT YOU DESCRIBED

1 EARLIER?

2 A. YES, IT IS.

TEXT REMOVED - NOT RELEVANT TO MOTION



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

|                            |   |                           |
|----------------------------|---|---------------------------|
| ORACLE CORPORATION, ET AL. | ) | JURY TRIAL                |
|                            | ) |                           |
| PLAINTIFFS,                | ) | NO. C 07-01658 PJH        |
|                            | ) |                           |
| VS.                        | ) | VOLUME 8                  |
|                            | ) |                           |
| SAP AG, ET AL.,            | ) | PAGES 1421 - 1511         |
|                            | ) |                           |
| DEFENDANTS.                | ) | OAKLAND, CALIFORNIA       |
| _____                      | ) | MONDAY, NOVEMBER 15, 2010 |

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:           BINGHAM MUCCUTCHEN LLP  
                                  THREE EMBARCADERO CENTER  
                                  SAN FRANCISCO, CALIFORNIA 94111-4607

BY: ZACHARY J. ALINDER,  
      HOLLY A. HOUSE,  
      GEOFFREY M. HOWARD,  
      DONN P. PICKETT, ATTORNEYS AT LAW

                                  BOIES, SCHILLER & FLEXNER LLP  
                                  1999 HARRISON STREET, SUITE 900  
                                  OAKLAND, CALIFORNIA 94612

BY: DAVID BOIES,  
      STEVEN C. HOLTZMAN, ATTORNEYS AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY:           RAYNEE H. MERCADO, CSR NO. 8258  
                                  DIANE E. SKILLMAN, CSR NO. 4909

RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

## TEXT REMOVED - NOT RELEVANT TO MOTION

4 ALL RIGHT. AND I ALSO WANT TO CLEAR UP ONE OTHER  
5 THING WITH YOU ALL BEFORE WE START ON THE DEFENDANTS' CASE.

6 NOW, ON OCTOBER 29TH, SAP AG AND ITS WHOLLY OWNED  
7 SUBSIDIARY SAP AMERICA STIPULATED TO THEIR OWN LIABILITY IN THIS  
8 CASE FOR CONTRIBUTORY COPYRIGHT INFRINGEMENT. THIS WAS A  
9 DECISION MADE AND AUTHORIZED BY THE SAP EXECUTIVE BOARD, WHICH  
10 IS THE HIGHEST DECISION-MAKING MANAGEMENT AUTHORITY IN THE  
11 COMPANY.

12 NOW, SAP'S STIPULATION TO CONTRIBUTORY COPYRIGHT  
13 INFRINGEMENT IS INCLUDED IN YOUR BINDER AT TAB 6. IT'S CALLED  
14 THE "TRIAL STIPULATION AND ORDER REGARDING CONTRIBUTORY  
15 INFRINGEMENT." THE STIPULATION HAS NOW BECOME AN ORDER OF THE  
16 COURT.

17 NOW, THIS STIPULATION MEANS THAT SAP AMERICA AND SAP  
18 AG HAVE ADMITTED THAT THEY -- ONE, THAT THEY KNEW OR HAD REASON  
19 TO KNOW OF THE INFRINGING ACTIVITY OF TOMORROWNOW; AND, TWO,  
20 THAT THEY INTENTIONALLY MATERIALLY CONTRIBUTED TO THE INFRINGING  
21 ACTIVITY.

22 NOW, WHILE MERE KNOWLEDGE OF INFRINGING CONDUCT IS  
23 INSUFFICIENT TO SHOW CONTRIBUTORY INFRINGEMENT; INACTION,  
24 COMBINED WITH SPECIFIC KNOWLEDGE CAN, IN SOME CASES, CONSTITUTE  
25 MATERIAL CONTRIBUTORY INFRINGEMENT.

## STATEMENT OF COURT

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1                   NOW, YOU HAVE HEARD TESTIMONY FROM FOUR OF THE FIVE  
2 MEMBERS OF SAP AG'S EXECUTIVE BOARD AS IT WAS COMPRISED AT ALL  
3 RELEVANT TIMES BETWEEN DECEMBER OF 2004 WHEN SAP AG FIRST  
4 CONSIDERED ACQUIRING TOMORROWNOW AND MARCH 2007, WHEN THE  
5 PLAINTIFFS INITIATED THIS LAWSUIT.

6                   THE FIVE MEMBERS OF THE BOARD BETWEEN THESE -- THESE  
7 YEARS WERE MR. KAGERMANN, MR. OSWALD, MR. BRANDT, MR. AGASSI,  
8 AND MR. APOTHEKER. NOW, SOME OF THESE WITNESSES, INCLUDING  
9 MR. BRANDT, HAVE TESTIFIED THAT THEY EITHER, ONE, DID NOT KNOW  
10 OR HAD REASON TO KNOW OF THE COPYRIGHT INFRINGEMENT AT ISSUE IN  
11 THIS CASE; OR, TWO, KNEW OF THE INFRINGEMENT BUT DIRECTED OR PUT  
12 PRESSURE ON TOMORROWNOW TO STOP THE INFRINGEMENT.

13                   ANY TESTIMONY, QUESTION, OR ARGUMENT THAT STATES OR  
14 SUGGESTS THAT SAP AG, INCLUDING MEMBERS OF ITS EXECUTIVE BOARD,  
15 EITHER DID NOT KNOW OR HAVE REASON TO KNOW OF THE INFRINGEMENT  
16 OR DID NOT INTENTIONALLY MATERIALLY CONTRIBUTE TO INFRINGEMENT  
17 IS INCONSISTENT WITH SAP'S STIPULATION TO COPYRIGHT -- TO  
18 CONTRIBUTORY COPYRIGHT INFRINGEMENT IN THIS CASE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

10 Q. NOW, YOU WERE IN THE COURTROOM A FEW MINUTES AGO. WE HEARD  
11 SOME TESTIMONY FROM MR. JONES. RECALL THAT GENERALLY?

12 A. YES.

13 Q. THERE WAS SOME TESTIMONY AND SOME EMAILS AND HIS OWN  
14 TESTIMONY ABOUT HOW COMPLEX AND CHALLENGING IT IS TO SWITCH  
15 SOFTWARE, YOUR ERP SOFTWARE. DO YOU AGREE HIM?

16 A. I DO AGREE WITH HIM.

17 Q. WHY?

18 A. BECAUSE WE'RE BOTH IN THE INDUSTRY, AND WE KNOW THAT IT  
19 TAKES FOR CUSTOMERS TO, A, DECIDE ON MAKING AN INVESTMENT OF  
20 THIS SIDE AND SCALE; B, OF COURSE THERE'S ALL KINDS OF CHANGE  
21 MANAGEMENT. THERE'S ALL KINDS OF BUSINESS RATIONALE.

22 BECAUSE TYPICALLY, THESE DECISIONS HAVE TO BE NOT  
23 ONLY DECIDED ON BY EXECUTIVE MANAGEMENT, BUT MOST OF THE TIME,  
24 IT GOES UP TO THE BOARD OF DIRECTORS. SO I DON'T THINK IT WOULD  
25 WORK OUT VERY WELL GOING INTO THE BOARD OF DIRECTORS WITHOUT A

- 1 CLEAR BUSINESS RATIONALE TO MAKING SUCH A CHANGE THAT HAS A
- 2 MATERIAL IMPACT ON THE RESULTS OF A COMPANY.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

4 Q. I'M GOING TO TAKE A RISK, AND I'M GOING TO CHALLENGE YOU ON  
5 SOMETHING HERE. YOU KNOW, WE SWITCHED FROM WINDOWS COMPUTER TO  
6 APPLE COMPUTERS NOT TOO LONG AGO AT OUR HOUSE.

7 A. SURE.

8 Q. AND WE SURVIVED THROUGH THAT. IS IT REALLY THAT BIG A DEAL  
9 TO SWITCH THE ERP SYSTEM AT A COMPANY?

10 A. IT REALLY IS A BIG DEAL.

11 Q. WHY?

12 A. WELL, YOU -- IF YOU THINK OF IT AS A PLUMBING IN A HOUSE,  
13 YOU'RE ESSENTIALLY REWIRING ALL THE PLUMBING IN THE HOUSE, AND  
14 THAT'S A BIG DEAL. SHEETROCK HAS TO COME OFF. PEOPLE HAVE TO  
15 PUT NEW PIPES INTO TWO-BY-FOURS, AND THEY HAVE TO DO THAT  
16 THROUGHOUT THE WHOLE ENTERPRISE. IT'S A BIG COMMITMENT. AND  
17 CUSTOMERS WILL ONLY MAKE THAT COMMITMENT IF THEY SEE THE  
18 BUSINESS RATIONALE IS ROCK SOLID AND THE GAIN FAR OUTWEIGHS THE  
19 DIFFICULTY OF CHANGE, SO IT'S A BIG CONVERSATION.

20 Q. IS MAINTENANCE AND SAVING MONEY ON MAINTENANCE A  
21 SUFFICIENTLY COMPELLING BUSINESS RATIONALE IN YOUR EXPERIENCE  
22 WITH CUSTOMERS?

23 A. ABSOLUTELY NOT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

23 Q. WHEN DID YOU FIRST BECOME AWARE THAT SAP HAD ENGAGED IN  
24 CONTRIBUTORY COPYRIGHT INFRINGEMENT OF ORACLE'S SOFTWARE?

25 A. WHEN THE ORACLE LAWSUIT WAS ANNOUNCED.

TEXT REMOVED - NOT RELEVANT TO MOTION

20 Q. AND ORACLE AND SAP ARE FIERCE COMPETITORS?

21 A. YES, WE ARE.

22 Q. AND YOU WERE FIERCE COMPETITORS BEFORE ORACLE ACQUIRED  
23 PEOPLESOFT, CORRECT?

24 A. YES.

25 Q. AND YOU WERE EVEN MORE FIERCE COMPETITORS AFTERWARDS,

1 CORRECT?

2 A. TRUE. TRUE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

5 Q. NOW, FOCUSING ON THE SITUATION WHERE YOU'RE ACTUALLY USING  
6 A COMPETITOR'S SOFTWARE TO TRY TO TAKE AWAY THEIR CUSTOMERS, DO  
7 YOU HAVE ANY LICENSES LIKE THAT?

8 A. I DON'T.

9 Q. OKAY.

10 A. NOT THAT I AM AWARE OF ANYWAY.

11 Q. IF YOU WERE GOING TO LICENSE ORACLE TO USE YOUR SOFTWARE  
12 TO TRY TO TAKE AWAY YOUR CUSTOMERS, YOU WOULD CHARGE A LOT OF  
13 MONEY FOR THAT, WOULDN'T YOU, SIR?

14 A. I WOULD ASSUME WE'D HAVE SOME KIND OF RUNNING ROYALTY, BUT  
15 IT WOULD BE AN ODD ARRANGEMENT.

TEXT REMOVED - NOT RELEVANT TO MOTION

CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, MONDAY, NOVEMBER 15, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR



DIANE E. SKILLMAN, CSR, RPR, FCRR

TUESDAY, NOVEMBER 16, 2010

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

|                            |   |                            |
|----------------------------|---|----------------------------|
| ORACLE CORPORATION, ET AL. | ) | JURY TRIAL                 |
|                            | ) |                            |
| PLAINTIFFS,                | ) | NO. C 07-01658 PJH         |
|                            | ) |                            |
| VS.                        | ) | VOLUME 9                   |
|                            | ) |                            |
| SAP AG, ET AL.,            | ) | PAGES 1512 - 1695          |
|                            | ) |                            |
| DEFENDANTS.                | ) | OAKLAND, CALIFORNIA        |
| _____                      | ) | TUESDAY, NOVEMBER 16, 2010 |

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:                   BINGHAM MCCUTCHEN LLP  
  THREE EMBARCADERO CENTER  
  SAN FRANCISCO, CALIFORNIA 94111-4607  
BY: ZACHARY J. ALINDER,  
      HOLLY A. HOUSE,  
      GEOFFREY M. HOWARD,  
      DONN P. PICKETT, ATTORNEYS AT LAW  
  
  BOIES, SCHILLER & FLEXNER LLP  
  1999 HARRISON STREET, SUITE 900  
  OAKLAND, CALIFORNIA 94612  
BY: DAVID BOIES,  
      STEVEN C. HOLTZMAN, ATTORNEYS AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY:                   RAYNEE H. MERCADO, CSR NO. 8258  
  DIANE E. SKILLMAN, CSR NO. 4909

RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

TEXT REMOVED - NOT RELEVANT TO MOTION

9 Q. IF YOU WOULD JUST EXPLAIN TO US, MR. CLARKE, WHAT THIS SLIDE  
10 IS AND WHAT IT MEANS.

11 A. YES. THIS SLIDE SHOWS THAT THERE ARE REALLY THREE AREAS  
12 THAT WE CALCULATE THESE DAMAGES IN. AND TWO OF THEM GO TOGETHER  
13 AND ARE AN ALTERNATIVE TO THE THIRD WAY OF DOING IT, AND YOU'RE  
14 PROBABLY FAMILIAR WITH ALL OF THESE TERMS BY NOW.

15 THE LOST SUPPORT PROFITS, THAT WILL BE THE PROFITS  
16 THAT ORACLE WOULD HAVE MADE IF THE CUSTOMERS AT ISSUE HAD NOT  
17 LEFT ORACLE. SO WE LOOK AT THE ONES THAT LEFT AS A RESULT OF  
18 THE INFRINGEMENT, CALCULATE THE PROFITS ORACLE WOULD HAVE MADE  
19 ON THOSE, AND THAT'S THIS \$19.3 MILLION NUMBER AT THE TOP.

20 THE INFRINGER'S PROFITS IS THE PROFITS THAT SAP AND  
21 TOMORROWNOW MADE THAT THEY WOULDN'T HAVE MADE ABSENT THE  
22 INFRINGEMENT. AND THAT'S WHAT WE CALL THE INFRINGER'S PROFITS.  
23 THAT'S THE EIGHT-POINT -- ALMOST \$8.7 MILLION ON HERE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

15 Q. WHETHER YOU SAY PUNISHMENT DOESN'T PLAY ANY ROLE IN THIS,  
16 WHY NOT?

17 IF -- IF THE DEFENDANT HAS INFRINGED THE PLAINTIFF'S  
18 COPYRIGHT, WHY DOESN'T PUNISHMENT PLAY SOME ROLE?

19 A. THAT'S A -- THAT'S ACTUALLY THE THIRD PIECE OF THE  
20 HYPOTHETICAL NEGOTIATION WHICH I DIDN'T GET TO. IN THE -- THE  
21 TIMING OF THE HYPOTHETICAL NEGOTIATION, WE'RE LOOKING AT A  
22 PERIOD RIGHT BEFORE THE INFRINGEMENT BEGINS. SO IN THAT  
23 NEGOTIATION, THERE IS NO INFRINGEMENT. THERE'S NO PUNISHMENT,  
24 THERE'S NO ANGER. THIS IS TWO BUSINESS PEOPLE TRYING TO REACH A  
25 DEAL.

1                   AND SO IT'S BECAUSE THE -- THE NEGOTIATION GOES ON  
2 BEFORE INFRINGEMENT BEGAN THAT THERE'S NO PUNISHMENT AND ANGER  
3 ALLOWED.

4 Q.   NOW, ONE OF THE ORACLE EXECUTIVES TESTIFIED IN SUBSTANCE  
5 THAT A NUMBER IN THE MILLIONS LIKE YOU'VE COME UP WITH WOULD  
6 REWARD BAD BEHAVIOR.   REWARD BAD BEHAVIOR.

7                   DOES THAT CONCEPT FIT HERE?

8 A.   NO.

9 Q.   AND WHY NOT?

10 A.   THAT REALLY GOES TO THE -- TO THE PUNISHMENT ANGLE.   WHAT  
11 WE'RE TRYING TO COME UP WITH IS WHAT WOULD BE REASONABLE IN THE  
12 CIRCUMSTANCES AND BASED ON ALL -- THE FACTS.   SO THERE'S NO  
13 QUESTION OF PUNISHING ANYONE OR REWARDING ANYONE FOR BAD  
14 BEHAVIOR.

15                   THE -- THE LICENSE AGREEMENT -- THE NEGOTIATION TAKES  
16 PLACE BEFORE THERE'S ANYTHING TO REWARD OR PUNISH, SO IT'S ALL  
17 GOT TO DO WITH THE TIMING OF THIS.   SO THAT'S WHY YOU DON'T DO  
18 ANY OF THE PUNISHING AND REWARDING.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

2 Q. OKAY. LET'S TURN TO THE ORACLE SIDE NOW. HAVE YOU SEEN  
3 DOCUMENTS THAT REFLECTED WHAT ORACLE WAS THINKING ABOUT THE --  
4 ABOUT TOMORROWNOW DURING THIS TIME?

5 A. THERE ARE MANY DOCUMENTS -- BECAUSE, REMEMBER, ORACLE AND  
6 TOMORROWNOW ACTUALLY HAD A RELATIONSHIP BEFORE ORACLE ACQUIRED  
7 PEOPLESOFT. SO PEOPLESOFT ORIGINALLY HAD THAT RELATIONSHIP, SO  
8 THERE WAS KNOWLEDGE OF TOMORROWNOW PRIOR TO ORACLE BUYING  
9 PEOPLESOFT. AND THAT INFORMATION CONTINUED. IT FLOWED IN A  
10 CONTINUUM, IF YOU LIKE, BECAUSE SOME OF THE SAME PEOPLE WERE  
11 INVOLVED AT PEOPLESOFT AND THEN LATER AT ORACLE.

12 SO ORACLE WAS WELL AWARE OF TOMORROWNOW'S ACTIVITIES.  
13 AND THE -- THERE'S NO FORECAST -- THERE ARE NO ASSUMPTIONS,  
14 THERE ARE NO PROJECTIONS THAT SHOW WHAT THEY WERE THINKING AT  
15 THE TIME. THE ONLY THING WE CAN SEE IS THAT EVERYTHING THAT  
16 THEY WROTE MOSTLY IN EMAIL TRAFFIC AND THAT KIND OF THING, SOME  
17 PRESENTATIONS, SHOWS THAT THEY THOUGHT THAT TOMORROWNOW WAS JUST  
18 A -- A NON- -- A NOTHING. IT WAS A NON-ENTITY.

19 I DON'T KNOW WHETHER YOU'RE GOING TO PUT UP ANY OF  
20 THOSE STATEMENTS OR NOT, BUT THERE WERE A LOT THAT YOU PUT UP  
21 THE OTHER DAY --

22 Q. WE'VE SEEN THOSE A LOT, BUT LET ME ASK YOU, ORACLE'S  
23 RESPONSE TO THAT, AS YOU'VE HEARD -- OR AS YOU'VE SEEN IS THAT  
24 THEY WERE UNDERESTIMATING THE IMPACT OF TOMORROWNOW BECAUSE THEY  
25 DIDN'T KNOW IT WAS INFRINGING.

1                   IN YOUR VIEW, WHAT EFFECT WOULD IT HAVE HAD FOR  
2                   PURPOSES OF THIS HYPOTHETICAL NEGOTIATION IF ORACLE HAD KNOWN  
3                   ABOUT THE INFRINGEMENT?

4                   A.   IT WOULD HAVE HAD NO EFFECT WHATSOEVER.   BECAUSE WHAT WAS  
5                   HAPPENING IN THE MARKETPLACE WAS HAPPENING IN THE MARKETPLACE.  
6                   TOMORROWNOW WAS ADVERTISING.   SAP WAS HELPING THEM.   THEY -- SO  
7                   THEY KNEW, AS THE MARKET KNEW, WHAT WAS GOING ON WITH  
8                   TOMORROWNOW.

9                   SO THE FACT THAT THEY WERE INFRINGING MAY WELL HAVE  
10                  BEEN OFFENSIVE TO THE ORACLE PEOPLE, BUT IT WOULDN'T HAVE  
11                  AFFECTED WHAT THEY THOUGHT ABOUT THE -- THE SUCCESS OF THE  
12                  PROGRAM.   EVERYTHING THAT WAS KNOWN WAS KNOWN.

13                  SO THAT MAKES NO DIFFERENCE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

17 Q. AND HOW DID YOU GO ABOUT DETERMINING WHAT THE ROYALTY RATE  
18 WOULD BE, THE RATE?

19 A. THE WAY I DID THIS RATE WAS DIFFERENT FOR TOMORROWNOW AND  
20 SAP. BUT IN BOTH CASES, I SET THE RATE AS HIGH AS I POSSIBLY  
21 COULD AND STILL BE ABLE TO SAY IT WAS REASONABLE.

22 MY RATIONALE FOR DOING THAT WAS THESE TWO COMPANIES  
23 ARE LOCKED IN MORTAL COMBAT. THEY WANT TO FIGHT TO THE DEATH.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

19 Q. OKAY. WE'VE HEARD ABOUT THE GEORGIA PACIFIC FACTORS.  
20 MR. MEYER MENTIONED THOSE. I THINK HE HAD A SLIDE ON THEM AS  
21 WELL.

22 DID YOU CONSIDER THE GEORGIA PACIFIC FACTORS IN  
23 REACHING YOUR OPINION?

24 A. I DID.

25 Q. OKAY. WE HAVE A SLIDE ON THOSE FACTORS, AND I THINK IT WILL

1 HELP US JUST WALK THROUGH THEM.

2 SLIDE 3, PLEASE.

3 (DEMONSTRATIVE PUBLISHED TO THE JURY.)

4 BY MR. MITTELSTAEDT:

5 Q. OKAY. LET'S NOT GO OVER ALL 15, BUT GROUP THEM TOGETHER.

6 AND I'D LIKE TO ASK YOU TO START WITH NO. 1, NO. 2, NO. 4, AND

7 NO. 12, WHICH HAVE TO DO WITH NORMAL ROYALTIES RECEIVED AND PAID

8 BY THESE PARTIES AND THEIR NORMAL POLICIES AND PROFITSHARING.

9 HOW DID YOU -- WHAT IS THAT -- WHAT DO THOSE FACTORS

10 MEAN, AND HOW DID YOU APPLY THEM?

11 A. THE -- THE IDEAL THING THAT WE ARE LOOKING FOR WHEN WE'RE

12 DOING THIS ANALYSIS IS AN ESTABLISHED ROYALTY. IF YOU CAN GO

13 OUT INTO THE MARKETPLACE AND FIND AN ESTABLISHED ROYALTY, THEN

14 YOU JUST USED THAT.

15 I DIDN'T FIND THAT IN THIS CASE AS IT HAPPENS, BUT

16 THESE FACTORS THAT WE'RE LOOKING AT HERE ALL HAVE TO DO WITH, IS

17 THERE AN ESTABLISHED ROYALTY IN THE MARKETPLACE. DO THE

18 COMPANIES HAVE AN ESTABLISHED WAY OF CHARGING FOR THIS TIME TYPE

19 OF SERVICE? SO THAT'S WHAT THOSE FACTORS ARE RELATED TO.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

17 Q. FACTOR 5 IS RELATIONSHIPS. TELL US WHAT THAT IS AND WHAT  
18 EFFECT THAT HAS HERE.

19 A. I HINTED AT THIS A LITTLE EARLIER. THE RELATIONSHIP BETWEEN  
20 THESE -- THESE PARTIES IS MORTAL ENEMIES, SO I -- I USE THAT TO  
21 INCREASE THE ROYALTY RATE. I WANTED TO REFLECT A VERY HIGH RATE  
22 BECAUSE OF THAT RELATIONSHIP.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

21 Q. OKAY. AND LET'S LOOK AT SLIDE 5.

22 (DEMONSTRATIVE PUBLISHED TO THE JURY.)

23 BY MR. MITTELSTAEDT:

24 Q. WHAT DOES THIS SHOW?

25 A. THIS SHOWS THE TOMORROWNOW REVENUE BY YEAR, AND YOU CAN SEE

1 ON THE LEFT-HAND SIDE HERE, WE HAVE THE YEARS. THE REVENUE IS  
2 IN THIS COLUMN. THIS WAS THE TOTAL REVENUE. WASN'T ACTUALLY  
3 THEIR ACTUAL REVENUE. I MADE SOME ADJUSTMENTS TO IT. I  
4 INCREASED THE REVENUES BECAUSE SAP WAS GETTING THEM TO DO  
5 DISCOUNTS FOR SOME CUSTOMERS. SO IF THEY DISCOUNTED IT HEAVILY,  
6 I ADDED BACK WHAT THEY REALLY SHOULD HAVE CHARGED 'CAUSE I FELT  
7 THAT WAS KIND OF LIKE A LOSS LEADER OPERATION FOR SAP.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

20 Q. HOW WOULD YOU COMPARE THE AMOUNT OF SPECULATION THAT WOULD  
21 BE REQUIRED TO COME TO SOME LUMP-SUM APPROACH HERE WITH THE  
22 OTHER CASES THAT YOU HAVE SEEN WHERE THERE ARE COMPARABLE  
23 LICENSES THAT CAN BE USED AS A BASIS FOR AN UPFRONT PAYMENT?

24 A. WELL, IF WE HAVE COMPARABLE LICENSES, THIS IS, LIKE YOU MAY  
25 HAVE HEARD, AN APPRAISER -- IF YOU'VE EVER BOUGHT AND SOLD A

1 HOUSE. THE APPRAISER COMES OUT AND SAYS, WELL, WE'VE LOOKED AT  
2 THE COMPS IN YOUR NEIGHBORHOOD, AND THE WAY THEY VALUE YOUR  
3 HOUSE IS THEY LOOK AT THE OTHERS THAT ARE LIKE IT, AND THEY SAY  
4 WE THINK BASED ON THAT, YOUR HOUSE WILL SELL FOR THIS MUCH.

5 IF THERE WERE COMPARABLE LICENSES HERE, WE WOULD HAVE  
6 USED THEM. I DIDN'T FIND ANY COMPARABLE LICENSES TO THIS  
7 PARTICULAR SCOPE OF INFRINGEMENT. SO THE LICENSE WE'RE TALKING  
8 ABOUT WITH LIMITED DURATION, LIMITED GEOGRAPHY, LIMITED ABILITY  
9 TO SELL AND BUY AND AMEND THE SOFTWARE, IS THAT -- THAT WOULD BE  
10 SOMETHING THAT THEY WOULD NOT WANT TO DEAL WITH. THEY WOULD --  
11 THEY'D WANT THE RUNNING ROYALTY TO DO THAT.

TEXT REMOVED - NOT RELEVANT TO MOTION

1 A. YES. ON THE LEFT HERE -- THEY'RE NOT TERRIBLY GOOD  
2 REPRESENTATIONS, BUT THESE ARE ACTUALLY COMPUTERS (INDICATING)  
3 AND SERVERS. AND INSIDE THE COMPUTER, WE HAVE PROCESSORS, AND  
4 EACH -- THIS ONE HAS FOUR PROCESSORS, AND EACH PROCESSOR IS A  
5 DUAL CORE, SO THE TOTAL NUMBER OF CORES IN THAT COMPUTER IS  
6 EIGHT. AND THIS IS WHAT TOMORROWNOW ACTUALLY HAD.

7 AND THEN THEY HAD ANOTHER COMPUTER THAT HAD EIGHT  
8 CORES IN IT AS WELL.

9 THE WAY ORACLE LICENSES THE -- THE DATABASE IS YOU  
10 DON'T PAY FOR EVERY CORE. THERE'S A FACTOR. AND IN THIS -- FOR  
11 THIS PARTICULAR TYPE OF EQUIPMENT, THAT FACTOR WAS 75 PERCENT.  
12 SO YOU TAKE 75 PERCENT OF 8, AND YOU GET 6.

13 AND IF YOU DO THE MATH OF 75 PERCENT OF THESE CORES,  
14 YOU GET THIS MANY CORES. AND THEN THEY ALSO HAD THESE 5  
15 COMPUTERS DOWN HERE, AND THIS WAS A -- DUAL-PROCESSOR, DUAL-CORE  
16 SO THERE ARE FOUR OF THOSE. WE'VE GOT 3 MACHINES LIKE THAT, ONE  
17 WITH JUST ONE PROCESSOR, DUAL-CORE, AND THIS ONE HAD -- WHATEVER  
18 THAT IS, EIGHT PROCESSORS, AND THEY WERE DUAL-CORE.

19 SO BECAUSE OF THE TYPE OF MACHINERY THAT THEY ARE,  
20 THE MULTIPLE FOR ORACLE FOR THOSE IS ONLY 50 PERCENT, SO THAT  
21 GIVES YOU THIS NUMBER OF CORES.

22 Q. MR. CLARKE, CAN I INTERRUPT YOU? WHEN YOU SAY THE LICENSING  
23 FACTOR FOR ORACLE, ARE YOU TALKING ABOUT THE LICENSING FACTOR  
24 THEY'RE APPLYING IN THIS CASE OR SOMETHING DIFFERENT?

25 A. THIS IS WHAT COMES OFF THE LICENSE WHEN YOU LOOK -- WHEN YOU

1 GO ON TO THEIR WEBSITE, YOU CAN SEE WHAT THEY SELL. AND THESE  
2 ARE THE FACTORS THAT APPLY TO THIS TYPE OF EQUIPMENT. SO  
3 IT'S -- IT'S A DIFFERENT FEE DEPENDING ON HOW -- DIFFERENT  
4 FACTOR DEPENDING ON THE NATURE OF THE EQUIPMENT.

5 AND I -- I'M PRETTY SURE MR. MEYER ADOPTED THE  
6 75 PERCENT. I DON'T THINK HE ADOPTED THE 50 PERCENT. I DON'T  
7 THINK -- I THINK HE IGNORED THESE COMPUTERS AND THIS 50 PERCENT,  
8 AND HE WENT WITH ESSENTIALLY 6 CORES, WHICH HE GOT FROM -- THEN  
9 MULTIPLIED BY THE 75 PERCENT.

10 SO IF YOU DO THAT MATH, THERE ARE ACTUALLY 27 CORES.  
11 THAT'S WHAT -- THAT'S WHAT TOMORROWNOW ACTUALLY USED. AND HOW  
12 THEY WOULD HAVE BEEN PRICED BY ORACLE NOT ON THE PER DOLLAR YET,  
13 BUT PER CORE. ANYWAY, THERE WERE 27 OF THEM.

14 Q. AND THEN WHAT'S THE NEXT STEP IN YOUR CALCULATION OF THE  
15 ROYALTY FOR THE DATABASE?

16 A. THE NEXT STEP IS TO LOOK AT THE COST THAT ORACLE CHARGES FOR  
17 A DATABASE. AND I ASSUME AN ENTERPRISE EDITION, WHICH IS  
18 \$40,000. SO THAT YOU WOULD NEED 20 -- I'M SORRY.

19 Q. ACTUALLY, LET ME GO ON TO SLIDE 8, WHICH WILL HELP EXPLAIN  
20 IT.

21 (DEMONSTRATIVE PUBLISHED TO THE JURY.)

22 THE WITNESS: OKAY. SO THE LICENSE FEE FOR ORACLE'S  
23 DATABASE IS \$40,000. AND IT'S FOR EACH PROCESSOR, SO THERE ARE  
24 27 PROCESSORS. THEN THE MAINTENANCE IS \$8,800 A YEAR FOR EACH  
25 PROCESSOR.

TEXT REMOVED - NOT RELEVANT TO MOTION

15 AND I SHOULD POINT OUT THAT ON THE ORACLE DATABASE, WE HAVE A --  
16 AN ESTABLISHED PRICE FOR THIS, SO ORACLE DATABASE ISN'T REALLY  
17 BEING PRICED THROUGH GEORGIA PACIFIC. IT'S BEING PRICED THROUGH  
18 LOOKING AT -- ON THEIR WEBSITE, YOU CAN SEE THE PRICE THAT THEY  
19 CHARGE FOR AN ENTERPRISE EDITION. AND THAT'S THE NUMBER I PUT  
20 IN HERE, THE 40,000.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

22 Q. AND LET'S LOOK FINALLY AT TWO SLIDES, SLIDE 53 TO START  
23 WITH.

24 (SLIDE DISPLAYED ON SCREEN.)

25 AS YOU DID FOR THE LOST SUPPORT PROFITS, IF YOU

1 WOULD WALK US THROUGH HOW YOU ACTUALLY DID THE CALCULATION ONCE  
2 YOU DETERMINED THE NUMBER OF CUSTOMERS?

3 A. YES.

4 WHEN I LOOKED AT THE CUSTOMERS, I FOUND THAT THE  
5 TOTAL REVENUE WAS THE 703 MILLION, THE NUMBER RIGHT AT THE TOP  
6 THERE. THAT'S 703 MILLION IS THAT TOTAL. SO THIS IS REVENUE  
7 OF SAP AFTER THE TOMORROWNOW START DATE. SO THAT'S IMPORTANT.  
8 WE ARE ONLY LOOKING AT THE REVENUE THAT THEY GENERATED AFTER  
9 THE TOMORROWNOW START DATE.

10 AND IF THAT WAS A CONTINUATION, IF THERE WAS SOME  
11 CONTINUATION OF WHAT THEY WERE DOING BEFORE THEN, SO THEY WERE  
12 ALREADY ON MAINTENANCE FOR A NUMBER OF PRODUCTS AND PAYING  
13 LET'S SAY HALF A MILLION DOLLARS A YEAR IN MAINTENANCE, AND  
14 THAT WOULD JUST CONTINUING, THAT SHOULDN'T BE ATTRIBUTED TO  
15 THIS BECAUSE THE SALE WAS MADE PRIOR. SO IT WOULD NOT BE  
16 AFFECTED BY WHAT WE ARE DOING HERE.

17 SO, THAT 703 MILLION REFLECTS THE ADJUSTMENT FOR  
18 AFTER THE TOMORROWNOW START DATE AND NOT INCLUDING ANY OF THAT  
19 ONGOING REVENUE.

20 Q. MR. CLARKE, LET ME JUST STOP YOU FOR A MINUTE.

21 THE END DATE FOR THIS CALCULATION IS, I AM NOT SURE  
22 IF YOU SAID IT, IT'S THE SAME END DATE THAT MR. MEYER USES?

23 A. ACTUALLY, I THINK THIS IS MORE LIKE 12/31/08. I AM PRETTY  
24 SURE THAT'S THE DATE WE USED.

25 Q. IN ANY EVENT, THE TWO OF YOU, YOU AND MR. MEYER, HAVE

1 CALCULATED THE INFRINGERS' PROFITS FOR THE SAME TIME PERIOD?

2 A. YES. WE BOTH USE THE SAME TIME PERIOD. IT'S JUST THREE  
3 MONTHS LONGER, THAT'S ALL.

4 Q. GO AHEAD.

5 A. THE UNRELATED REVENUES, THAT WAS AN ACQUISITION THAT SAP  
6 MADE THAT'S NOT INCLUDED IN THIS CASE, SO I TOOK THAT OUT.

7 AND SO THE REVENUES FOR THE EXCLUDED CUSTOMERS,  
8 THESE ARE ALL THE PEOPLE, ALL THE CUSTOMERS I EXCLUDED WERE  
9 675 MILLION. SO I SUBTRACT THAT BECAUSE THEY ARE NO LONGER  
10 INCLUDED. SO THE SUBTOTAL IS 13.7 MILLION.

11 AND I GET TO DEDUCT THE EXPENSE; THAT'S THE  
12 APPROPRIATE THING TO DO. SO THAT'S THE REVENUE. YOU TAKE AWAY  
13 THE EXPENSE. THAT WILL BE THE PROFIT THAT THE INFRINGERS MADE.

14 THE EXPENSES WERE 6 MILLION. THAT LEAVES SAP  
15 PROFITS TO BE DISGORGED OF 7.6 MILLION. AND TOMORROWNOW  
16 PROFITS WERE \$1 MILLION. YOU ADD THE 7.6 AND THE 1 MILLION AND  
17 YOU GET \$8.6 MILLION AS THE INFRINGERS' PROFITS.

18 Q. AND FINALLY, LET'S END WHERE WE STARTED, SLIDE 54. AND IF  
19 YOU WOULD WALK US THROUGH THIS, PLEASE.

20 (SLIDE DISPLAYED ON SCREEN.)

21 A. THIS IS SIMPLY A SUMMARY OF EVERYTHING WE HAVE TALKED  
22 ABOUT SO FAR.

23 SO IF YOU LOOK AT THE TOP, THIS IS -- IF YOU  
24 REMEMBER THE FIRST SLIDE THAT I SHOWED YOU, HAD TWO WAYS OF  
25 DOING IT AT THE TOP OR THE REASONABLE ROYALTY AT THE BOTTOM.

1                   SO AT THE TOP HERE, WE HAVE ORACLE'S LOST SUPPORT  
2 PROFITS OF 19.3 MILLION. THE INFRINGERS' SAP PROFITS OF 7.6,  
3 AND TOMORROWNOW INFRINGERS' PROFITS OF 1 MILLION. SO THE TOTAL  
4 LOST PROFITS AND INFRINGERS' PROFITS OF \$28 MILLION.

TEXT REMOVED - NOT RELEVANT TO MOTION

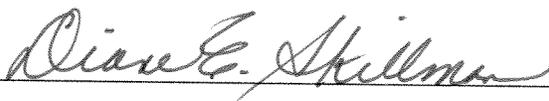
CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, TUESDAY, NOVEMBER 16, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR



DIANE E. SKILLMAN, CSR, RPR, FCRR

WEDNESDAY, NOVEMBER 17, 2010

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

|                            |   |                             |
|----------------------------|---|-----------------------------|
| ORACLE CORPORATION, ET AL. | ) | JURY TRIAL                  |
|                            | ) |                             |
| PLAINTIFFS,                | ) | NO. C 07-01658 PJH          |
|                            | ) |                             |
| VS.                        | ) | VOLUME 10                   |
|                            | ) |                             |
| SAP AG, ET AL.,            | ) | PAGES 1696 - 1879           |
|                            | ) |                             |
| DEFENDANTS.                | ) | OAKLAND, CALIFORNIA         |
| _____                      | ) | THURSDAY, NOVEMBER 18, 2010 |

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:           BINGHAM MCCUTCHEN LLP  
                                  THREE EMBARCADERO CENTER  
                                  SAN FRANCISCO, CALIFORNIA 94111-4607

BY: ZACHARY J. ALINDER,  
      HOLLY A. HOUSE,  
      GEOFFREY M. HOWARD,  
      DONN P. PICKETT, ATTORNEYS AT LAW

                                  BOIES, SCHILLER & FLEXNER LLP  
                                  1999 HARRISON STREET, SUITE 900  
                                  OAKLAND, CALIFORNIA 94612

BY: DAVID BOIES,  
      STEVEN C. HOLTZMAN, ATTORNEYS AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY:           RAYNEE H. MERCADO, CSR NO. 8258  
                                  DIANE E. SKILLMAN, CSR NO. 4909

RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

TEXT REMOVED - NOT RELEVANT TO MOTION

12 MR. LANIER: WE HAD ONE SMALL ISSUE WE THOUGHT WE  
13 WOULD TRY TO TAKE UP NOW THAT RELATES TO THE ANTICIPATED  
14 REBUTTAL TESTIMONY OF MS. CATZ. THEY'VE DISCLOSED A VARIETY OF  
15 DEMONSTRATIVES IN USE WITH HER TESTIMONY. OUR OBJECTION IS NOT  
16 TO THE DEMONSTRATIVES THEMSELVES, BUT TO US IT APPEARS THAT WHAT  
17 THEY INTEND TO DO IS USE MS. CATZ AS AN EXPERT WITNESS. SHE  
18 HASN'T BEEN DISCLOSED AS SUCH. THEY HAVE AN EXPERT ON THESE  
19 TOPICS. THE DEMONSTRATIVES --

20 THE COURT: WHAT ARE THE TOPICS?

21 MR. LANIER: THE TOPICS, IT LOOKS LIKE, RESPONDING TO  
22 MR. CLARK'S HYPOTHETICAL LICENSE ANALYSIS. THERE'S A VARIETY OF  
23 DEMONSTRATIVES THAT WE'RE NOT OBJECTING TO. IT LOOKS LIKE FACT  
24 TESTIMONY TO US. BUT, SPECIFICALLY, IT LOOKS LIKE MS. CATZ WILL  
25 OFFERING HER ECONOMIC ANALYSIS IN RESPONSE TO MR. CLARKE'S

1 ANALYSIS OF THE HYPOTHETICAL LICENSE.  
2 TO US -- PUTTING ASIDE OUR OTHER OBJECTION ABOUT  
3 SPECULATION OR THE OTHER ISSUES WE'VE TAKEN UP, THAT DOES APPEAR  
4 TO BE UNDISCLOSED EXPERT TESTIMONY ON WHICH THERE IS A DISCLOSED  
5 EXPERT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

10                   MR. LANIER: YES, YOUR HONOR, BECAUSE, AS YOUR HONOR  
11 HAS RULED, THE CALCULATION OF THE VALUE OF THE HYPOTHETICAL  
12 LICENSE IS BASED ON THE OBJECTIVELY REASONABLE PRUDENT  
13 BUYER/PRUDENT SELLER. THERE MIGHT BE FACT TESTIMONY ABOUT WHAT  
14 WE HAD IN OUR MINDS AT THE TIME, WHAT OUR BUSINESS PLANS OR  
15 EXPECTATIONS WERE AT THE TIME.

16                   BUT TO OFFER THAT ANALYSIS, WHICH IS PRECISELY  
17 REBUTTING MR. CLARKE'S ANALYSIS, NOT FACTS, BUT ANALYSIS, TO US,  
18 SEEMS TO BE THE PROVINCE OF EXPERTS. AND THEY'VE ACTUALLY  
19 OFFERED AN EXPERT TO DO EXACTLY THAT, MR. MEYER, WHO I THINK IS  
20 WITH US TODAY AND PRESUMABLY WILL COME BACK ON REBUTTAL.

21                   SO TO US, THAT ANALYSIS IS THE EXPERT TESTIMONY.  
22 FACTS, LIKE HERE WAS OUR BUSINESS MODEL AT THE TIME, OR HERE  
23 WERE OUR BUSINESS PLANS AT THE TIME, ARE, OF COURSE, DIFFERENT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

14 MR. LANIER: YOUR HONOR, THAT'S -- AGAIN, THAT'S  
15 PRECISELY THE ANALYSIS MR. CLARKE GAVE. THE ISSUE IS THE  
16 ANALYSIS. THE SCENARIO THAT EXISTED AT THAT TIME ISN'T THE  
17 SCENARIO THAT'S DEALT WITH IN THESE. IT ALSO REQUIRES US, FOR  
18 EXAMPLE, TO GET INTO CROSS-EXAMINATION ABOUT THE ASSUMPTIONS  
19 ABOUT HOW MANY CUSTOMERS WOULD HAVE LEFT. IT IS GOING TO, THEN,  
20 NECESSARILY BE HIGHLY SPECULATIVE. AND SO TO US, THAT'S  
21 IMPROPER EXPERT TESTIMONY.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

11 THE COURT: WELL, THE PROBLEM THAT I SEE IN THIS CASE  
12 IS THAT SO MANY OF THE WITNESSES HAVE THE KIND OF TECHNICAL  
13 KNOWLEDGE, IF YOU WILL, NECESSARY TO PRESENT TO BOTH PROSECUTE  
14 AND DEFEND THE CASE THAT THEY'RE NOT REALLY EXPERTS, BUT THEY  
15 CAN CERTAINLY TALK ABOUT THINGS THAT THEY HAVE PERSONAL  
16 KNOWLEDGE ABOUT, GIVEN THE NATURE OF THEIR POSITIONS. AND IT  
17 WOULD SEEM TO ME THAT SOMEONE IN MS. CATZ'S POSITION WOULD KNOW  
18 THIS KIND OF INFORMATION.

19 I THINK IT'S ENTIRELY APPROPRIATE. AND I DON'T THINK  
20 IT'S NECESSARILY EXPERT TESTIMONY. I THINK IT'S WITHIN THE  
21 REALM OF HER EXPERTISE AND HER POSITION.

22 MR. LANIER: UNDERSTOOD, YOUR HONOR. WE THOUGHT WE'D  
23 RAISE IT NOW SO THAT WE DON'T HAVE TO SPEND A LOT OF TIME ON IT  
24 IN FRONT OF THE JURY.

25 THE COURT: I WOULD OVERRULE THOSE OBJECTIONS.

TEXT REMOVED - NOT RELEVANT TO MOTION

3 Q. YOU WERE ASKED ABOUT THE CHANGE IN YOUR NUMBERS, YOUR  
4 CALCULATION FOR INFRINGER'S PROFITS. THOSE ARE SAP'S SOFTWARE  
5 PROFITS ATTRIBUTABLE TO TOMORROWNOW'S INFRINGEMENT.

6 YOU REMEMBER THAT?

7 A. I DO.

8 Q. AND WHAT I'D LIKE TO DO WITH YOU IS HAVE YOU TELL US WHY YOU  
9 CHANGED THE NUMBERS. SO LET'S START WITH -- YOUR FIRST REPORT  
10 WAS DATED MARCH 26 OF THIS YEAR, CORRECT?

11 A. THAT'S CORRECT.

12 Q. AND IN THAT REPORT, YOU HAD FOUR COMPANIES -- FOUR CUSTOMERS  
13 IN THIS CATEGORY AND THE AMOUNT OF THE PROFIT WAS APPROXIMATELY  
14 \$38 MILLION. IS THAT RIGHT?

15 A. THAT'S CORRECT.

16 Q. AND YOU DID A SUPPLEMENT IN MAY, AND THE NUMBER DROPPED FROM  
17 FOUR TO THREE?

18 A. YES.

19 Q. WOULD YOU TELL US WHY THAT NUMBER DROPPED?

20 A. BECAUSE I HAD A CUSTOMER DECLARATION THAT INDICATED THAT  
21 TOMORROWNOW HAD NOT PLAYED A ROLE IN -- IN THEM MAKING THAT --  
22 THAT CHANGE.

23 Q. DO YOU RECALL THE NAME OF THAT CUSTOMER?

24 A. NOT OFFHAND.

25 Q. OKAY. LET ME SHOW YOU WHAT'S BEEN MARKED FOR IDENTIFICATION

1 A6891.

2 A. (REVIEWING DOCUMENT.)

3 (OFF-THE-RECORD DISCUSSION.)

4 MR. MITTELSTAEDT: I'VE GOT A COPY FOR THE COURT.

5 Q. AND WOULD YOU TELL US WHAT THIS DECLARATION IS, SIR.

6 A. YES. IT'S A DECLARATION FROM A DANIEL CLARK, NO RELATION,  
7 AND IT'S -- HE WAS THE SENIOR VICE-PRESIDENT OF BUSINESS  
8 EXCELLENCE AND CHIEF INFORMATION OFFICER AT A COMPANY CALLED  
9 NEWPAGE CORPORATION.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

20 Q. WHY DID YOU REMOVE THIS CUSTOMER, STORA ENSO, FROM YOUR  
21 DAMAGE CALCULATION BASED ON THIS DECLARATION?

22 A. I DID THAT BECAUSE STORA ENSO HAD BEEN ACQUIRED BY NEWPAGE.  
23 NEWPAGE WAS A LONG-TERM USER OF SAP. SO IF YOU REMEMBER, I  
24 DESCRIBED TO YOU THAT IF A COMPANY WAS ACQUIRED, VERY OFTEN THE  
25 PARENT COMPANY WOULD REQUIRE THE NEW SUBSIDIARY TO CHANGE TO

1 THEIR SOFTWARE. THAT'S EXACTLY WHAT HAPPENED IN THIS CASE.

2 AND, ACTUALLY, IT IS DATED MAY 4TH, 2010.

3 Q. SO IT'S DATED THREE DAYS BEFORE YOUR SUPPLEMENTAL REPORT?

4 A. CORRECT.

5 Q. AND IF YOU'D LOOK AT THE FOURTH PARAGRAPH AND TELL US  
6 WHETHER THAT PROVIDED ANY ADDITIONAL REASON WHY YOU EXCLUDED  
7 THEM?

8 A. YES, IT DOES.

9 Q. AND WHAT'S THE FURTHER REASON?

10 A. THAT MR. CLARK SAYS THAT THE -- THE SUPPORT FROM TOMORROWNOW  
11 WAS NOT INFLUENCED IN ANY WAY -- DID NOT INFLUENCE IN ANY WAY  
12 THE DECISION TO GO TO SAP.

13 Q. OKAY.

14 AND THEN YOU WERE ASKED WHETHER YOU TOOK ANOTHER  
15 CUSTOMER OUT IN YOUR OCTOBER SUPPLEMENT. DO YOU RECALL THAT?

16 A. I DO.

17 Q. AND YOU SAID YOU TOOK ANOTHER CUSTOMER OUT, AND SO THE --  
18 THE PROFITS OWED TO ORACLE DROPPED BY A COUPLE MILLION DOLLARS.

19 DO YOU REMEMBER THAT?

20 A. I DO.

21 Q. AND I'D LIKE TO SHOW YOU THAT SECOND SUPPLEMENT. I THINK --  
22 I THINK COUNSEL FOR ORACLE ASKED YOU TO REFER TO THIS TO REFRESH  
23 YOUR RECOLLECTION AS TO WHAT YOU HAD DONE. I'D LIKE YOU TO LOOK  
24 AT IT AND TELL ME THE REASON THAT YOU REMOVED A CUSTOMER.

25 MAY I APPROACH, YOUR HONOR?

1 THE COURT: YES.

2 BY MR. MITTELSTAEDT:

3 Q. (HANDING DOCUMENT.)

4 A. THANK YOU.

5 Q. NOW, THAT'S THE SECOND SUPPLEMENT YOU FILED IN OCTOBER?

6 A. I BELIEVE THIS WAS A -- THIS WAS A JUNE CHANGE, ACTUALLY.

7 Q. OKAY.

8 A. THE SECOND SUPPLEMENT WAS DATED JUNE 4TH.

9 Q. WELL -- OKAY. ACTUALLY, I THINK WHAT HAPPENED WAS COUNSEL  
10 SAID HE WOULD SKIP OVER THE JUNE ONE IN THE INTEREST OF TIME.

11 A. YES.

12 Q. SO --

13 A. THAT'S THIS ONE.

14 Q. AND DOES THAT EXPLAIN WHY YOU DECREASED FROM THREE TO TWO?

15 A. CORRECT.

16 Q. AND IS THERE A DECLARATION ATTACHED TO THAT SECOND  
17 SUPPLEMENT?

18 A. YES, THERE IS.

19 Q. AND WHO IS THAT BY?

20 A. IT'S FROM MR. BIRRENBACH.

21 Q. OKAY. AND WHAT COMPANY IS HE WITH?

22 A. I'M PROBABLY GOING TO BUTCHER THIS NAME, BUT I'LL DO MY BEST  
23 ROTK-PPCHEN SEKTKELLEREI. IT'S A GERMAN COMPANY.

24 Q. AND IN YOUR SECOND SUPPLEMENT IN JUNE, DID YOU DESCRIBE THE  
25 REASON WHY YOU REMOVED THAT COMPANY FROM THE DAMAGE CALCULATION?

1 A. YES.

2 Q. AND WHAT REASON DID YOU PROVIDE?

3 A. I GAVE AS THE REASON THIS DECLARATION. AND BASED UPON THE  
4 DECLARATION, WHICH IS -- IT'S ONLY JUST OVER HALF A PAGE LONG, I  
5 WAS ABLE TO IDENTIFY FIVE DIFFERENT EXCLUSION REASONS FOR  
6 EXCLUDING THIS CUSTOMER.

7 THEY SPECIFICALLY WANTED THE SAP FUNCTIONALITY. THEY  
8 SAID THEY DIDN'T LIKE FUSION IN THE FUTURE FOR JDE WORLD  
9 PRODUCTS, WHICH IS WHAT THEY WERE USING AT THE TIME; THAT THEY  
10 HAD EVALUATED OTHER PROVIDERS. THEY HAD DECIDED TO JOIN SAP  
11 PRIOR TO JOINING TOMORROWNOW. IF YOU REMEMBER, THAT WAS ONE OF  
12 MY EXCLUSION POOLS. AND ALSO FOR OTHER REASONS, WHICH MAY BE  
13 GOING TOO FAR.

14 Q. DID THEY -- DID YOU RECEIVE ANY INFORMATION AS TO WHETHER  
15 TOMORROWNOW PLAYED A ROLE IN THEIR DECISION TO GO TO SAP?

16 A. YES.

17 Q. AND WHAT INFORMATION DID YOU RELY ON?

18 A. MR. BIRRENBACH SAID THAT IF TOMORROWNOW HAD NOT BEEN  
19 AVAILABLE, THEY WOULD STILL HAVE REPLACED THE JDE WORLD PROGRAMS  
20 THEY WERE USING WITH SAP.

TEXT REMOVED - NOT RELEVANT TO MOTION

CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, THURSDAY, NOVEMBER 18, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR



DIANE E. SKILLMAN, CSR, RPR, FCRR

FRIDAY, NOVEMBER 19, 2010

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

|                            |   |                           |
|----------------------------|---|---------------------------|
| ORACLE CORPORATION, ET AL. | ) | JURY TRIAL                |
|                            | ) |                           |
| PLAINTIFFS,                | ) | NO. C 07-01658 PJH        |
|                            | ) |                           |
| VS.                        | ) | VOLUME 11                 |
|                            | ) |                           |
| SAP AG, ET AL.,            | ) | PAGES 1880 - 2020         |
|                            | ) |                           |
| DEFENDANTS.                | ) | OAKLAND, CALIFORNIA       |
| _____                      | ) | FRIDAY, NOVEMBER 19, 2010 |

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:           BINGHAM MCCUTCHEN LLP  
                                  THREE EMBARCADERO CENTER  
                                  SAN FRANCISCO, CALIFORNIA 94111-4607

BY: ZACHARY J. ALINDER,  
      HOLLY A. HOUSE,  
      GEOFFREY M. HOWARD,  
      DONN P. PICKETT, ATTORNEYS AT LAW

                                  BOIES, SCHILLER & FLEXNER LLP  
                                  1999 HARRISON STREET, SUITE 900  
                                  OAKLAND, CALIFORNIA 94612

BY: DAVID BOIES,  
      STEVEN C. HOLTZMAN, ATTORNEYS AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY:           RAYNEE H. MERCADO, CSR NO. 8258  
                                  DIANE E. SKILLMAN, CSR NO. 4909

RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

TEXT REMOVED - NOT RELEVANT TO MOTION

8 Q. AND DO YOU BELIEVE THE APPROPRIATE LICENSE HERE SHOULD BE A  
9 LUMP-SUM UPFRONT PAYMENT OR A RUNNING ROYALTY?

10 MR. LANIER: OBJECTION, YOUR HONOR, FOR THE REASONS  
11 WE STATED YESTERDAY. AND TO AVOID INTERRUPTING, CAN WE HAVE A  
12 CONTINUING OBJECTION?

13 THE COURT: YES.

14 MR. LANIER: THANK YOU, YOUR HONOR.

TEXT REMOVED - NOT RELEVANT TO MOTION

1 Q. HOW ABOUT THE R & D? WHAT HAPPENS IF THE CASH FLOW GETS  
2 TAKEN AWAY, AND WHAT DOES THAT DO TO THE POTENTIAL FUTURE SPEND  
3 (SIC) ON R & D?

4 A. WELL, AS WE SAW, I MEAN, ONE OF THEIR BIG GOALS WAS TO TAKE  
5 MONEY AWAY FROM US. THEY WERE, IN FACT, MEASURED ABOUT TAKING  
6 MONEY AWAY FROM US, WHICH MEANS WE CAN'T PAY FOR EXISTING R & D,  
7 WE CAN'T BUILD THE NEXT PRODUCT WITH THAT -- THOSE SAME  
8 MAINTENANCE DOLLARS. THIS WAS REALLY THEIR -- THE WHOLE  
9 STRATEGY.

10 Q. AND IS THAT A RISK THAT SAP HAS OR ONLY ORACLE?

11 A. NO, ALL THE RISK IS ON US. ALL OF IT'S ON US.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

6 Q. ALL RIGHT. LET'S MOVE ON TO THE DATABASE RESELLER  
7 AGREEMENT. IN YOUR EXPERIENCE, DOES THE ORACLE DATABASE  
8 RESELLER AGREEMENT WITH SAP PROVIDE A GOOD BENCH MARK OR EXAMPLE  
9 FOR THE FAIR MARKET VALUE LICENSES THAT WE'RE TALKING ABOUT  
10 HERE?

11 A. ACTUALLY, IT -- IT DOESN'T MAKE ANY SENSE AT ALL. IN FACT,  
12 ALL -- EXTRAPOLATING FROM ANY RESELLER AGREEMENT DOESN'T MAKE  
13 SENSE --

14 (DEMONSTRATIVE PUBLISHED TO JURY.)

15 THE WITNESS: -- BECAUSE --

16 ACTUALLY, LET ME LAY THIS OUT FOR YOU.

17 MS. HOUSE: LET ME JUST TELL THE COURT WHAT THIS IS.

18 THIS IS PLAINTIFFS' DEMONSTRATIVE 18.

19 Q. COULD YOU EXPLAIN TO THE JURY WHAT YOU'RE TALKING ABOUT?

20 A. SURE. SO ON THE RIGHT SIDE IS HOW RESELLERS WORK. SO LET'S  
21 SAY ORACLE HAS THIS MANY CUSTOMERS, RIGHT? AND A RESELLER, HE  
22 SELLS OVER HERE, SO HE GETS EVEN MORE CUSTOMERS FOR US, OKAY.  
23 AND THAT'S THE BIG DIFFERENCE. YOU START HERE, AND A RESELLER'S  
24 A PARTNER. THEY HELP YOU GET CUSTOMERS YOU WOULDN'T OTHERWISE  
25 GET ON YOUR OWN. OKAY?

1                   SO WHAT HAPPENS IS -- LET'S SAY YOU START WITH A  
2 HUNDRED CUSTOMERS. IF YOU GET A RESELLER, MAYBE YOU GET 110,  
3 120 CUSTOMERS.

4                   OKAY. NOW, THAT'S RESELLERS. THAT MAKES SENSE.  
5 THEN A RUNNING ROYALTY CAN MAKE SENSE IN THAT CASE.

6                   ON THE OTHER SIDE, HERE WE HAVE -- ON THE LEFT SIDE,  
7 WE HAVE ALREADY -- AND WE TALKED BIT FOR THREE WEEKS NOW --  
8 14,000 CUSTOMERS BETWEEN PEOPLESOFT AND SIEBEL, 14,000. NOTHING  
9 SAP/TOMORROWNOW DOES WITH THE INTELLECTUAL PROPERTY WE LICENSE  
10 THEM GIVES US ONE MORE CUSTOMER. IT'S ALWAYS THE SAME 14,000.  
11 SO INSTEAD OF WIN/WIN WHERE A RESELLER GETS YOU MORE CUSTOMERS,  
12 IT'S WIN/LOSS. IT'S A ZERO-SUM GAME. THEY TAKE CUSTOMERS OUT  
13 OF THE 14,000. YOU'D NEVER HAVE ANY MORE.

14                   THAT'S THE PROBLEM. HOW COULD YOU POSSIBLY  
15 EXTRAPOLATE FROM A MODEL THAT WORKS WHEN YOU'RE GROWING IN A  
16 CASE WHERE IT'S A ZERO-SUM GAME. IT JUST DOESN'T MAKE SENSE.  
17 Q. AND JUST TO BACK UP FOR A SECOND, COULD YOU EXPLAIN WHY IT  
18 IS THAT YOU DECIDED TO LET SAP BE ONE OF THE RESELLERS OF THE  
19 ORACLE DATABASE?

20 A. WELL, SURE. I MEAN, WE HAVE A LOT OF RESELLERS. BUT  
21 REMEMBER, SAP'S THE LARGEST ENTERPRISE SOFTWARE COMPANY, AND  
22 WHEN A CUSTOMER BUYS ERP SOFTWARE, ACCOUNTING, HR, THEY HAVE TO  
23 RUN IT ON A DATABASE. AND SO WE'D LIKE ACCESS TO ALL THOSE  
24 CUSTOMERS THAT SAP -- THEY'RE SAP CUSTOMERS, BUT THEY NEED A  
25 DATABASE, SO WE'RE VERY HAPPY TO HAVE -- HERE ARE OUR CUSTOMERS,

1 LET SAP SELL SOME DATABASE TO US. THEY KEEP SOME OF THE MONEY,  
2 THEY GIVE US SOME OF THE MONEY. NET/NET, WE'RE MUCH BETTER OFF  
3 THAN IF THEY DIDN'T SELL TO THOSE CUSTOMERS.

4 Q. AND JUST SO WE'RE CLEAR, DOES SAP'S ORACLE DATABASE RESELLER  
5 AGREEMENT OR ANY OF THE PARTNER LICENSES THAT ORACLE HAS -- DO  
6 ANY OF THEM ALLOW ORACLE'S PARTNERS OR RESELLERS TO USE ORACLE'S  
7 INTELLECTUAL PROPERTY TO COMPETE AGAINST ORACLE FOR ORACLE'S  
8 CUSTOMERS?

9 A. NO. NO, NO. IT'S THE EXACT OPPOSITE. IT'S LITERALLY THE  
10 DIFFERENCE BETWEEN LEFT AND RIGHT HERE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

18 Q. AND IS WHAT SAP PAID FOR TOMORROWNOW RELEVANT TO EVALUATING  
19 THE LICENSE?

20 A. IT'S COMPLETELY IRRELEVANT. I MEAN, WHEN I HEARD THAT, I  
21 THOUGHT, YOU KNOW, I HAVE 15-DOLLAR CROWBAR. I BREAK INTO A  
22 10 MILLION-DOLLAR HOUSE. I CLEAN IT OUT. WHAT I PAID FOR THE  
23 CROWBAR IS COMPLETELY IRRELEVANT. I MEAN, IT'S JUST SILLY.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

12 Q. WELL, ORACLE'S DAMAGES CLAIM IS OVER A BILLION DOLLARS. WHY  
13 IS THE DAMAGES AMOUNT IN THE EXCESS OF A BILLION DOLLARS MORE  
14 APPROPRIATE?

15 A. THIS WHOLE BUSINESS IS A BUSINESS ABOUT BILLIONS. WE  
16 SPENT -- YOU KNOW, I KNOW EVERYBODY'S HEARD IT NOW A HUNDRED  
17 TIMES. WE SPENT OVER 17 BILLION ON THE PRODUCTS, BUT WE ALSO  
18 SPEND OVER \$4 BILLION A YEAR IN R & D IN THE BUSINESS.  
19 CUSTOMERS SPEND BILLIONS ON THESE PRODUCTS, HAVE MADE  
20 COMMITMENTS. THE -- THIS IS A BUSINESS WHERE THE INTELLECTUAL  
21 PROPERTY IS WORTH BILLIONS. IT IS WHAT OUR COMPANIES ARE. IT'S  
22 A BILL- -- MULTI-BILLION-DOLLAR BUSINESS.

23 Q. CAN YOU REMIND THE JURY WHAT IS THE VALUE ON JUST AN AT --  
24 ANNUAL, ONCE-A-YEAR BASIS -- WHAT'S THE VALUE OF THE MAINTENANCE  
25 STREAM THAT WAS UNDER ATTACK?

1 A. JUST BETWEEN PEOPLESOFT, JD EDWARDS, AND SIEBEL, WE'RE  
2 TALKING ABOUT OVER A BILLION SEVEN A YEAR OF JUST MAINTENANCE,  
3 JUST SUPPORT. AND THAT'S WHAT -- THAT BASE, THAT -- AND THAT'S  
4 ANNUALLY EVERY YEAR. THAT'S WHAT WAS EXPOSED.

5 Q. IS THE \$1.655 BILLION NUMBER THAT ORACLE SEEKS IN DAMAGES  
6 FAIR TO ORACLE AND TO SAP, IN YOUR OPINION?

7 A. YOU KNOW, THE WAY I THINK OF IT IS IT'S -- IT'S AROUND  
8 10 PERCENT OF WHAT WE ACTUALLY PAID FOR THE -- FOR INTELLECTUAL  
9 PROPERTY. IT'S -- I THINK IT'S CONSERVATIVE PERSONALLY,  
10 CONSIDERING THE REAL VALUE OF THE INTELLECTUAL PROPERTY.

11 BUT I THINK IT'S REASONABLE. I THINK IT'S A  
12 REASONABLE NUMBER.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

7                   SO WE HEARD A LOT ABOUT WATCHES AND CROW BARS AND ALL  
8    SORT OF STUFF LIKE THAT, AND I JUST WANTED TO FOLLOW UP A LITTLE  
9    BIT ON THIS, TOO.

10                   THIS IS A COPYRIGHT CASE. YOU KNOW THAT?

11    A. YES.

12    Q. OKAY. AND A COPYRIGHT CASE MEANS THAT SOMEBODY -- KIND OF A  
13    BROAD LEGAL MEANING -- COPIED SOME SOFTWARE, RIGHT?

14    A. YES.

15    Q. SO ORACLE'S STILL GOT IT, RIGHT? THEY STILL HAVE THAT  
16    SOFTWARE.

17    A. YEAH --

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

19 Q. OKAY. SO LET'S DO A QUICK REALITY CHECK TOGETHER, THEN. WE  
20 DID THIS BEFORE, BUT I THINK IT'S GOT TO DO WITH THE CUSTOMERS  
21 SO YOU KNOW THAT MATTERS TO US.

22 THERE WERE ABOUT 14,000 PEOPLESOFT, JDE, AND SIEBEL  
23 CUSTOMERS ALL TOLD, RIGHT?

24 358 OF THEM PICKED TOMORROWNOW, RIGHT?

25 A. YES, I GUESS SO.

1 Q. EIGHTY-SIX OF THEM BOUGHT SOMETHING FROM SAP -- FROM SAP  
2 AFTER OR AROUND BECOMING A TOMORROWNOW CUSTOMER, CORRECT?  
3 A. YES.

TEXT REMOVED - NOT RELEVANT TO MOTION

18 BY MS. HOUSE:

19 Q. NOW, JUST SO EVERYBODY'S CLEAR, THE LICENSE THAT WE'RE  
20 TALKING ABOUT HERE IS A LICENSE THAT ALLOWS SAP AND TOMORROWNOW  
21 TO USE ORACLE'S INTELLECTUAL PROPERTY TO THEN GO AFTER ORACLE  
22 CUSTOMERS, CORRECT?

23 A. CORRECT.

24 Q. AND SO WHEN MR. LANIER ASKED YOU WHETHER OR NOT MR. MEYER  
25 HAD FOUND ANY COMPARABLE LICENSES, ARE THERE ANY COMPARABLE

1 LICENSES TO THAT IN ORACLE'S PORTFOLIO?

2 A. OH, NO. NO -- ABSOLUTELY NOT.

3 Q. AND I'LL READ TO YOU FROM MR. MCDERMOTT'S TESTIMONY. YOU  
4 WERE HERE FOR HIS TESTIMONY, YES?

5 A. YES.

6 Q. AND MR. MCDERMOTT WAS ASKED BY MR. BOIES.

7 "NOW, FOCUSING ON THE SITUATION WHEN YOU'RE  
8 ACTUALLY USING A COMPETITOR'S SOFTWARE TO TRY TO TAKE  
9 AWAY THEIR CUSTOMERS, DO YOU HAVE ANY LICENSES LIKE  
10 THAT?"

11 AND HE ANSWERED, "I DON'T."

12 OKAY? SO IN YOUR EXPERIENCE, IS THIS SOMETHING --  
13 THIS KIND OF VAST USE OF A COMPETITOR'S SOFTWARE TO TRY TO GO  
14 AFTER THE OTHER COMPETITOR'S -- YOU KNOW, LICENSE -- CUSTOMER  
15 BASE, IS THIS UNPRECEDENTED?

16 A. YES, OF COURSE.

17 Q. AND WHEN YOU WERE TALKING ABOUT THE JAVA LICENSE, WERE YOU  
18 TRYING TO SAY THAT THAT WAS A COMPARABLE LICENSE TO THE LICENSES  
19 THAT WE'RE TALKING ABOUT HERE?

20 A. NO, I WAS JUST GIVING AN EXAMPLE.

TEXT REMOVED - NOT RELEVANT TO MOTION

CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, FRIDAY, NOVEMBER 19, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.

  
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR

DIANE E. SKILLMAN, CSR, RPR, FCRR

SATURDAY, NOVEMBER 20, 2010

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

|                            |   |                           |
|----------------------------|---|---------------------------|
| ORACLE CORPORATION, ET AL. | ) | JURY TRIAL                |
|                            | ) |                           |
| PLAINTIFFS,                | ) | NO. C 07-01658 PJH        |
|                            | ) |                           |
| VS.                        | ) | VOLUME 12                 |
|                            | ) |                           |
| SAP AG, ET AL.,            | ) | PAGES 2021 - 2230         |
|                            | ) |                           |
| DEFENDANTS.                | ) | OAKLAND, CALIFORNIA       |
| _____                      | ) | MONDAY, NOVEMBER 22, 2010 |

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

BINGHAM MCCUTCHEN LLP  
THREE EMBARCADERO CENTER  
SAN FRANCISCO, CALIFORNIA 94111-4607

BY: ZACHARY J. ALINDER,  
HOLLY A. HOUSE,  
GEOFFREY M. HOWARD,  
DONN P. PICKETT, ATTORNEYS AT LAW

BOIES, SCHILLER & FLEXNER LLP  
1999 HARRISON STREET, SUITE 900  
OAKLAND, CALIFORNIA 94612

BY: DAVID BOIES,  
STEVEN C. HOLTZMAN, ATTORNEYS AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY: RAYNEE H. MERCADO, CSR NO. 8258  
DIANE E. SKILLMAN, CSR NO. 4909

RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

TEXT REMOVED - NOT RELEVANT TO MOTION

9                   SECOND THING, A VARIETY OF SLIDES USE THE WORDS  
10 "THEFT" AND "STOLE," THINGS LIKE THAT. YOUR HONOR HAD GIVEN  
11 GUIDANCE ABOUT THAT WITH RESPECT TO THE OPENING. THIS IS NOT A  
12 CRIMINAL CASE. IT'S NOT A THEFT CASE. WE OBJECT TO THOSE  
13 SLIDES AS WELL. WE DON'T THINK THOSE TERMS ARE APPROPRIATE IN  
14 THIS CASE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

19 WITH REGARD TO THE CHARACTERIZATION OF COPYRIGHT  
20 INFRINGEMENT AS THEFT OR STEALING, I INDICATED TO YOU ALL FOR  
21 OPENINGS THAT YOU COULDN'T USE IT THROUGHOUT THE COURSE OF THE  
22 TRIAL. YOU'VE BEEN VERY GOOD. YOU HAVEN'T -- NONE OF THE  
23 WITNESSES HAVE USED THAT LANGUAGE. IN MY VIEW, THAT LANGUAGE IS  
24 INFLAMMATORY, UNNECESSARY.

25 THIS IS A COPYRIGHT CASE. "COPYRIGHT INFRINGEMENT"

# STATEMENT OF COURT

Page 2031

1 IS A TERM OF ART THAT IS WHAT HAS BEEN STIPULATED TO. AND NO,  
2 YOU MAY NOT USE THE LANGUAGE -- WORDS SUCH AS "THEFT" OR  
3 "STEALING."

4 THROUGHOUT THE COURSE OF THE TRIAL, WITNESSES HAVE  
5 USED LANGUAGE SUCH AS "TAKING OUR SOFTWARE," AND, OBVIOUSLY, YOU  
6 CAN CONTINUE TO USE THAT. BUT KEEP IN MIND THE BASIS FOR MY  
7 RULING WAS TWO-FOLD, NOT JUST THAT I DID NOT WANT THE JURY TO BE  
8 MISLED INTO THINKING THAT THERE WERE ANY KIND OF CRIMINAL --  
9 CRIMINAL UNDERTONES HERE. BUT ADDITIONALLY, IT WAS ON THE BASIS  
10 OF MY DETERMINATION THAT THE LANGUAGE IS JUST INFLAMMATORY.  
11 IT'S NOT NECESSARY.

12 SO THAT OBJECTION IS SUSTAINED.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

23                   MR. BOIES:   NOW, ONE WAY OF LOOKING AT THAT IS TO  
24   TAKE THEIR OWN EXHIBIT -- THIS IS PTX12.   AND WE'RE GOING TO  
25   KEEP COMING BACK TO PTX12 A NUMBER OF TIMES.   AND THAT ESTIMATED

1 WHAT THEIR REVENUE WOULD BE JUST OVER THREE YEARS 2005, 2006,  
2 2007.

3 NOW, YOU KNOW, THAT 2008, THEY ALSO INFRINGED. AND  
4 SO WE HAVE TO ESTIMATE THAT, AND WE HAVE TWO DIFFERENT WAYS OF  
5 ESTIMATING. ONE IS TO ESTIMATE THERE WAS NO GROWTH IN 2007 AND  
6 2008, WHICH WE KNOW UNDERSTATES IT BECAUSE THE CURVE WAS GOING  
7 UP. YOU CAN SEE JUST FROM 2005, 2006, AND 2007, HOW EVERY YEAR  
8 IT'S GOING UP.

9 THE OTHER WAY IS TO ASSUME THAT IT GROWS AT THE SAME  
10 RATE AS IT GREW IN 2007. THAT COMES UP WITH EITHER 1.3 BILLION  
11 OR \$1.7 BILLION.

12 ANOTHER WAY TO LOOK AT IT IS TO LOOK AT AN ESTIMATE  
13 THAT WAS PREPARED AS TO WHAT -- BY MR. MEYER AS TO WHAT THE  
14 3,000 MAINTENANCE CUSTOMERS AND 2,000 CONVERTED CUSTOMERS TO SAP  
15 WOULD REPRESENT. THAT'S \$1.2 BILLION.

16 ANOTHER WAY IS TO TAKE THE NUMBER OF CUSTOMERS --  
17 (DEMONSTRATIVE PUBLISHED TO JURY.)

18 MR. BOIES: -- THAT SAP EXPECTED TO GET -- AND WE  
19 KNOW WHAT THEY EXPECTED TO GET FROM THEIR DOCUMENTS -- AND THEN  
20 APPLY A VALUE TO THOSE CUSTOMERS.

21 THIS PARTICULAR SLIDE, 247, APPLIES A VALUE OF  
22 \$1.9 MILLION, WHICH WAS THE AVERAGE REVENUE THAT SAP'S EXPERT,  
23 MR. CLARKE CALCULATED THAT THE CUSTOMERS THAT HE CALCULATED HAD  
24 BEEN TAKEN BY SAP GAVE TO SAP AS A RESULT OF THE TOMORROWNOW  
25 ACQUISITION.

TEXT REMOVED - NOT RELEVANT TO MOTION

17                   OF COURSE, YOU LOOK AT THE REALITY AT THE TIME OF THE  
18   NEGOTIATION. THOSE KIND OF REALITY CHECKS, YOU MUST MAKE. YOU  
19   MUST LOOK AT WHAT PEOPLE REALLY EXPECTED, WHAT THE FACTS REALLY  
20   WERE IN JANUARY. BUT YOU DO NOT TAKE FACTS THAT YOU BELIEVE OR  
21   KNEW IN 2006, 2007, 2008, OR 2009 AND TRY TO IMPORT THEM BACK  
22   INTO JANUARY. THAT'S EXACTLY WHAT MR. MEYER AND MR. CLARKE AND  
23   ON CROSS-EXAMINATION SAID YOU DIDN'T DO, AND IT'S EXACTLY WHAT  
24   THE COURT WILL INSTRUCT YOU IS NOT TO BE DONE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

9                   NOW, THE FACTORS, WHAT ARE SOME OF THE FACTORS?  
10                   (DEMONSTRATIVE PUBLISHED TO JURY.)  
11                   MR. BOIES: WELL, YOU'VE HEARD THESE FACTORS FROM  
12 BOTH OF THE EXPERT WITNESSES. ONE FACTOR IS SCOPE AND DURATION  
13 OF LICENSE. ANOTHER FACTOR IS EACH PARTY'S NEED FOR THE  
14 COPYRIGHTED PROPERTY. ANOTHER FACTOR IS THAT SAP'S WILLINGNESS  
15 TO ASSUME RISK OF INFRINGEMENT LIABILITY IS AN ADMISSION OF  
16 VALUE.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

15 (DEMONSTRATIVE PUBLISHED TO JURY.)

16 MR. BOIES: THIS IS PTX4809. AND AT THE BOTTOM, YOU  
17 CAUGHT -- YOU SEE THEY'RE TALKING ABOUT THE PEOPLESOFT  
18 1.2 BILLION REVENUE IN SUPPORT BUSINESS OVER THE LAST FOUR  
19 QUARTERS THAT'S GOING TO GROW 8 PERCENT A YEAR. THAT'S WHAT  
20 THEY'RE COUNTING ON.

21 NOW, \$1.2 BILLION IN REVENUE DRAWING 8 PERCENT A YEAR  
22 OVER THE FIRST FOUR YEARS IS \$5.4 BILLION, AS IS INDICATED ON  
23 CHART 146.

24 IF PERMITTING SAP AND TOMORROWNOW TO COMPETE FOR  
25 THOSE REVENUES, USING ORACLE'S OWN SOFTWARE PUT EVEN HALF OF

1 THOSE REVENUES AT RISK, THAT LICENSE WOULD HAVE TO BE  
2 \$2.7 BILLION FOR THIS COMPONENT ALONE.

3 THAT'S WHAT ORACLE WAS COUNTING ON. THAT'S WHAT  
4 ORACLE WAS GIVING UP. THAT'S WHAT ORACLE IN THIS HYPOTHETICAL  
5 LICENSE SITUATION WOULD BE SAYING. WE COUNTED ON \$5.4 BILLION  
6 OF MAINTENANCE REVENUE IN DOING THIS DEAL. IF YOU WANT US TO  
7 ALLOW YOU TO TAKE A LOT OF THAT BY COMPETING WITH US, YOU'VE GOT  
8 TO PAY US FOR IT.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

7                   MR. BOIES: SO THEY KNEW THEY WERE NOT GETTING  
8 INTELLECTUAL PROPERTY. THEY KNEW THEY DIDN'T HAVE ANY R & D  
9 EMPLOYEES. THEY KNEW THAT THE ONLY -- ONLY BY INFRINGING COULD  
10 THIS HAVE BEEN HAPPENING. AND YET -- LET ME GO TO 33.

11                   (DEMONSTRATIVE PUBLISHED TO JURY.)

12                   MR. BOIES: THEY KNOWINGLY DECIDED THAT TOMORROWNOW  
13 WAS SO VALUABLE THAT SAP WOULD INQUIRE TOMORROWNOW DESPITE ITS  
14 INFRINGEMENT. THESE ARE THE FIVE MEMBERS OF THE SAP EXECUTIVE  
15 BOARD, ALL OF WHOM SUPPORTED THE ACQUISITION OF TOMORROWNOW.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

7                   MR. BOIES:   AND THIS IS JUST A SUMMARY WHY A LUMP-SUM  
8 ROYALTY LICENSE, AND IT COMPARES A LUMP-SUM ROYALTY WITH A  
9 RUNNING ROYALTY.

TEXT REMOVED - NOT RELEVANT TO MOTION

19                   DOES IT CONSIDER THE VALUE -- THE COST OF THE  
20 SOFTWARE, THE \$17 BILLION COST OF THE SOFTWARE?   LUMP SUM, YES;  
21 RUNNING, NO.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

13                   NOW, LET ME SPEND A MOMENT ON -- ON LOST PROFITS  
14           AND -- AND WHY LOST PROFITS DOESN'T INCLUDE ALL THAT NEEDS TO BE  
15           INCLUDED IN TERMS OF THE LOSS.   AND WHY WE'RE SEEKING FAIR  
16           MARKET VALUE LICENSE AS OPPOSED TO LOST PROFITS.   I WANT YOU TO  
17           UNDERSTAND.

18                   102?

19                   (DEMONSTRATIVE PUBLISHED TO JURY.)

20                   MR. BOIES:   FIRST, LOST PROFITS DOES NOT CONSIDER THE  
21           RISK ASSOCIATED WITH ORACLE'S SIGNIFICANT INVESTMENTS IN  
22           PEOPLESOFT.   SECOND, LOST PROFITS DOES NOT APPROPRIATELY MEASURE  
23           THE VALUE OF THE IP TAKEN, BASED ON THE EXPECTATIONS OF THE  
24           PARTY AT THE TIME, WHICH IS THE LEGAL STANDARD.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

23 AND TO PUT THAT MAGNITUDE IN PERSPECTIVE, GO TO -- GO

24 TO 75.

25 (DEMONSTRATIVE PUBLISHED TO JURY.)

1           MR. BOIES: I WANT TO REMIND YOU OF WHO TESTIFIED IN  
2 THIS TRIAL AND WHAT THEY SAID ABOUT THE VALUE OF A FAIR MARKET  
3 VALUE LICENSE. ALL RIGHT?

4           MR. PHILLIPS, FORMER PRESIDENT OF ORACLE; MS. CATZ,  
5 CURRENT PRESIDENT OF ORACLE --

6                           (DEMONSTRATIVE PUBLISHED TO JURY.)

7           MR. BOIES: -- MR. ELLISON, ORACLE'S C.E.O., ALL  
8 TESTIFIED THAT THE FAIR MARKET VALUE LICENSE WOULD HAVE A VALUE  
9 IN THE BILLIONS OF DOLLARS. MAYBE 4 BILLION, MAYBE 4 AND A  
10 HALF, MAYBE \$5 BILLION BUT BILLIONS OF DOLLARS.

11           MR. MEYER, OUR EXPERT, CAME IN AND HE QUANTIFIED IT  
12 AT 1.65 BILLION, SAYING THAT WAS A MINIMUM NUMBER. THERE WERE  
13 OTHER ELEMENTS THAT HE COULDN'T QUANTIFY, BUT IT WAS \$1.656  
14 BILLION.

15           NOBODY -- NO FACT WITNESS FROM SAP CAME IN TO GIVE  
16 CONTRARY TESTIMONY. NOT A SINGLE FACT WITNESS GOT ON THE STAND  
17 FROM SAP TO TELL YOU WHAT THEY BELIEVED THE FAIR MARKET VALUE OF  
18 THIS LICENSE WAS. NOT A SINGLE FACT WITNESS WOULD COME INTO  
19 THIS COURTROOM, SUBJECT THEMSELVES TO CROSS-EXAMINATION, AS  
20 MR. ELLISON, AND MR. PHILLIPS AND MS. CATZ DID, AND TRY TO  
21 DEFEND A NUMBER FOR YOU. THE BUSINESS TESTIMONY IS UNDISPUTED.  
22 YOU HAVE THE ORACLE TESTIMONY. AND YOU HAVE NOTHING FROM SAP  
23 ABOUT WHAT THE VALUE WAS OF THIS FAIR MARKET VALUE LICENSE.

24           WHAT THEY DID DO WAS THEY BROUGHT IN MR. CLARKE, WHO  
25 SAYS IT'S \$40 MILLION. NOW, YOU HEARD THE CROSS-EXAMINATION OF

1 MR. CLARKE. AND YOU HEARD ALL THE PROBLEMS WITH THAT ANALYSIS.  
2 YOU HEARD ALL THE THINGS HE DIDN'T TAKE INTO ACCOUNT.

3 YOU'VE SEEN SOME OF THOSE THINGS TODAY, BUT YOU HAVE  
4 THEIR EXPERT AT 40, OUR EXPERT AT 1.656 BILLION, AND YOU HAVE  
5 FACT WITNESS TESTIMONY, BUSINESS TESTIMONY FROM OUR WITNESSES  
6 GIVING YOU A VALUATION. YOU HAVE NOTHING FROM THEM.

7 NOW, THIS IS 237 --

8 (DEMONSTRATIVE PUBLISHED TO JURY.)

9 MR. BOIES: -- MR. MEYER'S CALCULATION. THAT COMES  
10 UP WITH A \$1.655.6 BILLION (SIC), \$1,655,600,000. AND IT'S GOT  
11 THE THREE COMPONENTS, THE PEOPLESOFT LICENSE, THE SIEBEL  
12 LICENSE, AND THE DATABASE LICENSE. THE VAST MAJORITY OF IT IS  
13 THE PEOPLESOFT LICENSE.

14 AND THERE, WHAT HE SAID WAS, THIS IS A MINIMUM  
15 NUMBER. IT'S LARGER. I CAN'T TELL YOU HOW MUCH LARGER BECAUSE  
16 THE DATA ISN'T THERE.

17 SO ONE OF THE -- ONE OF THE PROBLEMS WE'RE CONFRONTED  
18 WITH HERE IS A QUESTION OF WHAT CAN BE QUANTIFIED AND WHAT DO  
19 YOU HAVE TO ESTIMATE? AND THIS WAS HIS QUANTIFICATION.

20 NOW, LET ME GO TO 239 BECAUSE I WANT TO JUST COMPARE  
21 THAT QUANTIFICATION.

22 (DEMONSTRATIVE PUBLISHED TO JURY.)

23 MR. BOIES: YOU HAVE MR. PHILLIPS' VALUATION, YOU  
24 HAVE MR. ELLISON'S VALUATION OF LICENSE. YOU HAVE WHAT A  
25 LICENSE AT 20 PERCENT OF THE PEOPLESOFT AND SIEBEL ACQUISITIONS

## ORACLE'S CLOSING ARGUMENT

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1 WOULD BE. YOU HAVE THE VALUE OF 3,000 CUSTOMERS, JUST  
2 \$1 MILLION PER CUSTOMER.

3 YOU HAVE THE MEYER'S INDICATION VALUE AT 2.86  
4 BILLION. YOU HAVE SAP'S ROAD MAP REVENUE THROUGH 2007 EXTENDED  
5 FOR THE TEN MONTHS IN 2008, AT 1.7 -- 1.77 --

6 YOU HAVE 10 PERCENT OF PEOPLESOFT AND SIEBEL  
7 ACQUISITION PRICE, WHICH WOULD BE 1.72 BILLION, AND ON AND ON  
8 AND ON, EXAMPLE AFTER EXAMPLE AFTER EXAMPLE.

9 YOU HAVE MR. MEYER'S AT 1.65 BILLION, AND YOU HAVE  
10 MR. CLARK AT 40 MILLION.

TEXT REMOVED - NOT RELEVANT TO MOTION

TEXT REMOVED - NOT RELEVANT TO MOTION

12                   AND THAT'S VERY IMPORTANT. BECAUSE IF YOU DID  
13 ANYTHING ELSE, YOU WOULD SIMPLY BE ENCOURAGING PEOPLE TO TAKE  
14 AND USE THINGS THEY DON'T HAVE ANY RIGHT TO. BECAUSE THEY  
15 WOULD KNOW THAT IF I GET CAUGHT, ALL I AM GOING TO HAVE TO DO  
16 IS PAY FOR WHAT THE LOSS WAS AND GIVE UP MY PROFITS IF SOMEBODY  
17 CAN PROVE IT. BUT I AM NOT GOING TO HAVE TO PAY FOR THE VALUE  
18 OF WHAT I ACTUALLY TOOK.

19                   AND IF YOU THINK ABOUT IT, IN COMMON SENSE TERMS, IF  
20 SOMEBODY GOES IN AND STEALS A GAME FROM BEST BUY, AND LET'S SAY  
21 BEST BUY HAS A LOT OF THOSE GAMES, SO THEY DON'T REALLY LOSE  
22 ANY CUSTOMERS OVER IT BECAUSE THEY HAVE EXCESS INVENTORY, AND  
23 LET'S SAY THE PERSON NEVER USES THE GAME, BESIDES PARENTS WON'T  
24 LET THEM USE THE GAME, WHATEVER REASON, DOESN'T USE THE GAME,  
25 DOES THAT MEAN HE DOESN'T OWE ANYTHING FOR THAT GAME THAT WAS

1 TAKEN?

2 YOU CAN'T HAVE THAT KIND OF RULE ABOUT THINGS THAT  
3 PEOPLE ESSENTIALLY TAKE. YOU DON'T HAVE A RIGHT TO TAKE AND  
4 THEN GO BACK IN AND SAY, WELL, WE DIDN'T MAKE AS MUCH AS WE  
5 THOUGHT WE GAINED, YOU DIDN'T LOSE AS MUCH AS YOU THOUGHT YOU  
6 WOULD LOSE, THEREFORE, WE DON'T HAVE TO PAY YOU WHAT IT WOULD  
7 HAVE COST US TO LICENSE THAT SOFTWARE AT THE TIME.

8 NOT ONLY IS THAT NOT FAIR, BUT THAT SENDS UP EVERY  
9 WRONG INCENTIVE FOR HOW WE WANT PEOPLE, AND PARTICULARLY LARGE  
10 CORPORATIONS TO BEHAVE AND CONDUCT THEIR BUSINESSES. IT IS  
11 ALSO SOMETHING THAT UNDERMINES THE VERY FOUNDATIONS OF THE  
12 SOFTWARE BUSINESS.

TEXT REMOVED - NOT RELEVANT TO MOTION

1           AND IN THAT CONNECTION, I WANT TO PUT UP THE CHART  
2           THAT I HAD SHOWED YOU BEFORE THAT PUT IN CONTEXT THE VARIOUS  
3           ESSENCE, AND THIS WAS -- IT WAS A SUMMARY CHART LISTED -- HERE  
4           IT IS, 239.

5           (SLIDE DISPLAYED ON SCREEN.)

6           WHAT I WOULD LIKE TO DO IS SHOW YOU HOW I WOULD FILL  
7           THIS OUT IF I HAD -- HOW I WOULD DO IT IS AS RELEVANT AS HE  
8           WOULD DO IT BECAUSE IT IS ALL UP TO YOU. SINCE HE DID IT, LET  
9           ME SHOW YOU WHAT I THINK.

10           NOW, IN THE FAIR MARKET VALUE OF THE LICENSE, AND  
11           LET ME JUMP BACK TO 239 JUST FOR A MINUTE. I WILL PUT UP -- I  
12           WILL TRY AND PUT IT UP HERE.

13           (SLIDE DISPLAYED ON ELMO.)

14           YOU REMEMBER THAT ON 239 THERE WERE A WHOLE SERIES  
15           OF VALUATIONS. NOW, SOME OF THE VALUATIONS WERE VERY HIGH,  
16           SOME WERE IN THE MIDDLE, SOME WERE VERY LOW. THERE ARE TWO  
17           VALUATIONS THAT I THINK ARE USEFUL TO KEEP IN MIND.

18           ONE IS THE 3,000 CUSTOMERS VALUED AT A MILLION  
19           DOLLARS AND THE OTHER IS FAIR MARKET VALUE LICENSE THAT  
20           MR. MEYER CAME UP WITH. AND THE ANSWER IS PROBABLY SOMEWHERE  
21           IN THERE.

22           I THINK WE KNOW IT'S HIGHER THAN MR. MEYER'S FAIR  
23           MARKET VALUE LICENSE BECAUSE HE IDENTIFIED A WHOLE SERIES OF  
24           THINGS THAT HE COULD NOT TAKE INTO ACCOUNT. ON THE OTHER HAND,  
25           I AGREE WITH COUNSEL THAT THE VALUATIONS AT FOUR OR \$5 BILLION

1 ARE VALUATIONS THAT IT'S HARD TO HAVE ENOUGH SUPPORT FOR SO  
2 THAT WE CAN ACTUALLY SAY THAT'S A DAMAGE NUMBER THAT YOU OUGHT  
3 TO AWARD.

4 SO WHAT I WOULD SAY IS 3,000 CUSTOMERS, WHICH WAS ON  
5 THE LOW END OF SOME OF THEIR ESTIMATES. REMEMBER YOU SAW SOME  
6 OF THE ESTIMATES OF A MAJORITY, WHICH WOULD BE FIVE OR 6,000.  
7 YOU SAW OTHER ESTIMATES AT 4,000, OTHER ESTIMATES AT 5,000. SO  
8 3,000 IS A REASONABLY CONSERVATIVE NUMBER. AND \$1 MILLION  
9 VALUE PER CUSTOMER IS A VERY CONSERVATIVE NUMBER BECAUSE YOU  
10 WILL REMEMBER THAT FOR JUST THOSE FOUR CUSTOMERS THAT  
11 MR. CLARKE HAD, THE AVERAGE REVENUE WAS \$1.9 MILLION. YOU TAKE  
12 THOSE AND YOU COME UP WITH A \$3 BILLION NUMBER.

13 AND MR. MEYER COMES UP WITH \$1.65 BILLION NUMBER,  
14 AND THOSE NUMBERS, HE SAYS, UNDERSTATE BECAUSE HE CAN'T  
15 IDENTIFY ALL OF THE ASPECTS AND HE DOESN'T EVEN MAKE AN ATTEMPT  
16 TO EVALUATE THE EXTENT OF DISRUPTION AND THE LIKE THAT WAS ONE  
17 OF THE KEY REASONS THAT SAP ENGAGED IN THIS INFRINGEMENT. SO,  
18 FAIR MARKET VALUE OF THE LICENSE IS SOMEWHERE BETWEEN 1.65 AND  
19 3 BILLION.

TEXT REMOVED - NOT RELEVANT TO MOTION

1                   FIFTH, WHY DIDN'T SAP TAKE THE SIMPLE STEP OF  
2 REMOVING ORACLE'S SOFTWARE FROM TOMORROWNOW'S COMPUTERS?

3                   YOU HEARD MR. BRANDT TESTIFY THAT HE KNEW IT WAS  
4 IMPROPER TO HAVE ORACLE SOFTWARE ON -- TO HAVE ORACLE SOFTWARE  
5 ON TOMORROWNOW'S COMPUTERS. AND YOU HEARD HIM SAY THAT EVEN  
6 THOUGH HE COULDN'T CHECK IT, HE HAD A LOT OF PEOPLE WHO COULD  
7 CHECK IT WITH A PHONE CALL.

8                   WHY DIDN'T THEY DO THAT? IF IT DIDN'T MATTER, IF IT  
9 DIDN'T MATTER, WHY DIDN'T THEY DO THAT?

TEXT REMOVED - NOT RELEVANT TO MOTION



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

|                            |   |                            |
|----------------------------|---|----------------------------|
| ORACLE CORPORATION, ET AL. | ) | JURY TRIAL                 |
|                            | ) |                            |
| PLAINTIFFS,                | ) | NO. C 07-01658 PJH         |
|                            | ) |                            |
| VS.                        | ) | VOLUME 13                  |
|                            | ) |                            |
| SAP AG, ET AL.,            | ) | PAGES 2231 - 2267          |
|                            | ) |                            |
| DEFENDANTS.                | ) | OAKLAND, CALIFORNIA        |
| _____                      | ) | TUESDAY, NOVEMBER 23, 2010 |

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:           BINGHAM MCCUTCHEM LLP  
                                  THREE EMBARCADERO CENTER  
                                  SAN FRANCISCO, CALIFORNIA 94111-4607  
BY: ZACHARY J. ALINDER,  
      HOLLY A. HOUSE,  
      GEOFFREY M. HOWARD,  
      DONN P. PICKETT, ATTORNEYS AT LAW  
  
                                  BOIES, SCHILLER & FLEXNER LLP  
                                  1999 HARRISON STREET, SUITE 900  
                                  OAKLAND, CALIFORNIA 94612  
BY: DAVID BOIES,  
      STEVEN C. HOLTZMAN, ATTORNEYS AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY:           RAYNEE H. MERCADO, CSR NO. 8258  
  
                                  DIANE E. SKILLMAN, CSR NO. 4909

TEXT REMOVED - NOT RELEVANT TO MOTION

7 MR. LANIER: VERY BRIEFLY, YOUR HONOR, ONE ISSUE  
8 RELATING TO THE REBUTTAL CLOSING ARGUMENT YESTERDAY. ONCE WE  
9 GOT THE TRANSCRIPT, WE REALLY REFLECTED ON THIS. WE THINK --  
10 AND WE'RE -- AGAIN, WE'RE SURE UNINTENTIONALLY, A STATEMENT WAS  
11 MADE IN ARGUMENT THAT WE THINK ACTUALLY IS AN INCURABLE ERROR.  
12 IT MIGHT BE A BASIS FOR A NEW TRIAL, WHICH WAS AN APPEAL -- AN  
13 EXAMPLE BY MR. BOIES OF AN EXAMPLE OF STEALING, WHICH IS A  
14 DIFFERENT ISSUE, FROM BEST BUY, WHO IS THE EMPLOYER OF ONE OF  
15 THE JURORS.

16 THAT SECOND PART, WE THINK, IS INCURABLE. DON'T  
17 IGNORE -- DON'T PAY ANY ATTENTION TO TESTIMONY ABOUT ONE OF YOUR  
18 EMPLOYERS, JURORS. WE THINK THAT WOULD BE INCURABLE AND MAY BE  
19 A BASIS WE RAISE LATER. BUT WE DON'T ASK FOR AN INSTRUCTION ON  
20 THAT NOW.

21 THE STEALING POINT WE DO THINK IS WORTH A BRIEF  
22 NEUTRALLY PHRASED CURATIVE INSTRUCTION FROM THE COURT. YOU MAY  
23 HAVE HEARD TESTIMONY ABOUT STEALING. THIS IS A CASE ABOUT  
24 COPYRIGHT INFRINGEMENT, NOT THEFT, SOMETHING LIKE THAT THAT  
25 DOESN'T SINGLE OUT EITHER SIDE.

1 MR. BOIES: YOUR HONOR, I DON'T THINK THAT THE  
2 ANALOGY RAISES THAT PROBLEM AT ALL. FROM THE WITNESS STAND,  
3 WITHOUT OBJECTION, WITNESSES TESTIFIED ABOUT USING A CROWBAR TO  
4 BREAK INTO A HOUSE AND BURGLARIZE IT AND CLEAN IT OUT. THAT WAS  
5 RECOGNIZED AS AN ANALOGY. THEY DIDN'T OBJECT TO THAT AT ALL AT  
6 THE TIME. I DON'T THINK THEY CAN OBJECT TO THE BEST BUY  
7 ANALOGY.

8 THE COURT: I'M NOT AS BOTHERED BY THE ANALOGY AS THE  
9 BEST BUY -- I TOTALLY FORGOT THAT ONE OF THE WITNESSES WAS A  
10 BEST BUY EMPLOYEE.

11 MR. LANIER: AND, CANDIDLY, WE HAD FORGOTTEN THAT,  
12 TOO. AND UNTIL WE GOT THE RECORD AND DO WHAT WE ALWAYS DO,  
13 WHICH IS READ IT. AND IT'S ALSO WHY WE DON'T -- WE DON'T KNOW  
14 THAT THAT'S CURABLE NOW. AND, FRANKLY, THE ATTEMPT TO CURE IT  
15 MIGHT MAKE IT WORSE. SO WE'RE NOT ASKING FOR A CURATIVE  
16 INSTRUCTION ON THAT POINT.

17 I MEAN, ALL WE'LL SAY ON THE -- THE STEALING POINT IS  
18 THAT YOUR HONOR HAD GIVEN SPECIFIC DIRECTION IMMEDIATELY BEFORE  
19 ARGUMENT AND IN A COMMENT, "AND IF YOU THINK ABOUT IT IN  
20 COMMON-SENSE TERM, IF SOMEBODY GOES IN AND STEALS A GAME," AND  
21 IT GOES FROM THERE.

22 AND SO THE DIRECTION TO ARGUMENT THAT -- THAT IS OUR  
23 OBJECTION THAT WE DO THINK A, AGAIN, NEUTRALLY PHRASED CURATIVE  
24 INSTRUCTION MIGHT BE OF SOME VALUE.

25 THE COURT: YEAH, I'M NOT -- I'M NOT ENTIRELY SURE

1 THAT -- THAT A CURATIVE INSTRUCTION IS NECESSARY. I MEAN, KEEP  
2 IN MIND THAT I THINK THAT REASONABLE JURORS MIGHT DIFFER ON  
3 WHETHER OR NOT THE PLAINTIFFS SHOULD HAVE BEEN ABLE TO  
4 CHARACTERIZE THE CONDUCT AS THEFT OR STEALING.

5 IT'S JUST THAT I FOUND IT TO BE UNNECESSARILY  
6 INFLAMMATORY AND UNNECESSARY IN THIS KIND OF CASE, PARTICULARLY  
7 GIVEN THE -- THE STIPULATION AS TO LIABILITY.

8 SO I DON'T THINK THAT I WANT TO GO SO FAR AS TO DRAW  
9 FURTHER ATTENTION TO THE USE OF THAT KIND OF LANGUAGE, WHICH I  
10 CERTAINLY PROHIBITED WITH RESPECT TO THE INFRINGEMENT. BUT BY  
11 WAY OF THE ANALOGIES, THEFT OF THE WATCH, THE CROWBAR TO THE  
12 CAR, AND THE VIDEO -- STEALING OF VIDEOTAPE, I DON'T THINK THAT  
13 I'M GOING TO DO THAT.

14 MR. LANIER: UNDERSTOOD, YOUR HONOR.

15 THE COURT: ALTHOUGH I CERTAINLY DO UNDERSTAND THE  
16 POSITION OF THE DEFENSE.

17 MR. LANIER: THANK YOU, YOUR HONOR.

TEXT REMOVED - NOT RELEVANT TO MOTION

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**CERTIFICATE OF REPORTER**

I, RAYNEE H. MERCADO, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC, ET AL. V. SAP AG, ET AL., WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, ON TUESDAY, NOVEMBER 23, 2010, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.



RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR

TUESDAY, NOVEMBER 23, 2010