

EXHIBIT A

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL.)

PLAINTIFFS,)

VS.)

SAP AG, ET AL.,)

DEFENDANTS.)

NO. C 07-01658 PJH

Certified Copy

PAGES 1 - 296

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

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.
7 BUT OTHERWISE, I AGREE WITH THE THREE CATEGORIES. I THINK YOU
8 CAN PUT ON SOME EVIDENCE AS LONG AS IT GOES TO THE QUESTIONS
9 THAT YOU'VE RAISED WITH RESPECT TO HOW THE DAMAGES ARE TO BE
10 VALUATED AND PROVIDE SOME CONTEXT. AND I THINK THAT THAT'S --
11 SAP'S IN THAT POSITION AND THAT'S HOW IT IS GOING TO HAVE TO
12 BE.
13 MR. LANIER: WE UNDERSTAND, YOUR HONOR.
14 THE COURT: TAKE THE WORD "THEFT" OUT AND I'M FINE
15 WITH WHAT YOU'RE DOING.
16 MR. LANIER: THE SECOND OBJECTION WE HAD TO WHAT
17 THEY PRESENTED, AND AGAIN, IT MIGHT MATTER MORE IF THEY PRESENT
18 WITNESSES SUCH AS THEIR EXPERT PAUL PINTO, ET CETERA. AGAIN,
19 IT SEEMS CLEAR WE HAVEN'T HEARD IT YET, BUT IT SEEMS CLEAR THEY
20 INTEND TO PRESENT EVIDENCE ABOUT DEVELOPMENT COSTS AND COSTS
21 THAT WERE AVOIDED, AN ISSUE THAT WE THINK YOUR HONOR'S RULINGS
22 NOW REPEATEDLY HAVE PRETTY WELL FORECLOSED. WE DON'T THINK WE
23 NEED TO HEAR THE EXPERT ON SAY DEVELOPMENT COSTS OR OUR TWO
24 RESPONSIVE EXPERTS. THEY SHOULDN'T BE IN THIS CASE.
25 THE COURT: IT'S NOT PART OF THE CASE.

DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

1 MR. PICKETT: THAT ISN'T, I AGREE. BUT THAT'S NOT
2 WHAT -- I GUESS THERE'S ONE SLIDE HE'S TALKING ABOUT, WHICH
3 TALKS ABOUT THE RESEARCH AND DEVELOPMENT THAT ORACLE PUTS INTO
4 THE SOFTWARE.
5 NOW, IF ORACLE'S COMING TO THE NEGOTIATING TABLE --
6 FOR THAT MATTER, WHEN SAP DOES BECAUSE THEY PUT BILLIONS INTO
7 R&D, TOO. IT'S A DEMONSTRATION THAT IN THEIR MINDSET THIS TYPE
8 OF THING HAS A LOT OF VALUE BECAUSE IT IS BASED ON SOME R&D,
9 NOT WHAT IT WOULD COST OR WHAT SOME EXPERT WILL SAY DOWN THE
10 ROAD. IT HAS NONE OF THAT. IT'S JUST A BACKGROUND PIECE ON
11 ONE SLIDE, I BELIEVE, THERE IS A LOT OF R&D THAT GOES INTO THE
12 STUFF.
13 AND, FRANKLY, IT'S HOW THESE -- AND WITNESSES WILL
14 TESTIFY, IT'S HOW THE COMPANIES WORK. THEY BRING IN A LOT OF
15 REVENUES AND THEY PILE IT BACK INTO R&D BECAUSE THEY WANT TO
16 GET THE NEXT GENERATION OF SOFTWARE.
17 THE COURT: YOU ARE NOT SEEKING DAMAGES FOR IT, YOU
18 ARE SIMPLY SEEKING -- TRYING TO EDUCATE THE JURY ON HOW
19 IMPORTANT IT WAS TO ORACLE BY SHOWING HOW MUCH YOU PUT INTO IT?
20 MR. PICKETT: CORRECT.
21 MR. LANIER: AS PRESENTED BY THEIR EXPERT WHEN HE
22 TESTIFIED AT DEPOSITION AND IN HIS REPORT, IT WAS ONE OF HIS
23 FACTORS IN SUPPORT OF HIS LICENSE THEORY. YOUR HONOR'S RULED
24 IT OUT.
25 IT GOES BEYOND CONTEXT BECAUSE IT CLEARLY IS SO
DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

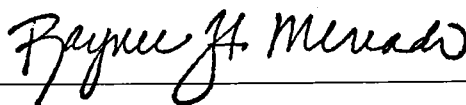
1 CLOSELY TIED TO A POTENTIAL MONETARY REMEDY THAT YOUR HONOR HAS
2 EXCLUDED, BUT THE POTENTIAL FOR CONFUSION IS SO HIGH. THEY
3 HAVE OTHER WAYS, THEY CLAIM, TO PROVE WHAT TWO PARTIES WOULD
4 HAVE AGREED TO DO. YOU DON'T HAVE TO PROVE ACQUISITION COSTS
5 OR DEVELOPMENT COSTS. WE DON'T NEED TO HAVE AN EXPERT ON THOSE
6 TOPICS.
7 THE COURT: I CAN'T IMAGINE YOU'RE GOING TO BE
8 ATTEMPTING TO PROVE ACQUISITION OR DEVELOPMENT COSTS BECAUSE I
9 HAVE ALREADY RULED ON THOSE.
10 IS THAT CORRECT?
11 MR. PICKETT: THAT'S CORRECT.
12 THE COURT: ALL RIGHT. BUT I DON'T SEE WHAT THE
13 PROBLEM IS IN ESTABLISHING WHAT ORACLE -- HOW ORACLE DEVELOPED
14 THE PRODUCT AND HOW MUCH OF ITS RESOURCES IT PUT INTO THE
15 DEVELOPMENT OF THE PRODUCT.
16 IT CANNOT SEEK COMPENSATION FOR THAT, BUT IT CAN
17 CERTAINLY TALK ABOUT HOW IMPORTANT IT IS.
18 MR. PICKETT: WE DON'T USE THOSE WORDS "ACQUISITION
19 COST" ANY AND OF THAT.
20 THE COURT: DEVELOPMENT COSTS.
21 OKAY. THAT TAKES CARE OF NUMBER ONE, WHICH I
22 THOUGHT WOULD BE PRETTY EASY.
23 NUMBER TWO, ADMISSIBILITY OF EXHIBITS EXPECTED TO BE
24 USED WITH ORACLE'S FIRST WITNESSES. WHAT'S THE ISSUE WITH
25 RESPECT TO THAT?
DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

1 MR. LANIER: WE HAVE EXCHANGED SOME OBJECTIONS. I
2 DON'T KNOW THAT WE HAVE ACTUALLY HAD A CHANCE TO TALK ABOUT IT
3 BECAUSE WE JUST GOT THEM OVER THE WEEKEND.
4 THE COURT: I WILL HAVE TO TELL YOU ALL THAT I
5 REALLY DO EXPECT WITH ALL OF THE TIME THAT YOU HAVE PUT IN ON
6 THIS CASE, I REALLY DO EXPECT YOU ALL TO BE ABLE TO GET
7 EXHIBITS IN WITHOUT INVOLVING THE COURT.
8 I CANNOT IMAGINE THAT YOU ARE GOING TO WANT ME TO
9 PREVIEW EVERY ONE OF THE THOUSANDS OF EXHIBITS THAT YOU ALL
10 HAVE AGREED UPON. YOU'VE EXCHANGED THESE EXHIBITS IN
11 DISCOVERY, YOU ARE FAMILIAR WITH THEM.
12 WHAT I WOULD LIKE TO SEE, AND THE ONLY THINGS THAT I
13 THINK I SHOULD HAVE TO SEE IS IF THERE'S PARTICULAR CATEGORIES
14 OF EXHIBITS FOR WHICH THERE IS A LEGITIMATE OBJECTION TO THAT
15 PARTICULAR CATEGORY, IF THERE IS A SEMINAL EXHIBIT WITH REGARD
16 TO SOME PARTICULAR ISSUE. BUT I DON'T REALLY THINK THAT YOU
17 SHOULD EXPECT ME TO BE ABLE TO REVIEW ALL OF THE EXHIBITS IN
18 ADVANCE OF THEM BEING USED, AND I WOULD NOT EXPECT THAT YOU
19 WOULD OBJECT TO THE MAJORITY OF THESE EXHIBITS.
20 MR. LANIER: YOUR HONOR, THE PARTIES HAD EXCHANGED
21 LISTS OF 500 EXHIBITS TO TRY TO WORK THROUGH THIS. WE GOT
22 OBJECTIONS TO 430. WHAT'S BECOME CLEAR IS THAT WE'RE GOING TO
23 NEED TO DO THIS EXHIBIT BY EXHIBIT WITH WITNESSES. THERE'S A
24 LOT OF HEARSAY PROBLEMS, ACCORDING TO THEM, AND WE HAVE SOME
25 ISSUES OF OUR OWN.
DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

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)

Certified Copy

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

OPENING STATEMENT \ MITTELSTAEDT

1 ON SAP SOFTWARE, SAP SOFTWARE, THIS BUSINESS APPLICATION
2 SOFTWARE WAS SAP SOFTWARE. AND TO MAKE SURE IT WAS SAP
3 SOFTWARE, SAP'S BOARD ISSUED SOMETHING CALLED RULES OF
4 ENGAGEMENT WITH TOMORROWNOW. AND WHAT THEY DID WAS ESTABLISH AN
5 IRON WALL BETWEEN SAP AND TOMORROWNOW. THEY KNEW THAT
6 TOMORROWNOW WAS GOING TO HAVE ACCESS TO ORACLE'S SOFTWARE, AND
7 THERE WAS NOTHING WRONG WITH HAVING ACCESS.

8 IF I CAN GO BACK TO THE EASEL, YOU KNOW, EVERYBODY
9 AGREES THAT THESE CUSTOMERS HAD A RIGHT TO DOWNLOAD MATERIALS
10 AND THEY HAD A RIGHT -- TOMORROWNOW OR OTHER THIRD-PARTY
11 SUPPORTERS TO HAVE ACCESS TO THAT. AND SO SAP WANTED TO MAKE
12 SURE THAT ANY ORACLE SOFTWARE WOULDN'T GO TO SAP.

13 AND SO WHEN THEY SAY SAP CHOSE TO USE ORACLE
14 SOFTWARE, THEY DON'T REALLY MEAN THAT. THEY MEAN TOMORROWNOW
15 WAS USING IT. AND SO WHEN WE GET TO THIS SECOND CATEGORY OF --
16 OF CUSTOMERS, CUSTOMERS THAT USED TO BE AT PEOPLESOF OR ORACLE
17 AND THEN SWITCHED AND BECAME SAP CUSTOMERS. THERE'S A LOT OF
18 CUSTOMERS IN THAT CATEGORY, ABOUT 86 IN TOTAL. AND THE QUESTION
19 IS HOW MANY OF THEM SWITCHED FROM ORACLE TO SAP BECAUSE OF
20 TOMORROWNOW.

21 AND YOU WOULDN'T EXPECT MANY CUSTOMERS TO BE IN THAT
22 CATEGORY, AND LET ME TELL YOU WHY. AS ORACLE'S COUNSEL HAS
23 SAID, MAKING A SWITCH OF SOFTWARE -- THIS IS THE SOFTWARE THAT
24 RUNS YOUR BUSINESS -- IS A REAL BIG DEAL. IT'S LIKE -- ONE WAY
25 OF THINKING OF IT IS REPLUMBING YOUR ENTIRE HOUSE. OR IF YOU
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

OPENING STATEMENT \ MITTELSTAEDT

1 THINK OF A GROCERY STORE, IT'S REMOVING ALL THE SHELVING, TAKING
2 ALL THE MATERIALS OFF, ALL THE FOOD, EVERYTHING OFF THE
3 SHELVING, REPLACING THAT SHELVING, AND THEN PUTTING ALL THE
4 MATERIALS BACK AND TRYING TO DO IT WHILE YOU'RE STILL RUNNING
5 YOUR BUSINESS.

6 IT'S EXPENSIVE, AND IT'S DISRUPTIVE, AND COMPANIES
7 DON'T MAKE A BIG DECISION LIKE THAT WITHOUT A REALLY GOOD REASON
8 TO DO IT.

9 AND GETTING HALF PRICE ON YOUR SUPPORT FOR YOUR OLD
10 ORACLE SOFTWARE DURING THIS TRANSITION PERIOD IS NOT A GOOD
11 REASON OR GOOD ENOUGH REASON FOR A COMPANY TO DECIDE TO LEAVE
12 ORACLE AND GO TO SAP TO BUY SAP SOFTWARE.

13 OKAY. THAT'S WHAT I SAY. WHAT'S THE BASIS FOR THAT?
14 WELL, YOU'LL HEAR THE TESTIMONY FROM ORACLE THEMSELVES, FROM
15 CUSTOMERS, AND FROM SAP ON HOW COMPANIES MAKE THAT DECISION TO
16 SWITCH FROM ONE SUPPLIER TO ANOTHER.

17 AND LET ME START WITH ORACLE. AND REMEMBER, JUST SO
18 WE'RE CLEAR, WE'RE TALKING NOW ABOUT CUSTOMERS WHO GO TO SAP TO
19 BUY THEIR SOFTWARE. IF THEY GO TO SAP TO BUY THEIR SOFTWARE,
20 COMPLETELY UNRELATED TO TOMORROWNOW, THEN WE DON'T OWE ORACLE
21 FOR THE PROFITS WE MADE ON THAT SOFTWARE SALE. THAT'S JUST FAIR
22 COMPETITION. IF THOSE CUSTOMERS CAME TO US AND BOUGHT OUR
23 SOFTWARE BECAUSE OF TOMORROWNOW, WE ADMIT WE OWE ORACLE THE
24 PROFITS WE MADE ON THAT. SO WE'VE GOT TO DISTINGUISH WHY
25 CUSTOMERS CAME TO SAP.

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

OPENING STATEMENT \ MITTELSTAEDT

1 THIS CASE IS ALL ABOUT CUSTOMERS, HOW CUSTOMERS MADE
2 THE DECISIONS THEY MADE, AND YOU'LL HEAR A LOT OF TESTIMONY ON
3 THAT, AND THE REASON YOU'LL BE HEARING TESTIMONY IS -- IS WHAT
4 IN LEGAL TERMINOLOGY IS CALLED CAUSATION. WHAT CAUSED THESE
5 CUSTOMERS TO MAKE THE DECISION THEY DID? WAS IT TOMORROWNOW?
6 IF IT'S TOMORROWNOW, WE OWE THEM COMPENSATION. IF
7 IT'S SOMETHING ELSE, WE DON'T. IT WOULD BE A WINDFALL FOR THEM
8 TO SAY EVERY TIME ORACLE LOSES A CUSTOMER TO SAP, SAP'S GOT TO
9 PAY US. THAT WOULDN'T MAKE ANY SENSE. THEIR ONLY HOOK HERE IS
10 TOMORROWNOW, SO THEY'VE GOT TO TIE IN CUSTOMERS TO TOMORROWNOW.

11 SO HERE'S -- HERE'S WHAT ORACLE SAID.

12 (DEMONSTRATIVE PUBLISHED TO JURY.)

13 MR. MITTELSTAEDT: THIS IS MR. PHILLIPS, AGAIN,
14 COPRESIDENT OF ORACLE. AND THE QUESTION AT THE DEPOSITION WAS,
15 "IN ANY OF THE INTERACTIONS THAT YOU'VE HAD WITH CUSTOMERS THAT
16 ARE CONSIDERING A SWITCH ONE WAY OR THE OTHER, FROM ORACLE TO
17 SAP OR SAP TO ORACLE, HAVE ANY OF THEM EVER MENTIONED
18 MAINTENANCE OR SUPPORT AS A FACTOR IN THEIR DECISION?"

19 SO IN OTHER WORDS, WHEN YOU'RE SWITCHING SOFTWARE
20 SUPPLIERS, ARE YOU DOING THAT BECAUSE OF MAINTENANCE OR SUPPORT
21 WHERE YOU'RE GETTING THAT?

22 MR. PHILLIPS: THAT'S NEVER BEEN AN ISSUE. THAT --
23 THAT WOULDN'T BE THE REASON NORMALLY THAT PEOPLE WOULD SWITCH.

24 AND WHY WOULDN'T IT BE THE REASON?

25 IT'S BECAUSE THESE ARE REALLY, REALLY BIG DECISIONS,
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

OPENING STATEMENT \ MITTELSTAEDT

1 AND TOMORROWNOW OFFERING HALF PRICE SUPPORT FOR THIS INTERIM
2 TRANSITION PERIOD ON YOUR OLD PEOPLESOF SOFTWARE IS NOT A GOOD
3 ENOUGH REASON FOR PEOPLE TO SWITCH.

4 THAT'S WHAT HE'S SAYING.

5 OKAY. LET ME GIVE YOU AN EXAMPLE OF A CUSTOMER.

6 THIS CUSTOMER IS LEXMARK. IT'S A BIG MAKER OF PRINTERS. AND
7 LEXMARK WAS TRYING TO DECIDE WHETHER TO STAY WITH PEOPLESOF OR
8 TO SWITCH TO SAP OR SOMEBODY ELSE.

9 (DEMONSTRATIVE PUBLISHED TO JURY.)

10 MR. MITTELSTAEDT: AND AS YOU CAN IMAGINE FOR A BIG
11 CORPORATION, THEY HAD A VERY SYSTEMATIC WAY OF GOING ABOUT THIS.
12 AND HERE'S WHAT MR. O'DONNELL SAID.

13 "Q. WHAT FACTORS INFLUENCED YOUR DECISION
14 TO GO TO SAP?"

15 AND HIS ANSWER WAS, "THERE WERE OVER 300
16 DATAPOINTS THAT WERE MEASURED AND SCORED," SO 300
17 ISSUES.

18 "Q. WERE THOSE SAME 300 DATAPOINTS MEASURED
19 AND SCORED FOR ORACLE?"

20 "A. YES.

21 "Q. SO THEY COMPARED HOW ORACLE AND SAP DID
22 SAP SCORED HIGHER ON THOSE 300 DATAPOINTS?"

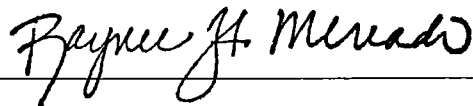
23 "A. YES."

24 MR. MITTELSTAEDT: AND THEN HE WAS ASKED, "WHEN
25 SELECTING SAP, WHAT ROLE, IF ANY, DID THE EXISTENCE OF
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

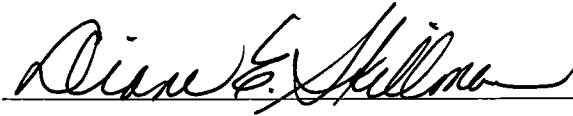
CERTIFICATE OF REPORTER

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

Certified Copy

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

814

ELLISON - FURTHER REDIRECT / BOIES

1 MR. McDONELL: YOUR HONOR, COUPLE OF THINGS. FIRST
 2 OF ALL IN TERMS OF THE MENTION OF THESE VARIOUS THINGS COUNSEL
 3 JUST TALKED ABOUT, THOSE WERE GENERIC; NONE OF THEM WERE IN THE
 4 CONTEXT OF THIS PRECISE ISSUE, UPSELL AND CROSS-SELL. THEY
 5 REALLY DID NOT PRESENT THAT ISSUE IN ANY WAY, SHAPE, OR FORM.
 6 THERE CERTAINLY IS EXPECTATION EVIDENCE ON BOTH SIDES
 7 THAT IS APPROPRIATE IN THIS CASE. WHAT WE'RE TALKING ABOUT HERE
 8 NOW IS ENFORCING THE CONSEQUENCE OF THE SANCTIONS ORDER THAT
 9 RESULTED IN YOUR ORDER ADOPTING IT AND RESULTED IN THE ORDERS ON
 10 MOTIONS IN LIMINE.

11 AND, AGAIN, IT IS CLEAR NOW THAT -- THAT UPSSELL AND
 12 CROSS-SELL IS IN THESE NUMBERS. AND IF I JUST MAY HAVE A SLIDE
 13 VERY QUICKLY OF MY OWN, YOUR HONOR, TO SHOW YOU REALLY THE --
 14 THE PRECISE THING WE'RE TALKING ABOUT HERE.

(EXHIBIT PUBLISHED TO JURY.)

16 MR. McDONELL: NO, NEXT SLIDE, PLEASE.

(EXHIBIT PUBLISHED TO JURY.)

18 MR. McDONELL: NO.

19 IT'S ONE OF THE SUPPORT SHEETS THAT'S LIKE AN EXCEL
 20 SPREADSHEET.

(EXHIBIT PUBLISHED TO JURY.)

22 MR. McDONELL: YOUR HONOR, HERE IS THE BACKUP SUPPORT
 23 FOR THEIR CURRENT VERSION OF THEIR -- EITHER AS COUNSEL
 24 MENTIONED, 2 BILLION OR APPROXIMATELY \$1.5 BILLION CLAIM, ONE
 25 WITHOUT UPSSELL AND CROSS-SELL, ONE THAT INCLUDES IT.

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

816

ELLISON - FURTHER REDIRECT / BOIES

1 ACQUISITIONS.

2 INSTEAD, WHAT WE DO HAVE ARE JUST THESE ISOLATED
 3 UNSUPPORTED PROJECTIONS, WHICH, AS COUNSEL HAS NOW TOLD YOU,
 4 ARE -- ARE THE FOUNDATION OF THEIR CLAIM OF THIS \$11 BILLION
 5 VALUE.

6 THE COURT: LET ME MAKE SURE I UNDERSTAND. THESE
 7 PROJECTIONS NOW ARE BASED UPON PRE-JANUARY 2005 SALES FIGURES.

8 MR. McDONELL: WE DON'T KNOW WHAT THEY'RE BASED ON.

9 THEY'RE SIMPLY PROJECTIONS WHICH ARE PRESUMABLY --

10 THE COURT: WELL, EXCUSE ME. THERE ARE DATES ON AT
 11 LEAST THE ONE THAT COUNSEL GAVE ME, AND IT'S SEPTEMBER OF '03;
 12 IS THAT CORRECT?

13 MR. McDONELL: YES. SO --

14 THE COURT: AND SEPTEMBER OF '04. IT'S THROUGH
 15 DECEMBER OF '04. THE -- IT SEEMS TO ME THAT THE ONES THAT
 16 POST-DATE ARE SOMEWHAT PROBLEMATIC, BUT THOSE THAT PREDATE
 17 AREN'T REALLY THE SAME THING WE WERE TALKING ABOUT.

18 MR. McDONELL: THEY'RE EQUALLY, IF NOT MORE,
 19 IMPORTANT BECAUSE THESE ARE PROJECTIONS, YOUR HONOR. A
 20 PROJECTION IS JUST A NUMBER A PERSON WRITES DOWN ON A PAGE. AND
 21 WHETHER THEY BASE THAT PROJECTION IN A WAY THAT CLOSELY HEWS
 22 WITH SOME HISTORICAL EVIDENCE THAT MAKES THE PROJECTION
 23 RELIABLE, DEPENDABLE, IMPORTANT, OR NOT, IS THE CRUX OF WHAT
 24 WE'RE GETTING AT HERE.

25 THE COURT: OKAY. LOOK, I THINK THAT I CAN MAKE THIS
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

815

ELLISON - FURTHER REDIRECT / BOIES

1 THIS IS THE BACKUP SUPPORT FOR THE LARGER NUMBER THAT
 2 SHOWS AS CLEAR AS CAN BE THAT WHAT THEY'RE INCLUDING IN
 3 COMPUTING THAT NUMBER IS LOST INCREMENTAL REVENUE -- UPSSELL LOST
 4 INCREMENTAL REVENUE -- WELL, THE NEXT ONE, IF I COULD SEE IT, IS
 5 THE SAME FOR CROSS-SELL. THOSE NUMBERS ARE FOUNDATIONS ON WHICH
 6 THEY BUILD THE \$2.1 BILLION CLAIM.

7 THE PROBLEM THAT WE'RE ADDRESSING HERE IS TWO-FOLD.
 8 ONE, YOU KNOW, THEY DRAW THIS DISTINCTION BETWEEN A LOST
 9 OPPORTUNITY TO UPSSELL AND CROSS-SELL AND A LOST EXPECTED
 10 OPPORTUNITY TO UPSSELL AND CROSS-SELL.

11 YOUR HONOR, THAT'S A DISTINCTION WITHOUT A
 12 DIFFERENCE. LOST PROFITS ARE PROFITS THAT WERE NEVER MADE, SO
 13 WHETHER YOU CALL IT A LOST OPPORTUNITY OR A LOST EXPECTED
 14 OPPORTUNITY, IT'S THE SAME THING. AND IT PLAYS OUT IN THE
 15 EVIDENCE OF THIS CASE THE SAME WAY, BECAUSE YOU'LL SEE WHAT WE
 16 HAVE HERE. AND IT'S, FRANKLY --

17 FRANKLY, DIFFICULT FOR ME TO STAY OUT OF THE WAY.

18 MAY I USE YOUR MICROPHONE, MR. PICKETT?

19 MR. PICKETT: SURE. IT'S NOT A OPRAH MIKE, BUT --

20 MR. McDONELL: YOUR HONOR, WE HAVE TO GO BACK TO
 21 FIRST PRINCIPLES, AND WHAT IS THE SUBSTANCE OF THE HARM WE'RE
 22 TALKING ABOUT HERE? WHAT WE DID NOT GET WAS HISTORICAL UPSSELL
 23 AND CROSS-SELL INFORMATION ABOUT WHAT THESE COMPANIES,
 24 PEOPLESOFT AND SIEBEL HAD ACTUALLY ACCOMPLISHED OVER TIME GOING
 25 ALL THE WAY BACK TO THE PERIOD SEVERAL YEARS BEFORE THOSE

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

817

ELLISON - FURTHER REDIRECT / BOIES

1 EASY FOR BOTH OF YOU. THERE'S SOMETHING THAT YOU NEED TO
 2 ADDRESS.

3 FIRST OF ALL, NO DISTINCTION WAS MADE BETWEEN THE
 4 ACTUAL LOST PROFITS BASED UPON THE -- THE POST-JANUARY 2005
 5 PERIOD AND THE PROJECTIONS WHICH WERE BASED UPON PREVIOUS SALES
 6 ACTIVITY ON ORACLE'S PART. THERE WAS NO DISTINCTION MADE AT
 7 EITHER IN JUDGE LAPORTE'S ORDER IN THE -- AT THE TIME OF THE
 8 PRETRIAL CONFERENCE WHEN THE WHOLE SECOND ISSUE WITH REGARD TO
 9 UPSSELL AND RESALE APPEARED.

10 THERE'S NO DISTINCTION. THE FIRST THIS EVEN OCCURRED
 11 TO ME WAS ON FRIDAY WHEN THE EXHIBIT WAS SHOWN -- SHOWING SAP'S
 12 PROJECTIONS. I IMMEDIATELY THOUGHT, HMM, I WONDER WHAT THAT
 13 MEANS IN TERMS OF ARGUMENT AS TO ORACLE'S PROJECTIONS. IT NEVER
 14 OCCURRED TO ME THAT THERE WAS A DISTINCTION TO BE MADE.

15 JUDGE LAPORTE'S ORDER DOESN'T ADDRESS IT. NO ORDER
 16 THAT I'VE ISSUED ADDRESSES THIS. AS FAR AS I'M CONCERNED, THIS
 17 IS ENTIRELY NEW ISSUE. IT IS NOT BARRED BY THE PRIOR DISCOVERY
 18 ORDER. IT COULDN'T CONCEIVABLY BE BARRED WHEN I DIDN'T EVEN
 19 KNOW IT WAS AN ISSUE AT THE TIME THAT I ADOPTED THE SANCTIONS
 20 ORDER.

21 SO THE QUESTION IS WHETHER OR NOT IRRESPECTIVE OF THE
 22 SANCTION ORDER, WHETHER OR NOT THE EVIDENCE SHOULD COME IN. AND
 23 THE ONLY QUESTION HERE IS WHETHER OR NOT IT WAS PRODUCED IN
 24 DISCOVERY. AND TO THE EXTENT THAT IT WASN'T PRODUCED IN
 25 DISCOVERY, THE DIFFICULTY FOR SAP AT THIS POINT IS THAT YOU

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

ELLISON - FURTHER REDIRECT / BOIES

1 DIDN'T RAISE THE MOTION. YOU ALL RAISED MOTIONS ON ALL MANNER
2 OF EVIDENTIARY ISSUES. I CANNOT IMAGINE THAT THIS IS NOT
3 SOMETHING THAT YOU WERE AWARE OF.

4 MR. McDONELL: YOUR HONOR, THIS -- THIS WAS OUR
5 MOTION IN LIMINE NO. 2 COUPLED --

6 THE COURT: NO. NO. NO. THERE WAS NO DISTINCTION
7 MADE WHATSOEVER IN THAT MOTION WITH REGARD TO PROJECTED SALES.
8 THE HYPO --

9 WHEN I RULED THAT THE LOST REVENUE FROM UPSSELL AND
10 CROSS-SELL COULD NOT BE USED TO SUPPORT A HYPOTHETICAL LICENSE,
11 THAT WAS BASED UPON POST-JANUARY 2005 SALES. THERE WAS NO
12 DISTINCTION MADE WITH RESPECT TO WHAT SALES WERE BEING RELIED
13 UPON BY THE EXPERT AND TO THE EXTENT THAT THIS INFORMATION WAS
14 IN MR. MEYER'S REPORT FROM A YEAR AND A HALF AGO, I DON'T
15 REMEMBER THAT. YOU ALL DID NOT BRING IT TO MY ATTENTION, AND I
16 CERTAINLY HAD NO INTENTION OF RULING ON THAT SPECIFICALLY.

17 SO THE QUESTION IS, DO YOU HAVE A BASIS NOW FOR
18 KEEPING IT OUT BECAUSE THE FORMER RULING DOES NOT KEEP IT OUT?

19 MR. McDONELL: AND WE DO, YOUR HONOR. AND IT'S --
20 THE COMMUNICATION MAY BE IMPERFECT ON THIS, BUT THE SUBSTANCE OF
21 THE PROBLEM AND THE PREJUDICE REMAINS THE SAME. AND THE BASIS
22 IS AS FOLLOWS:

23 JUDGE LAPORTE FOUND THAT WE WERE DENIED DISCOVERY OF
24 ACTUAL LICENSE SALES BY THE PLAINTIFFS, EITHER FOR PEOPLESOFT OR
25 SIEBEL, OR FOR ANY OTHER PARTY. EVIDENCE OF ACTUAL LICENSE --
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

ELLISON - FURTHER REDIRECT / BOIES

1 SALES, AND YOU'RE SAYING THAT YOU DIDN'T RECEIVE THE UNDERLYING
2 INFORMATION THAT SUPPORTS THE CONCLUSIONS CONTAINED IN THESE
3 COLUMNS?

4 MR. McDONELL: WE DIDN'T LEAVE (SIC) THE -- WE DIDN'T
5 GET THE UNDERLYING SUPPORT FOR THE PRE-INFRINGEMENT PERIOD OR
6 THE POST-INFRINGEMENT PERIOD.

7 THE COURT: OKAY.

8 MR. McDONELL: WE HAD NEITHER.

9 THE COURT: OKAY. MR. --

10 MR. McDONELL: AND AS A RESULT COULD NOT CRITICALLY
11 ASSESS --

12 THE COURT: -- SHAKING HIS HEAD.

13 NOW, OBVIOUSLY, I HAVE NO IDEA WHAT YOU ALL RECEIVED
14 IN DISCOVERY FROM EACH OTHER.

15 MR. PICKETT: LET ME BE VERY CLEAR ABOUT THIS. THIS
16 DATA WAS PRODUCED LONG, LONG TIME AGO. IT WAS PRODUCED BEFORE
17 MR. ELLISON TESTIFIED. IT WAS PRODUCED BEFORE MS. CATZ
18 TESTIFIED AT DEPOSITION. IT WAS PRODUCED BEFORE MR. PHILLIPS
19 TESTIFIED. THEY COULD HAVE ASKED ANY ONE OF THEM ABOUT THESE
20 FIGURES, WHAT WAS IN YOUR MIND? THIS IS WHAT YOU -- YOU KNOW,
21 YOU PAID FOR PEOPLESOFT BASED ON THESE ASSUMPTIONS. THOSE ARE
22 THE ASSUMPTIONS THE EXPERT IS USING FOR THE -- THE FAIR MARKET
23 VALUE OF USE.

24 THEY COULD HAVE SOUGHT -- THEY DON'T HAVE TO TAKE
25 THEM AT FACE VALUE. THEY HAD AN OPPORTUNITY TO TAKE DISCOVERY
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

ELLISON - FURTHER REDIRECT / BOIES

1 THE COURT: AFTER THE INFRINGEMENT BEGAN.

2 MR. McDONELL: NO, YOUR HONOR. AT ANY TIME. WE
3 ASKED FOR DISCOVERY OF -- ALL FINANCIAL INFORMATION RELATING TO
4 THESE ISSUES, AND WE DIDN'T GET IT. WE WERE CONSISTENTLY DENIED
5 AND ONLY ALLOWED REVENUES CONCERNING DELIVERY OF SUPPORT
6 SERVICES. NO SOFTWARE LICENSE SALES HISTORICAL DATA WAS
7 PRODUCED. THAT'S A SETTLED ISSUE. JUDGE LAPORTE FOUND THAT
8 THE BOOK IS CLOSED.

9 THE PROBLEM WITH THAT AND WHAT WE'RE TALKING ABOUT
10 HERE AND NOW IS WHY ARE WE PREJUDICED AS A RESULT OF THAT? AND
11 IT'S VERY STRAIGHTFORWARD, AND LET ME BE -- TRY -- TRY TO BE
12 VERY CLEAR.

13 THEY NOW WANT US TO ACCEPT THESE PROJECTIONS AT FACE
14 VALUE. FACE VALUE. WE NOW HAVE NO CHOICE, THEY WILL SAY, BUT
15 TO ACCEPT THESE PROJECTIONS UPON WHICH THEY FOUND THEIR -- THEIR
16 BILLION-DOLLAR CLAIM.

17 AND, AGAIN, I GO BACK TO A PROJECTION, WITHOUT MORE,
18 IS JUST SOMEBODY WRITING DOWN ON A PIECE OF PAPER WHAT THEY
19 MIGHT WANT TO SELL. AND WHAT WE DIDN'T GET WAS THE HISTORICAL
20 ACTUAL UPSSELL AND CROSS-SELL EXPERIENCE BEFORE THE DATE OF THESE
21 PROJECTIONS. HAD WE HAD THAT EVIDENCE, WE COULD HAVE CRITICALLY
22 ASSESSED THESE PROJECTIONS AND --

23 THE COURT: NOW, ARE YOU SAYING, THEN, THAT THE
24 PROJECTIONS THAT ARE INCLUDED POST-ACQUISITION OF TOMORROWNOW BY
25 SAP, THAT'S POST-JANUARY 2005, ARE BASED UPON THE PRE-2005
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

ELLISON - FURTHER REDIRECT / BOIES

1 ON IT. THAT'S -- THAT'S WHY IT'S NOT AN ISSUE. THAT'S WHY
2 THERE'S NO PREJUDICE, UNLIKE IN THE OTHER SITUATION.

3 NOW, THERE IS SOME CLAIM HERE THAT -- WHICH IS A NEW
4 CLAIM -- SOME PRIOR DATA WAS NOT PRODUCED. BUT TWO POINTS ON
5 THAT. FIRST THESE PROJECTIONS ARE THE BEST EVIDENCE OF WHAT'S
6 IN THEIR MIND. AND THEY HAD THOSE.

7 SECOND, AS I SAID, IT WAS A HOSTILE TAKE-OVER. THERE
8 WAS NO OTHER INFORMATION OTHER THAN 10K'S AND PUBLICLY AVAILABLE
9 INFORMATION. AND WHEN WE PUT -- WHEN WE PRESENT THIS, WE WILL
10 LAY THAT FOUNDATION TO SHOW THAT IT'S PUBLICLY AVAILABLE
11 INFORMATION. BUT IT IS THE PROJECTION.

12 YOU KNOW, LET'S JUST STEP BACK FOR A MOMENT. THE
13 BIG -- WE ALL KNOW THAT THIS IS A MAINTENANCE BUT THEN THE IDEA
14 IS YOU GET THE APPLICATION SOFTWARE. AND THEN ONCE YOU GET THAT
15 SOFTWARE, YOU GET MAINTENANCE FOR YOURS. THAT'S THE WAY THE
16 BUSINESS RUNS FOR BOTH SAP AND ORACLE.

17 AND WE KNOW THAT WHEN A PARTY WOULD BE NEGOTIATING
18 THIS, SAP (SIC) HAD A CERTAIN THING IN MIND. THEY THOUGHT THE
19 COMBINATION OF MAINTENANCE AND UPSSELL WOULD, IN THE FIRST THREE
20 YEARS, COME UP TO ALMOST \$900 MILLION. WHAT WOULD BE ON THE SAP
21 SIDE?

22 WELL, IT'S THIS DATA RIGHT HERE, WHICH, AGAIN, HAS
23 BEEN PRODUCED LONG AGO, FULLY DISCLOSED, FULL OPPORTUNITY TO
24 TAKE DISCOVERY AND. AND IF THEY DISAGREE, AND THEY DO, THEY CAN
25 SAY TO MR. ELLISON, WELL, YOU KNOW, YOU THOUGHT THAT IT'S 20 TO
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

822

ELLISON - FURTHER REDIRECT / BOIES

1 30 PERCENT OF THE CUSTOMERS OR 30 PERCENT OF THE CUSTOMERS. AND
2 THEY CAN CROSS-EXAMINE THAT. AND THE JURY CAN DECIDE. THAT'S
3 THE FAIR THING TO DO IN THIS CASE.

4 IT'S -- IT'S THE WAY THE SECOND MEASURE OF DAMAGES,
5 FAIR MARKET VALUE OF USE, IS DETERMINED.

6 THE COURT: OKAY. ALL RIGHT. LAST WORD.

7 MR. McDONELL: YES, YOUR HONOR. THAT WAS JUST A
8 CIRCULAR POINT. HE'S SAYING -- BECAUSE THEY HAVE PROJECTIONS WE
9 DIDN'T NEED AND DON'T NEED DISCOVERY ABOUT THE PROJECTIONS.
10 HE'S SAYING THAT WE SHOULD HAVE NOW DONE OUR DISCOVERY ON THAT
11 ISSUE HERE IN THIS COURTROOM BY EXAMINING ORACLE EXECUTIVES
12 ABOUT IT. IT'S FAR TOO LATE FOR THAT.

13 JUDGE LAPORTE WAS CRYSTAL CLEAR IN HER FOCUS ON THE
14 FACT THAT WE HAD NOT RECEIVED A FAIR OPPORTUNITY TO CHALLENGE IN
15 ANY WAY, SHAPE, OR FORM A CLAIM OF LOST UPSALE AND CROSS-SELL
16 OPPORTUNITIES AS YOU SEE ON THE SLIDE, THAT'S PRECISELY WHAT
17 THEY'RE PRESENTING HERE TODAY.

18 THIS IS A -- IT'S A CONTAINED ISSUE RIGHT NOW. THEY
19 HAVE DEVELOPED THEIR EXPERT APPROACHES ON THIS PRECISE ISSUE SO
20 THEY'RE PREPARED TO PUT THEIR EXPERT ON TODAY WITH EITHER
21 UPSALE/CROSS-SELL IN OR UPSALE/CROSS-SELL OUT.

22 IT HAS BEEN CRYSTAL CLEAR THAT WE'VE BEEN OBJECTING
23 TO AND ACTING UNDER THE UNDERSTANDING THAT THIS IS OUT FOR ALL
24 PURPOSES, AND WE ASK THAT YOU ENFORCE WHAT WE HAVE UNDERSTOOD TO
25 BE YOUR ORDER.

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

824

ELLISON - FURTHER REDIRECT / BOIES

1 TWO.

2 MR. McDONELL: IT'S MORE THAT -- IT -- IT'S -- THE
3 SUBSTANCE I COME BACK TO IS WE DIDN'T HAVE ACTUAL DATA EITHER
4 BEFORE OR AFTER THE DATE OF THE INFRINGEMENT. AND SO WE
5 COULDN'T ASSESS THE -- THE CREDIBILITY OF THE PROJECTIONS AT THE
6 TIME THEY'RE MADE OR WITH THE BENEFIT OF HINDSIGHT, WHICH THE
7 CASE LAW PERMITS.

8 THE COURT: SO YOUR EXPERT DIDN'T LOOK AT THE
9 PROJECTIONS AND HAS NO OPINION AS TO THE MERIT OF THE
10 PROJECTIONS?

11 MR. McDONELL: HE HAS -- HE WILL HAVE OPINIONS. HE
12 WILL, HOWEVER, STATE THAT HE HAS BEEN -- AND HE HAS STATED THIS
13 IN THE DECLARATION HE FILED WITH JUDGE LAPORTE, THAT HE'S BEEN
14 SEVERELY LIMITED (PHONETIC) -- LIMITED IN HIS ABILITY TO
15 CHALLENGE HIM BECAUSE HE DOESN'T HAVE THE UNDERLYING DATA.

16 AND HE IS -- AS A RESULT, THERE'S A FAIR AMOUNT OF
17 PRESSURE ON OUR SIDE TO SIMPLY ACCEPT THEM.

18 THE COURT: OKAY. I DON'T QUITE --

19 MR. PICKETT: I NEED TO CORRECT --

20 THE COURT: EXCUSE ME. EXCUSE ME.

21 MR. PICKETT: SORRY.

22 THE COURT: I'M NOT EXACTLY SURE HOW I'M SUPPOSED TO
23 RESOLVE IT WITH ONE SIDE SAYING THE DATA HAS BEEN PROVIDED AND
24 THE OTHER SIDE SAYING WE DON'T HAVE ACCESS AND HAVEN'T HAD
25 ACCESS TO THE UNDERLYING DATA.

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

823

ELLISON - FURTHER REDIRECT / BOIES

1 THE COURT: AND THE -- THE -- IS MR. PICKETT NOT
2 CORRECT THAT YOU HAD THIS PARTICULAR DATA, AND ARE YOU TELLING
3 ME THAT YOU CHOSE NOT TO TAKE DISCOVERY ON THIS PARTICULAR DATA
4 BECAUSE YOU THOUGHT THAT IT WAS BLOCKED BY JUDGE LAPORTE'S
5 ORDER?

6 MR. McDONELL: NO.

7 THE COURT: AND IF THAT'S THE CASE, I DON'T QUITE --
8 I DON'T UNDERSTAND HOW THAT WORKS.

9 MR. McDONELL: HERE'S THE POINT, YOUR HONOR. BY THE
10 TIME IT BECAME KNOWN THAT ORACLE WAS SEEKING DAMAGES BEYOND LOST
11 SUPPORT PROFITS, IT WAS FAR, FAR LATE IN THE FACT DISCOVERY
12 PERIOD; IN FACT, JUST MONTHS FROM THE CLOSE OF FACT DISCOVERY.

13 THE ISSUE GOT LITIGATED BEFORE JUDGE LAPORTE AND THEN
14 LITIGATED BEFORE YOUR HONOR THROUGH THE OBJECTIONS, AND JUDGE
15 LAPORTE FOUND THAT THIS WAS OUT OF BOUNDS, PERIOD. AND FOR
16 PURPOSES OF YOUR ADOPTING ORDER, WE UNDERSTOOD THAT YOU TOOK
17 THAT EVEN ONE STEP TOWARDS FURTHER CLARIFICATION BY SAYING THIS
18 IS NOT COMING IN THROUGH THE BACK DOOR EITHER.

19 WE UNDERSTOOD THAT LOST UPSALE AND CROSS-SELL
20 OPPORTUNITIES WERE OFF THE TABLE. YES, WE HAD SOME PROJECTION
21 DOCUMENTS.

22 THE COURT: SO YOU THINK THE DISTINCTION BETWEEN THE
23 ACTUAL SALES, WHICH IS WHAT I WAS CONCENTRATING ON, AS OPPOSED
24 TO THE PROJECTED SALES -- YOU THINK THERE'S NO -- YOU HAVE
25 CONSTRUED THE ORDER AS NOT PROVIDING A DISTINCTION BETWEEN THOSE

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

825

ELLISON - FURTHER REDIRECT / BOIES

1 GENERALLY, THESE KINDS OF MATTERS ARE DETERMINED
2 BEFORE TRIAL. WHEN THE MAGISTRATE JUDGE LAPORTE LOOKED AT
3 THESE, SHE MADE A DETERMINATION. I AFFIRMED IT. DIDN'T OCCUR
4 TO ME THAT THERE WAS THE DISTINCTION THAT YOU'RE NOW DRAWING.

5 YOU ALL NEED TO GIVE ME SOME ASSISTANCE IN
6 DETERMINING HOW I'M SUPPOSED TO DECIDE AN ISSUE OF -- DISCOVERY
7 ISSUE THAT SHOULD HAVE BEEN RESOLVED BEFORE TRIAL.

8 MR. PICKETT: LET ME BE CRYSTAL CLEAR ABOUT ONE
9 THING. THIS DATA WAS PRODUCED PRIOR TO THEIR FILING THE RULE 37
10 MOTION WITH MAGISTRATE JUDGE LAPORTE.

11 THE DEPOSITIONS OF MR. ELLISON, MS. CATZ,
12 MR. PHILLIPS WERE PRIOR TO THEIR MOTION TO MAGISTRATE JUDGE
13 LAPORTE.

14 IF THEY HAD SOME QUARREL WITH WHAT THESE PROJECTIONS
15 WERE OR WHETHER THERE WAS SOMETHING MORE THEY NEEDED, OR THERE
16 WAS SOMETHING MISSING, WOULDN'T THEY HAVE TOLD JUDGE LAPORTE
17 ABOUT IT RATHER THAN TRYING TO SWEEP THIS IN NOW AND SAY THAT
18 WELL, PROJECTIONS, YOU KNOW, AREN'T GOOD ENOUGH. PROJECTIONS
19 ARE PRECISELY THE ISSUE.

20 KEEP IN MIND THE CASE LAW ON THIS HYPOTHETICAL
21 NEGOTIATION. IT'S NOT BASED ON -- YOU KNOW, AFTER THE FACT.
22 IT'S BASED ON PROJECTIONS IN THE MIND AT THE TIME. THAT'S THIS
23 EVIDENCE. THEY'VE HAD IT. THEY'VE HAD AN OPPORTUNITY -- AND
24 IT'S FAR TOO LATE TO COME IN HERE NOW AND TRY AND CUT THIS OUT,
25 PARTICULARLY WHEN THEY'VE OPENED THE DOOR AGAIN AND AGAIN AND

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

ELLISON - FURTHER REDIRECT / BOIES

1 AGAIN.

2 MR. McDONELL: YOUR HONOR, LET'S COME BACK TO WHAT'S
3 BEEN PRECLUDED. JUDGE LAPORTE PRECLUDED THEM FROM PURSUING
4 CLAIMS FOR LOST UPSELL AND CROSS-SELL OPPORTUNITIES.
5 OPPORTUNITIES. A PROJECTION OF WHAT THEY THINK THEY'RE GOING TO
6 GET IN CROSS-SELL AND UPSELL IS NOTHING MORE THAN A PROJECTION
7 OF THAT OPPORTUNITY. IT'S AN EMBODIMENT OF THAT OPPORTUNITY.

8 JUDGE LAPORTE FOUND THAT WE HAD NOT HAD ADEQUATE
9 DISCOVERY ON THAT ISSUE TO CHALLENGE IT ONE WAY OR THE OTHER.
10 WE STILL HAVE NOT HAD IT. IT IS ABSOLUTELY WITHIN THE COURT'S
11 POWER AND AUTHORITY TO SIMPLY AFFIRM THAT RULING AND ALLOW
12 PLAINTIFFS TO PROCEED WITH THEIR ALTERNATIVE THEORY THAT THEIR
13 EXPERT'S READY TO PROCEED WITH HERE TODAY.

14 THE COURT: RIGHT. RIGHT. WELL, I THINK YOU'VE BOTH
15 MADE GOOD ARGUMENTS. IT CLEARLY WASN'T CONTEMPLATED BY THE
16 COURT AT THE TIME OF THE PRETRIAL RULING. BUT I'M PERSUADED BY
17 THE DEFENSE POSITION. I THINK IT'S CLOSE ENOUGH -- I THINK
18 OPPORTUNITY IS CLOSE ENOUGH.

19 I'M GOING TO REAFFIRM THE RULING. UPSELL,
20 CROSS-SELL, WHICH I HAVE DENIED ALL ALONG, CONTINUES TO BE
21 DENIED.

22 MR. McDONELL: THANK YOU, YOUR HONOR.

23 MR. PICKETT: WILL WE AT LEAST BE ABLE TO MAKE AN
24 OFFER OF PROOF FOR THE RECORD, YOUR HONOR?

25 THE COURT: SURE.

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

ELLISON - FURTHER REDIRECT / BOIES

1 THE COURT: DO YOU WANT TO SAY ANYTHING ABOUT IT,
2 MR. HOWARD?

3 MR. HOWARD: YOUR HONOR, I BELIEVE YOUR HONOR'S
4 ALREADY RULED ON THIS 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 --

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

ELLISON - FURTHER REDIRECT / BOIES

1 MR. PICKETT: ALSO YOUR HONOR, IN RULING LAST TIME,
2 SAID THAT THERE WOULD BE A LIMITING INSTRUCTION THAT THE JURY
3 WOULD BE TOLD THAT IF THERE'S A DIFFERENCE BETWEEN --

4 THE COURT: AND THAT'S WHY I ALLOWED MR. ELLISON TO
5 TESTIFY AS TO THE OTHER -- AS TO THE LOST -- THE FACT THAT HE
6 WOULD HAVE CONSIDERED THE LOST OPPORTUNITIES. I WAS WONDERING
7 WHEN YOU ALL WERE GOING TO SUBMIT SOMETHING ON IT.

8 MR. PICKETT: UNTIL -- I THOUGHT THE PROJECTIONS WERE
9 IN THE CASE, FRANKLY. I DIDN'T -- WELL, I THOUGHT THEY WERE IN
10 THE CASE.

11 THE COURT: OKAY. ALL RIGHT. WELL, WE NEED TO MOVE
12 ON, AND THAT'S RULING ON IT.

13 YOU ALL CAN PREPARE AN INSTRUCTION -- WELL, PLAINTIFF
14 CAN PREPARE AN INSTRUCTION BASED UPON THE COURT'S ORDER ADOPTING
15 THE MAGISTRATE JUDGE'S SANCTION ORDER. AND IN THAT ORDER, I
16 SAID, IF THE DEFENDANTS TAKE THE POSITION THAT THE DAMAGES ARE
17 EXCESSIVE, THE PLAINTIFFS WILL BE GIVEN AN OPPORTUNITY TO TELL
18 THE JURY -- AND I'M NOT SURE EXACTLY WHAT YOU WANT TO TELL
19 THEM -- THAT YOU HAVE BEEN PRECLUDED FROM CLAIMING ALL THE
20 DAMAGES THAT YOU BELIEVE THAT YOU CAN ESTABLISH IN THE CASE.

21 IF YOU CAN COME UP WITH AN INSTRUCTION, I'LL GIVE IT.

22 LET'S MOVE TO THE SECOND ONE. THE SECOND MOTION.

23 DID YOU WANT TO SAY ANYTHING ABOUT IT?

24 MR. LANIER: NO, YOUR HONOR. I THINK OUR POSITION'S
25 CLEAR.

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

ELLISON - FURTHER REDIRECT / BOIES

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.

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

846

CATZ - DIRECT / HOUSE

1 EXPERIENCE THAT YOU BROUGHT TO THE FINANCIAL MODELING FOR THE
 2 PEOPLESFT ACQUISITION?
 3 A. WELL, A FEW THINGS. FIRST OF ALL, I MYSELF HAD BEEN AN
 4 INVESTMENT BANKER FOR OVER 13 AND A HALF YEARS BY THEN. AND OF
 5 COURSE, I'D BEEN WORKING IN RUNNING ORACLE OPERATIONS BY THEN
 6 FOR ABOUT FOUR YEARS. AND SO I REALLY -- YOU KNOW, IT'S
 7 ACTUALLY NOW WHAT I TEACH AT SCHOOL, SO THEN I HAD THAT
 8 EXPERIENCE ALREADY.
 9 Q. AND APPROXIMATELY HOW MANY FINANCIAL MODELS HAVE YOU WORKED
 10 ON IN YOUR LONG CAREER?
 11 A. HUNDREDS, LITERALLY.
 12 Q. ALL RIGHT. LET'S TALK SPECIFICALLY ABOUT ORACLE'S FINANCIAL
 13 MODEL FOR THE PEOPLESFT AND SIEBEL ACQUISITIONS.
 14 AGAIN, WHY DID ORACLE HAVE THOSE PROJECTIONS
 15 PREPARED? WHAT ARE THEY USED FOR?
 16 A. WELL, THESE PROJECTIONS ARE THE BASIS FOR ASKING PERMISSION
 17 FROM THE BOARD OF DIRECTORS TO SPEND 11 -- ACTUALLY MORE THAN
 18 \$11 BILLION AND TO TAKE ON ALL THE LIABILITIES THAT COME WITH
 19 PEOPLESFT AND THE ASSETS.
 20 SO THOSE MODELS ARE LITERALLY THE KEY JUSTIFICATION
 21 TO SPEND \$11.1 BILLION.
 22 Q. HOW AGGRESSIVE WERE YOUR GOING-FORWARD FINANCIAL
 23 EXPECTATIONS IN THE ACQUISITION MODEL FOR PEOPLESFT?
 24 A. WELL, THE FINAL BOARD PRESENTATION THAT WAS GIVEN IN
 25 DECEMBER, LITERALLY RIGHT BEFORE WE ACQUIRED PEOPLESFT, WAS
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

848

CATZ - DIRECT / HOUSE

1 PEOPLESFT ACQUISITION HAVE A CODE NAME?
 2 A. YEAH. THE -- THE DEAL WAS CALLED SPICE. WE WERE ONION.
 3 PEOPLESFT WAS PEPPER. AND JD EDWARDS, WHICH WAS THEN PART OF
 4 PEOPLESFT, THAT -- THEY WERE JALAPEÑO, WHICH STARTS WITH A "J."
 5 SO --
 6 Q. AND WHY DO -- WHY DO YOU HAVE THESE KIND OF CODE NAMES IN
 7 CONNECTION WITH DEALS?
 8 A. WELL, YOU DON'T WANT IT TO LEAK. YOU DON'T WANT IT --
 9 SOMEBODY LEAVES A PIECE OF PAPER OR A PRINTER OR LEAVES A LAPTOP
 10 SOMEWHERE, THAT ALL OF A SUDDEN, THE WHOLE THING IS KNOWN
 11 PUBLICLY.
 12 I MEAN, THESE THINGS YOU WANT TO TRY TO -- YOU KNOW,
 13 WHEN YOU FIRST DO THEM, YOU WANT TO KEEP THEM CONFIDENTIAL.
 14 Q. OKAY.
 15 IF WE COULD SHOW ON THE BOARD WHAT'S BEEN MARKED
 16 PLAINTIFFS' EXHIBIT 615.
 17 (EXHIBIT PUBLISHED TO JURY.)
 18 MS. HOUSE: AND HOPEFULLY PULL IT OUT A LITTLE BIT SO
 19 IT'S EASIER TO READ.
 20 Q. COULD YOU TELL THE JURY WHAT THIS IS.
 21 A. YEAH, THIS IS ACTUALLY THE PEOPLESFT INCREMENTAL OPERATING
 22 MODEL.
 23 Q. AND WHEN WAS THIS MODEL PREPARED?
 24 A. WELL, THIS ONE IN PARTICULAR -- I THINK THIS IS THE FINAL
 25 ONE. I'D NEED TO LOOK AT IT, BUT THIS SHOULD BE THE FINAL ONE
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

847

CATZ - DIRECT / HOUSE

1 STILL VERY CONSERVATIVE, BECAUSE WE REALLY DIDN'T WANT TO GET IT
 2 WRONG. WE WERE GOING TO BE MEASURED AGAINST THIS MODEL GOING
 3 FORWARD. AND SINCE THIS WAS, ONE, A VERY LARGE ACQUISITION AND
 4 EXTREMELY VISIBLE, BUT ALSO THE VERY FIRST ONE ON WHAT WAS AN
 5 ACQUISITION STRATEGY, THAT WE FELT WE HAD TO EXCEED IT BECAUSE
 6 OTHERWISE, YOU KNOW, THE BOARD WOULD NEVER HAVE SUPPORTED US
 7 DOING ANOTHER DEAL OR ANOTHER DEAL AFTER THAT.
 8 SO I THINK IT WAS CONSERVATIVE, AND, YOU KNOW, I
 9 WANTED TO MAKE SURE WE MADE IT.
 10 Q. NOW, BASED ON YOUR EXPERIENCE WITH ORACLE'S MULTIPLE
 11 ACQUISITIONS AND ALSO AS AN INVESTMENT BANKER AND PROFESSOR IN
 12 THIS AREA, WHEN FORECASTS ARE PRESENTED TO BOARD MEMBERS ABOUT
 13 GOING-FORWARD FINANCIAL EXPECTATIONS AND GOALS, ARE THEY EVER
 14 TREATED AS MARKETING HYPE?
 15 A. THAT DOESN'T EVEN MAKE ANY KIND OF BUSINESS SENSE. I MEAN,
 16 WHEN YOU'RE PRESENTING ON A BUSINESS OPPORTUNITY AND YOU'RE
 17 TALKING ABOUT EITHER, YOU KNOW, MOVING INTO SOMETHING OR DOING
 18 MORE SOMETHING, YOU WANT TO MAKE SURE THAT IT IS REALLY WHAT YOU
 19 THINK OR AT LEAST EVEN CONSERVATIVE ABOUT WHAT YOU THINK BECAUSE
 20 ALL THOSE THINGS YOU GET MEASURED AGAINST LATER.
 21 SO I MEAN, YOU DON'T WANT TO DRAW SOME PIE-IN-THE-SKY
 22 PICTURE BECAUSE THE FUTURE DOES HAPPEN, AND YOU WANT TO MAKE
 23 SURE, HOPEFULLY, THAT YOU'VE -- YOU'VE MET YOUR -- YOU'VE SET
 24 EXPECTATIONS CORRECTLY AND YOU'VE MET THEM.
 25 Q. NOW, GOING BACK TO THE PEOPLESFT FINANCIAL MODEL, DID THE
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

849

CATZ - DIRECT / HOUSE

1 THAT WAS DONE FOR DECEMBER.
 2 Q. AND IT WAS FINAL BECAUSE IT WAS THE LAST ONE, AND WHAT DID
 3 YOU DO WITH IT?
 4 A. WELL, THIS IS THE ONE WE ACTUALLY USED FOR THE BOARD
 5 PRESENTATION TO GET THE FINAL PERMISSION TO SPEND 11 --
 6 \$11.1 BILLION ON PEOPLESFT.
 7 Q. AND WHAT WERE YOU TRYING TO SHOW THE BOARD WITH THIS MODEL?
 8 A. WELL, THESE ARE ACTUALLY THE DRIVERS, THE IMPORTANT
 9 ASSUMPTIONS THAT UNDERLIE THE PROFITS AND THE REVENUES, AND --
 10 AND, REALLY, THE -- THE WHOLE OPERATING STRUCTURE OF PEOPLESFT.
 11 Q. OKAY. COULD YOU DESCRIBE --
 12 YOU COULD PULL THAT BACK DOWN AND JUST MAYBE THE LEFT
 13 SIDE OF THE PAGE.
 14 (EXHIBIT PUBLISHED TO JURY.)
 15 THE WITNESS: OKAY.
 16 BY MS. HOUSE:
 17 Q. COULD YOU DESCRIBE TO THE JURY WHAT'S ON THE LEFT SIDE OF
 18 THE PAGE.
 19 A. OKAY. SO FIRST OF ALL, ON THE LEFT SIDE, THE COLUMNS THAT
 20 HAVE NUMBERS IN THEM, THOSE ARE ACTUALLY HISTORICAL NUMBERS.
 21 THESE ARE PEOPLESFT ACTUAL NUMBERS THAT WE KNEW FROM PUBLIC
 22 RECORDS AND OTHERWISE ABOUT PEOPLESFT.
 23 AND, YOU KNOW, YOU CAN SEE THE VERY FIRST LINE OF
 24 THIS IS ABOUT CUSTOMERS. THAT REALLY DRIVES THIS WHOLE MODEL.
 25 AND WHAT YOU CAN SEE IS, YOU KNOW, SORT OF THE CUSTOMERS BY THE
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CATZ - DIRECT / MS. HOUSE

1 THIS AREA.
2 THE OTHER THING WE WOULD GET, OF COURSE, IS THEIR
3 4,000 CUSTOMERS, MANY OF WHICH, YOU KNOW, WE DIDN'T HAVE
4 BEFORE.
5 Q. AND HOW DID YOU ANTICIPATE THAT THE ACQUISITION OF SIEBEL
6 WOULD CHANGE THE DYNAMIC IN THE RELATIONSHIP BETWEEN SAP AND
7 ORACLE?
8 A. WELL, IT WAS ACTUALLY VERY IMPORTANT BECAUSE WE WOULD HAVE
9 THE NUMBER ONE PLAYER. THOUGH SAP ACTUALLY HAD CRM SOFTWARE AS
10 DID ORACLE AND PEOPLESFT, WE DIDN'T HAVE THE NUMBER ONE.
11 SO, FOR THE FIRST TIME WE WOULD ACTUALLY HAVE A
12 PRODUCT LINE THAT WAS, IN FACT, THE BIG GUY, THE LEADER. AND
13 BUYING SIEBEL, YOU KNOW, WE VIEWED IT AS A REAL GAME CHANGER
14 BECAUSE WE COULD OFFER THE NUMBER ONE PRODUCT.
15 Q. AND HOW MUCH DID ORACLE PAY TO ACQUIRE SIEBEL?
16 A. WE SPENT OVER \$6 BILLION FOR IT.
17 Q. NOW, DID THE SIEBEL ACQUISITION ALSO HAVE A CODE NAME?
18 A. ACTUALLY, IT HAD TWO. SO WE HAD -- WE HAD COLORS FOR US.
19 AND THEY WERE INDIGO, I THINK, BECAUSE WE DECIDED TO STOP USING
20 THE FIRST LETTER.
21 Q. TOO OBVIOUS?
22 A. YES, TOO OBVIOUS.
23 THEN, OF COURSE, WE STARTED GETTING CONFUSED. SO
24 THEY HAD NAMES, AND THEIR NAME WAS SIERRA. THEY DID LIKE
25 MOUNTAINS. I DON'T REMEMBER WHAT MOUNTAIN RANGE. STARTS WITH
DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

CATZ - DIRECT / MS. HOUSE

1 THE MODEL THAT WE'RE SHOWING?
2 A. THIS IS REALLY VERY SIMILAR, JUST SLIGHTLY CLEANED UP TO
3 WHAT WE SAW WITH THE PEOPLESFT DEAL.
4 SO THESE ARE THE -- THESE ARE THE MODEL INPUTS
5 AREAS. ON THE LEFT SIDE ARE HISTORICAL. THAT'S WHY THE
6 NUMBERS, THE DATES ALL HAVE A'S. THAT MEANS ACTUAL. AND THEN
7 FURTHER OUT, IT'S PROJECTIONS, FURTHER TO THE RIGHT.
8 Q. AND WERE YOU PERSONALLY INVOLVED IN THE CREATION OF THIS
9 MODEL?
10 A. YES, I WAS VERY INVOLVED, ACTUALLY, IN ALL THE ASSUMPTIONS
11 HERE WITH COLLABORATION WITH OTHERS.
12 Q. AND WHAT WAS THE PURPOSE OF CREATING THIS PROJECT SIERRA
13 FINANCIAL MODEL?
14 A. THIS WAS, AGAIN, EXACTLY THE SAME; TO JUSTIFY OUR BOARD'S
15 DECISION TO SPEND 6 BILLION PLUS DOLLARS ON BUYING SIEBEL.
16 Q. DID YOU ALSO CONSIDER, LIKE YOU HAD THE PROJECT SIERRA
17 MODEL, DID YOU CONSIDER THIS TO BE A REASONABLE MODEL?
18 A. YES. WE CONSIDERED IT TO BE VERY MAKEABLE, VERY
19 REASONABLE, FRANKLY CONSERVATIVE.
20 Q. AND WHY, AGAIN, WOULD YOU -- WHY, AGAIN, DID YOU AIM FOR A
21 CONSERVATIVE MODEL?
22 A. BECAUSE, AGAIN, WE WOULD BE SPENDING A LOT OF MONEY AND
23 PUTTING IN SOMETHING THAT WASN'T ACHIEVABLE DIDN'T MAKE SENSE.
24 WE REALLY WANTED TO BE ABLE TO JUSTIFY PAYING ALL THAT MONEY
25 FOR THE COMPANY, AND WE WANTED TO MAKE SURE WE SET EXPECTATIONS
DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

CATZ - DIRECT / MS. HOUSE

1 AN O.
2 BUT THEY WERE INDIGO IN OUR MODELS AND SIERRA IN
3 THEIRS. WE STARTED CALLING IT SIERRA SO WE COULD KEEP IT
4 STRAIGHT.
5 Q. LET ME SHOW YOU A PAGE FROM PLAINTIFFS' EXHIBIT 614. IT'S
6 AT PAGE 31284.
7 CAN YOU PULL THAT UP, PLEASE?
8 (EXHIBIT DISPLAYED ON SCREEN.)
9 CAN YOU TELL THE JURY WHAT THIS IS?
10 IT'S IN YOUR BINDER. WE BLEW IT UP TO MAKE IT
11 EASIER TO READ FOR THE JURY.
12 A. I JUST DON'T SEE IT.
13 Q. 614?
14 A. 614. IT'S IN FRONT HERE. YEP. OH, YEAH. WE WERE OKAY.
15 SO HERE'S -- THIS IS THE MODEL TO SUPPORT THE SIEBEL
16 DEAL. IF YOU LOOK UP ABOVE BEFORE THE BLOWUP, YOU'LL SEE IT
17 SAYS ORACLE, YOU KNOW, ORANGE. AND THAT'S US. AND INDIGO,
18 PROJECT INDIGO, YOU WILL SEE IS SIEBEL. AND THIS IS THE
19 DRIVERS FOR THE MODEL.
20 Q. AND THE PAGE THAT WE ARE ON IS THE ONE THAT'S TABBED IN
21 YOUR BINDER?
22 THAT ONE, THE TITLE PAGE YOU CAN TURN TO OR YOU CAN
23 LOOK ON THE SCREEN, WHICHEVER YOU PREFER.
24 A. YES.
25 Q. IT SAYS "SUMMARY INCREMENTAL CASE". WHAT IS THIS PART OF
DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

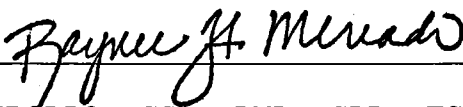
CATZ - DIRECT / MS. HOUSE

1 CORRECTLY, AND WE MET THEM.
2 Q. CAN YOU GIVE THE JURY AN EXAMPLE OF HOW YOU USED A
3 PARTICULARLY CONSERVATIVE INPUT INTO THIS MODEL?
4 A. ACTUALLY, THE NUMBERS THAT WE USED FOR A LOT OF THE
5 DIFFERENT REVENUE AMOUNTS WERE ACTUALLY LOWER THAN WHAT
6 ANALYSTS WERE EXPECTING. THESE ARE FINANCIAL INDUSTRY
7 ANALYSTS, THE FOLKS THAT WORK FOR THE BIG BROKERAGE FIRMS ALL
8 MAKE THESE ESTIMATES ABOUT HOW A PUBLIC COMPANY WILL PERFORM.
9 AND THE NUMBERS WE USED WERE LOWER THAN WHAT FOLKS
10 THOUGHT SIEBEL WOULD DO ON THEIR OWN. AND SIEBEL, UNDER
11 ORACLE'S BRAND NAME, WOULD DO EVEN BETTER, NOT LESS WELL. SO
12 WE WERE SORT OF DOUBLY CONSERVATIVE. LESS THAN WHAT THEY WERE
13 GOING TO DO ON THEIR OWN, GIVING NO CREDIT TO WHAT THEY WOULD
14 DO WITH US.
15 MS. HOUSE: THANK YOU. IF YOU WOULD PUT THAT ONE
16 DOWN.
17 BY MS. HOUSE:
18 Q. JUST SO THE JURY UNDERSTANDS, AFTER THE ACQUISITIONS OF
19 THESE TWO COMPANIES, DID ORACLE HAVE AN OBLIGATION TO SECURE
20 ANY VALUATION REPORTS FROM THIRD PARTY COMPANIES?
21 AND WHAT WERE THEY USED FOR?
22 A. SO, THE WAY THIS WORKS IS THAT WE PUBLISH THESE FINANCIAL,
23 FINANCIAL RESULTS. AND WHEN YOU BUY A COMPANY, YOU'LL ACTUALLY
24 USUALLY HIRE LIKE AN S & P OR A DUFFENFELT (PHONETIC). THESE
25 ARE THIRD PARTY FOLKS WHO DO WHAT'S CONSIDERED AN OBJECTIVE
DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

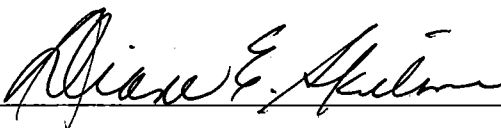
CERTIFICATE OF REPORTER

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 9
)	
SAP AG, ET AL.,	)	PAGES 1512 - 1695
)	
DEFENDANTS.	)	OAKLAND, CALIFORNIA
	)	TUESDAY, NOVEMBER 16, 2010

CERTIFIED COPY

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

1 SAYING "TWO CUSTOMERS." THAT'S -- THEY'VE DOUBLED THE NUMBER OF
2 CUSTOMERS. IN OTHER WORDS, THEY'VE GONE FROM TWO TO FOUR.
3 THE COURT: ALL RIGHT.
4 WITH REGARD TO THE MOTION THAT WAS BRIEFED YESTERDAY
5 BY THE DEFENDANTS, ESSENTIALLY THE REQUEST THAT THE COURT
6 RECONSIDER THE AT-RISK REPORT CUSTOMER COMMENTS, I'M PREPARED TO
7 RULE ON THAT.
8 MR. McDONELL YOU PRESENTED THAT, DID YOU NOT?
9 MR. McDONELL: YES, YOUR HONOR.
10 THE COURT: OKAY. ALL RIGHT. I'VE READ YOUR BRIEF;
11 I READ YOUR BRIEF. I DID NOT READ THE VOLUMINOUS DOCUMENTS THAT
12 YOU ALL SUBMITTED BECAUSE I DIDN'T HAVE AN OPPORTUNITY TO DO SO.
13 AND AT THIS TIME, I'M GOING TO DENY YOUR REQUEST.
14 I'M NOT GOING TO ALLOW IT IN. I RULED PRIOR TO TRIAL THAT YOU
15 HAD NOT CITED AN EXCEPTION TO THE HEARSAY RULE THAT I FOUND
16 PERSUASIVE. I LOOKED AT THE ADDITIONAL ONE CASE THAT YOU CITED,
17 AND IT DOESN'T CHANGE MY VIEW.
18 I THINK ORACLE'S POSITION IS -- IS THE CORRECT ONE.
19 THEY WEREN'T -- THESE CUSTOMER COMMENTS WEREN'T ADOPTED BY
20 ORACLE. IN FACT, TO THE EXTENT THAT SOME OF THE COMMENTS WERE
21 COMPLAINTS, IT WOULD BE ODD TO FIND THAT ORACLE ADOPTED THEM AS
22 THEIR OWN.
23 SO, THEREFORE, THE CUSTOMER COMMENTS STILL, IN MY
24 VIEW, ARE HEARSAY, AND THEY'RE NOT SUFFICIENTLY RELIABLE TO
25 WARRANT ADMISSION UNDER THE RESIDUAL HEARSAY EXCEPTION.
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1 SO YOUR REQUEST IS DENIED.
2 MR. HOWARD: THANK YOU, YOUR HONOR.
3 THE COURT: OKAY. LET'S BRING THE JURY.
4 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE
5 OF THE JURY:)
6 THE COURT: ALL RIGHT. GOOD MORNING, LADIES AND
7 GENTLEMEN.
8 COUNSEL, EVERYONE, BE SEATED.
9 MR. MITTELSTAEDT, CALL YOUR NEXT WITNESS.
10 MR. MITTELSTAEDT: YES, YOUR HONOR.
11 GOOD MORNING.
12 THE COURT: GOOD MORNING.
13 MR. MITTELSTAEDT: THE DEFENDANTS CALL MR. STEPHEN
14 CLARKE.
15 (PAUSE IN THE PROCEEDINGS.)
16 THE CLERK: PLEASE STEP UP HERE. RAISE YOUR RIGHT
17 HAND.
18 STEPHEN K. CLARKE,
19 CALLED AS A WITNESS FOR THE DEFENDANTS, HAVING BEEN DULY SWORN,
20 TESTIFIED AS FOLLOWS:
21 THE CLERK: PLEASE STATE YOUR FULL NAME AND SPELL
22 YOUR LAST NAME FOR THE RECORD AND SPEAK CLEARLY INTO THE
23 MICROPHONE.
24 THE WITNESS: MY NAME IS STEPHEN CLARKE, C-L-A-R-K-E.
25
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLARKE - DIRECT / MITTELSTAEDT
DIRECT EXAMINATION
1 BY MR. MITTELSTAEDT:
2 Q. MR. CLARKE, GOOD MORNING. WHAT IS YOUR ROLE IN THIS CASE?
3 A. IT WAS TO CALCULATE THE DAMAGES THAT ORACLE HAD SUFFERED AS
4 A RESULT OF COPYRIGHT INFRINGEMENT AND ALSO TO LOOK AT
5 MR. MEYER'S ANALYSIS OF THAT SAME ISSUE AND COMMENT ON IT AS I
6 SAW FIT.
7 Q. BEFORE WE GET INTO THAT, LET'S GET SOME BACKGROUND ON YOU.
8 COULD YOU TELL THE JURY WHEN AND WHERE YOU WERE BORN?
9 A. I WAS BORN IN A SMALL TOWN CALLED WIGAN NEAR MANCHESTER IN
10 ENGLAND. THE -- DID YOU JUST SAY WHEN, TOO?
11 Q. YES.
12 A. 1950.
13 Q. AND WOULD YOU TELL US ABOUT YOUR EDUCATION BRIEFLY, PLEASE.
14 A. I STARTED HIGH SCHOOL IN THAT -- IN THAT LITTLE TOWN IN
15 1961. WE START WHEN WE'RE 11 YEARS OLD IN ENGLAND IN HIGH
16 SCHOOL. I GRADUATED FROM THERE IN '69 AND WENT TO MANCHESTER
17 UNIVERSITY, AND AT THE SAME TIME I WAS AT MANCHESTER, I ALSO
18 JOINED THE ROYAL AIR FORCE. SO STRAIGHT OUT OF HIGH SCHOOL, I
19 JOINED THE ROYAL AIR FORCE, SO I WENT THE COLLEGE WHILE I WAS IN
20 THE ROYAL AIR FORCE AS A PILOT.
21 Q. AND AFTER COLLEGE, WHAT DID YOU DO?
22 A. I THEN WENT TO THE EQUIVALENT OF THE U.S. AIR FORCE ACADEMY.
23 IT'S CALLED THE ROYAL AIR FORCE COLLEGE CRANWELL LEARNED TO BE
24 AN OFFICER IN THE ROYAL AIR FORCE.
25 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLARKE - DIRECT / MITTELSTAEDT
1 Q. AND HOW LONG DID YOU SERVE IN THE AIR FORCE AFTER COLLEGE?
2 A. AFTER COLLEGE, IT WAS ABOUT TWO MORE YEARS.
3 Q. AND AFTER THE AIR FORCE, WHAT DID YOU DO?
4 A. I BECAME -- I WENT FROM THE SUBLIME TO THE RIDICULOUS. I --
5 I BECAME A CHARTERED ACCOUNTANT IN LONDON.
6 Q. AND WOULD YOU DESCRIBE TO US THE PROCESS OF BECOMING A
7 CHARTERED ACCOUNTANT, AND ACTUALLY TELL US WHAT THAT IS, TOO.
8 A. YES. THE -- A CHARTERED ACCOUNTANT IS A LOT LIKE A C.P.A.
9 IT'S A SOMEWHAT MORE INTERNATIONAL QUALIFICATION. AND IT'S VERY
10 DIFFICULT TO BECOME ONE. AND IT'S A THREE-YEAR TRAINING WHERE
11 YOU'RE -- WE CALLED IT ARTICLED, SO YOU'RE -- YOU HAVE A LEADER
12 WHO IS RESPONSIBLE FOR TAKING YOU THROUGH YOUR CAREER AND
13 TEACHING YOU HOW TO BE AN ACCOUNTANT.
14 Q. AND DURING THAT PERIOD, WHAT KIND OF WORK WERE YOU DOING?
15 A. MY MAIN ROLE WAS TO -- AT FIRST TO DO ACCOUNTING FOR SMALLER
16 COMPANIES. I WOULD TRAVEL AROUND LONDON AND SHOW UP FOR A DAY
17 OR TWO HOURS AND DO THEIR ACCOUNTING. AND AT THE SAME TIME, I
18 WAS LEARNING TO DO AUDIT WORK. SO LATER, ONCE I FIGURED OUT THE
19 ACCOUNTING, I STARTED TO DO AUDITING, TRAVELING AROUND FROM ONE
20 COMPANY TO ANOTHER TO SEE WHETHER THE BOOKS WERE BEING PROPERLY
21 KEPT.
22 Q. OKAY. AND WHAT WAS YOUR NEXT JOB?
23 A. AFTER -- AFTER I BECAME A CHARTED ACCOUNTANT AND FULLY
24 QUALIFIED, I JOINED A SMALL AIRLINE IN -- JUST NORTH OF LONDON
25 AT STANSTED AIRPORT AND, AND I WAS THEIR CONTROLLER -- IT'S WHAT
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1532

CLARKE - DIRECT / MITTELSTAEDT

1 **WE WOULD CALL THE CONTROLLER IN THE UNITED STATES.**

2 Q. YOUR NEXT JOB?

3 **A. MY NEXT JOB WAS WITH 20TH CENTURY FOX. I ALWAYS WANTED TO**

4 **WORK IN A FOREIGN COUNTRY, SO I STARTED APPLYING TO FOREIGN**

5 **COMPANIES AND GOT A JOB WITH 20TH CENTURY FOX. AND THEY MOVED**

6 **ME TO THE UNITED STATES IN 1980.**

7 Q. WHAT KIND OF WORK WERE YOU DOING FOR 20TH CENTURY FOX?

8 **A. I DID PREDOMINANTLY AUDIT WORK AGAIN, BUT VERY MUCH OF AN**

9 **INTERNATIONAL NATURE. I TRAVELED TO MANY COUNTRIES TO SEE**

10 **WHETHER SOMEONE WAS STEALING FROM THE COMPANY, AND THEY USUALLY**

11 **WERE.**

12 **AND IN THE PROCESS OF DOING THAT WORK, I OFTEN HAD TO**

13 **APPROVE ROYALTY PAYMENTS, SO I WAS WORKING WITH THE CONTRACTS**

14 **AND THE LICENSE AGREEMENTS TO COMPUTE HOW MUCH THE DIRECTORS AND**

15 **THE STARS SHOULD BE PAID FOR THEIR -- THEIR WORK ON THE -- ON**

16 **THE SHOWS.**

17 Q. AND WHEN DID YOU GET INTO THE CONSULTING BUSINESS?

18 **A. THAT WAS 1984 OR SO. MAYBE '85.**

19 Q. OKAY. AND CAN YOU TELL US WHAT KIND OF CONSULTING YOU DID

20 AT THE START?

21 **A. YES, WHEN I FIRST STARTED CONSULTING, I WAS PREDOMINANTLY**

22 **HELPING COMPANIES IMPROVE THEIR OPERATIONS, JUST TRYING TO MAKE**

23 **THEM RUN BETTER, MORE EFFICIENTLY, MAKE MORE PROFIT, AND**

24 **ADVISING THEM, IN MANY CASES, ON THEIR SYSTEMS, THEIR ACCOUNTING**

25 **SYSTEMS AND COMPUTER SYSTEMS.**

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

1533

CLARKE - DIRECT / MITTELSTAEDT

1 Q. AND WHAT KIND OF CONSULTING DID YOU DO AFTER THAT?

2 **A. MY CLIENTS KEPT GETTING BIGGER AND BIGGER AS TIME WENT BY,**

3 **SO I CONTINUED WITH THAT INITIAL WORK FOR ABOUT FIVE YEARS. BUT**

4 **THEN, I SAW SOME OF MY COLLEAGUES DOING THIS KIND OF WORK, AND I**

5 **THOUGHT IT WAS A VERY ATTRACTIVE PROPOSITION, SO I STARTED TO**

6 **MARKET MYSELF TO DO EXPERT WITNESS WORK IN ECONOMICS AND**

7 **ACCOUNTING AND BUSINESS GENERALLY.**

8 Q. AND IN THE COURSE OF BEING A CONSULTANT OR OTHERWISE, HAVE

9 YOU ACTUALLY RUN ANY BUSINESSES YOURSELF?

10 **A. I'VE RUN MANY BUSINESSES OVER THE YEARS, SOME IN THE CONTEXT**

11 **OF A BANKRUPTCY OR A RECEIVERSHIP WHERE I STEP INTO THE PLACE OF**

12 **MANAGEMENT. I ENDED UP RUNNING SOME OF THESE SMALLER COMPANIES**

13 **FOR A TIME.**

14 **I HAD CLIENTS THAT JUST WANTED ME TO HELP THEM RUN**

15 **THEIR OPERATIONS, SO I DID QUITE A LOT OF THAT, AS WELL AS**

16 **RUNNING MY OWN COMPANY EVENTUALLY.**

17 Q. AND CAN YOU -- CAN YOU GIVE US AN IDEA OF SOME OF THE KINDS

18 OF BUSINESSES THAT YOU'VE OPERATED?

19 **A. YES. THE MOST FUN I EVER HAD WAS RUNNING A PROFESSIONAL**

20 **SPORTS FRANCHISE AND BEING INTERVIEWED ON A T.V. EVERY NIGHT.**

21 **THAT WAS GREAT FUN.**

22 **THERE WAS A VIDEO VENDING MACHINE COMPANY THAT I RAN.**

23 **THESE DAYS YOU'D CALL IT RED BOX, BUT THESE MACHINES WERE MUCH**

24 **BIGGER BECAUSE WE ONLY HAD VIDEOTAPES BACK THEN, SO THEY DIDN'T**

25 **HOLD AS MANY -- AS MANY MOVIES.**

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

1534

CLARKE - DIRECT / MITTELSTAEDT

1 **IS THAT ENOUGH EXAMPLES?**

2 Q. YES. IN THE COURSE OF YOUR WORK, HAVE YOU ANALYZED ANY

3 BUSINESSES -- THE VALUE -- HAVE YOU VALUED BUSINESSES,

4 TRANSACTIONS, AND LICENSES?

5 **A. I HAVE.**

6 Q. AND CAN YOU GIVE US -- TELL US THE SCOPE OF WHAT YOU'VE

7 DONE?

8 **A. YES. I'VE FIRST VALUED A BUSINESS IN, I THINK, 1969. IT**

9 **WAS ONE OF THE THINGS ONE OF MY PROFESSORS WAS DOING ON THE**

10 **SIDE. SO YOU KNOW MOST PROFESSORS WORK OUTSIDE THEIR**

11 **PROFESSORSHIP. AND HE HAD A BUSINESS OF -- OF VALUING**

12 **BUSINESSES AND IMPROVING THEM, WHICH IS WHAT GOT ME -- GOT ME**

13 **STARTED ON THIS BUSINESS IMPROVEMENT APPROACH TO MY WORK.**

14 **AND SO I FIRST DID A VALUATION IN '69, HELPED HIM TO**

15 **DO IT. OF COURSE HE HAD TO SIGN IT. AND SINCE THEN, I'VE**

16 **PROBABLY DONE -- PROBABLY BETWEEN A THOUSAND AND 1500**

17 **VALUATIONS. I'VE NEVER COUNTED THEM, BUT IT WOULD BE WAY UP**

18 **THERE.**

19 **SO SOME OF THEM WERE RUN -- COMPANIES THAT WERE**

20 **RUNNING. SOME OF THEM WERE COMPANIES THAT WERE SORT OF ALMOST**

21 **DEAD, IF YOU LIKE. AND SOME OF THEM HAVE BEEN ASSETS, SUCH AS**

22 **THE ASSETS THAT WE'RE TALKING ABOUT IN -- IN THIS PARTICULAR**

23 **CASE.**

24 Q. HAVE YOU HAD EXPERIENCE VALUING INTELLECTUAL PROPERTY?

25 **A. YES. MANY TIMES.**

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

1535

CLARKE - DIRECT / MITTELSTAEDT

1 Q. CAN YOU -- MANY TIMES?

2 **AND DO YOU HAVE ANY EXPERIENCE IN NEGOTIATING**

3 **LICENSES?**

4 **A. I DO.**

5 MR. BOIES: YOUR HONOR, WE OFFER MR. CLARKE AS AN

6 EXPERT WITNESS.

7 THE COURT: ALL RIGHT. DO YOU WISH TO -- WHO'S GOING

8 TO BE EXAMINING? MR. BOIES?

9 MR. BOIES: IS THERE A PARTICULAR AREA OF EXPERTISE?

10 THERE ARE CERTAIN THINGS WE WOULD NOT OBJECT TO, BUT THERE WOULD

11 BE CERTAIN --

12 THE COURT: MR. MITTELSTAEDT, YOU'RE OFFERING HIM FOR

13 EXPERT IN WHAT PARTICULAR AREA?

14 MR. MITTELSTAEDT: DAMAGE CALCULATIONS ON THE

15 HYPOTHETICAL NEGOTIATION AND ON CALCULATING LOST PROFITS AND

16 INFRINGER'S PROFITS.

17 MR. BOIES: ALL RIGHT. NO OBJECTION ON THAT BASIS.

18 THE COURT: ALL RIGHT. DO YOU WISH TO VOIR DIRE?

19 MR. BOIES: NOT AT THIS TIME.

20 THE COURT: ALL RIGHT. HE WILL BE ACCEPTED AS AN

21 EXPERT.

22 BY MR. MITTELSTAEDT:

23 Q. OKAY. LET'S TURN TO THIS CASE NOW. WOULD YOU DESCRIBE IN

24 GENERAL WHAT WORK YOU DID ON THIS CASE.

25 **A. YES. THE FIRST THING I DID WAS TO START GATHERING**

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

CLARKE - DIRECT / MITTELSTAEDT

1 DOCUMENTS. THE WORK IS BASED ALMOST ENTIRELY ON DOCUMENTS. AND
2 IN THIS CASE, THERE WAS A MOUNTAIN OF -- OF DOCUMENTS THAT WE
3 GATHERED, 12 AND A HALF MILLION PAGES OF DOCUMENTS, IS WHAT WE
4 GOT, WHICH IS A PILE ABOUT A MILE AND A HALF HIGH IF YOU JUST
5 STACK IT UP. AND WE STARTED TO ANALYZE THAT INFORMATION.

6 LATER ON, WE GATHERED MORE INFORMATION FROM THE
7 COMPANIES ABOUT THEIR OPERATIONS, THEIR FINANCIAL CONDITION, THE
8 AMOUNT OF PROFIT THAT THEY MAKE. AND ALSO DURING THAT LATER
9 TIME, DEPOSITIONS WERE BEING TAKEN WHERE SOMEBODY WOULD TELL
10 EITHER WHAT THEY KNEW AND WHAT THEY'D SAID AND DONE, OR THEY
11 WERE TESTIFYING ON BEHALF OF THE COMPANY AND SAYING THIS IS WHAT
12 THE COMPANY DID. SO I READ THOSE. AND THERE WERE MANY OF
13 THOSE, TOO.

14 AND THEN THERE WERE CUSTOMERS' DECLARATIONS, SOME OF
15 WHICH TALKED ABOUT HOW THEY MADE THE DECISION TO GO TO
16 TOMORROWNOW OR MAKE SOME OTHER DECISION.

17 IN ADDITION, I SHOULD POINT OUT THAT VIRTUALLY ALL OF
18 THE INFORMATION I WAS LOOKING AT WAS REALLY FOCUSED ON THE 358
19 TOMORROWNOW CUSTOMERS AND THE 86 SAP CUSTOMERS.

20 Q. NOW, MR. CLARKE, WHY WERE YOU FOCUSING ON THE CUSTOMERS?

21 A. THIS CASE IS ALL ABOUT CUSTOMERS.

22 Q. WHEN YOU REFERRED TO THE 12 AND A HALF MILLION PAGES, DID
23 YOU HAVE ANYONE HELP YOU REVIEW THAT INFORMATION?

24 A. I DID.

25 Q. AND HOW MANY STAFF MEMBERS DID YOU HAVE WORKING ON THIS FROM
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLARKE - DIRECT / MITTELSTAEDT

1 INFORMATION TO LET US KNOW WHY THEY DID WHAT THEY DID. **SO IT'S**
2 **A BEHAVIORAL ISSUE, WHY DID THEY DO WHAT THEY DID.**

3 Q. OKAY. WHAT CONCLUSIONS DID YOU REACH AS TO THE AMOUNT OF
4 COMPENSATION THAT TOMORROWNOW AND SAP OWE TO ORACLE?

5 AND, YOUR HONOR, WE HAVE A SLIDE ON THIS, AND THIS
6 WOULD BE THE FIRST SLIDE.

7 (DEMONSTRATIVE PUBLISHED TO JURY.)

8 BY MR. MITTELSTAEDT:

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.

24 SO YOU GET TO AWARD EITHER THOSE TWO. OR ANOTHER WAY
25 TO DO IT IS TO LOOK AT THIS REASONABLE ROYALTY CALCULATION. AND
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLARKE - DIRECT / MITTELSTAEDT

1 TIME TO TIME?

2 A. AT ANY ONE TIME, THERE MIGHT HAVE BEEN 50 PEOPLE WORKING ON
3 THIS ENGAGEMENT. OVERALL, JUST BEFORE MY DEPOSITION, WHICH WAS
4 IN JUNE, I COUNTED THEM UP. AND THERE WERE 121 DIFFERENT PEOPLE
5 WHO WORKED ON THE ENGAGEMENT. YOU CAN IMAGINE WITH THAT VOLUME
6 OF INFORMATION TO LOOK AT, IT'S JUST VERY TIME-CONSUMING, SO WE
7 HAD A LARGE TEAM OF PEOPLE.

8 Q. OKAY. WANT TO TALK A LITTLE BIT MORE ABOUT WHY YOU WERE
9 FOCUSING ON THE CUSTOMER INFORMATION. YOU MENTIONED 358
10 TOMORROWNOW CUSTOMERS AND 86 SAP CUSTOMERS.

11 WHY DIDN'T YOU JUST CALCULATE THAT THE DEFENDANTS
12 OWED COMPENSATION TO ORACLE FOR ALL OF THOSE CUSTOMERS?
13 A. BECAUSE WE SHOULD ONLY CALCULATE THE DAMAGES THAT AROSE AS A
14 RESULT OF WHAT'S BEING ALLEGED IN THE CASE. NOW, IT'S NOT AN
15 ALLEGATION ANY LONGER. IT'S AN ADMISSION, THAT THE COPYRIGHTS
16 WERE INFRINGED.

17 SO IT'S WHAT HAPPENED AS A RESULT OF THAT
18 INFRINGEMENT THAT'S WHAT MATTERS. AND THE ONLY WAY TO DO THAT
19 IS TO LOOK AT ONE CUSTOMER AT A TIME. YOU HAVE TO TRY AND
20 DETERMINE WHY THEY DID WHAT THEY DID. IF THEY -- IF THEY WENT
21 TO TOMORROWNOW OR WENT TO SAP FOR REASONS COMPLETELY UNRELATED
22 TO THE INFRINGEMENT, THEN THERE WOULD BE NO DAMAGES, AND EACH
23 CUSTOMER IS UNIQUE.

24 SO THE ONLY WAY TO DO THAT IS TO GATHER THE
25 INFORMATION ONE CUSTOMER AT A TIME AND TRY TO UNDERSTAND THAT
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLARKE - DIRECT / MITTELSTAEDT

1 YOU HEARD AT LENGTH FROM MR. MEYER ON THIS ISSUE. I'M GOING TO
2 DEAL WITH IT, TOO. WE COME TO COMPLETELY DIFFERENT NUMBERS, AS
3 YOU CAN SEE. BUT THIS IS AN ALTERNATIVE. SO YOU GET ONE AND
4 TWO, OR THREE.

5 Q. OKAY. NOW, THE LOST-SUPPORT PROFITS NUMBER OF 19 MILLION,
6 THAT'S LOWER THAN THE 32 MILLION I TOLD THE JURY IN THE OPENING
7 STATEMENT. CAN YOU EXPLAIN TO US WHY THAT NUMBER HAS NOW
8 DROPPED TO 19 FROM 32?

9 A. YES. THE -- THE PLAINTIFFS IN THE 32 MILLION WERE TWO
10 COMPANIES, OIC THAT I KNOW YOU'VE HEARD ABOUT, AND OUSA, WHICH
11 IS ORACLE -- ORACLE U.S.A. VERY LATE IN THE CASE, THE ORACLE
12 U.S.A. -- THE OUSA PLAINTIFF WAS REMOVED FROM THE CASE, SO THE
13 DAMAGES THAT RELATED TO OUSA HAD TO COME OUT OF CALCULATION.

14 SO THE DIFFERENCE IS -- ALMOST EXACTLY THE DIFFERENCE
15 BETWEEN THE 32 MILLION AND THIS NUMBER IS BECAUSE OF THAT OUSA
16 REMOVAL FROM THE CASE.

17 Q. OKAY. AND DID MR. MEYER ALSO LOWER HIS NUMBER FOR THE SAME
18 REASON AS YOU UNDERSTAND IT?

19 A. HE DID.

20 Q. THE INFRINGER'S PROFITS, THAT'S SAP'S PROFITS ON SOFTWARE
21 SOLD AS A RESULT OF TOMORROWNOW'S INFRINGEMENT. HOW MANY
22 CUSTOMERS IS REFLECTED IN THE 8 MILLION?

23 A. I'D JUST LIKE TO CORRECT THAT A LITTLE BIT. THE INFRINGER'S
24 PROFITS IS BOTH TOMORROWNOW AND SAP.

25 SO NOW GOING TO THE SECOND PART OF YOUR QUESTION,
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1548

CLARKE - DIRECT / MITTELSTAEDT

1 PART. THE ONLY THING THAT CHANGED WITH SAFE PASSAGE WAS "TN OR
2 SOME OTHER THIRD-PARTY VENDOR" WAS ADDED. AND IT'S THAT LITTLE
3 PIECE THAT WE'RE TRYING TO VALUE.

4 Q. NOW, IN ADDITION TO THAT PROBLEM, WHAT WAS THE SIGNIFICANCE
5 OF THE ZIEMEN DOCUMENT SAYING THAT THE NUMBER OF CUSTOMERS WAS
6 AN ASSUMPTION AND MR. MEYER TREATING THAT AS AN EXPECTATION?

7 A. IN -- IN ACCOUNTING AND IN BUSINESS, WHEN THOSE TWO
8 OPERATIONS MEET -- YOU KNOW THE ACCOUNTING GUYS IN THE COMPANY
9 ARE TRYING TO WORK WITH THE BUSINESS PEOPLE IN THE COMPANY, YOU
10 HEAR ALL KINDS OF ASSUMPTIONS, TARGETS, GOALS, FORECASTS,
11 PROJECTIONS, THEY'RE ALL SLIGHTLY DIFFERENT. NONE OF THEM MEAN
12 THE SAME THING.

13 EVEN THOUGH MR. MEYER PUT THEM UP ON HIS SCHEDULE AND
14 SAID THESE ALL CORROBORATE MY 3,000-CUSTOMER DEAL, THAT'S NOT
15 TRUE. AN ASSUMPTION'S JUST AN ASSUMPTION. AND LOOKING AT THAT
16 DOCUMENT AND LISTENING TO MR. ZIEMEN'S TESTIMONY, THERE WAS NO
17 GREAT ANALYSIS BEHIND THAT.

18 IF THE -- IF THE ACCOUNTING PEOPLE AND THE BUSINESS
19 PEOPLE WERE GOING TO TAKE ACTION ON THE BASIS OF THAT DOCUMENT
20 TO GO AND GET A LICENSE, THAT NUMBER WOULD NOT HAVE BEEN WHAT
21 IT -- WHAT MR. ZIEMEN WROTE ON THE PAGE. THAT NUMBER WOULD HAVE
22 BEEN MUCH MORE HEAVILY ANALYZED. THEY WOULD HAVE TALKED TO
23 CUSTOMERS. THEY WOULD HAVE TALKED TO ACCOUNT EXECS. THEY WOULD
24 HAVE TALKED TO THE ANALYSTS WHO FOLLOW THE INDUSTRY. AND THEY
25 WOULD HAVE DONE A REALLY THOROUGH ANALYSIS. NONE OF THAT

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

1550

CLARKE - DIRECT / MITTELSTAEDT

1 LIKE, SAYING, LOOK AT THE 11 BILLION, TAKE 30 PERCENT OR
2 20 PERCENT OF IT. BUT THAT IS NOT WHERE YOU SHOULD BE LOOKING.

3
4 YOU SHOULD BE LOOKING AT THE -- AT NOT A SHARE OF THE
5 COMPANY, LOOKING AT THE VALUE OF WHAT WAS ACTUALLY INFRINGED AND
6 THE WAY TOMORROWNOW USED IT.

7 Q. OKAY.

8 AND WHAT ASSUMPTIONS WAS MR. MEYER MAKING ABOUT THE
9 REASONS THAT CUSTOMERS WOULD SWITCH FROM PEOPLESOFT TO SAP?

10 MR. BOIES: YOUR HONOR, I'M GOING TO OBJECT TO HIS
11 CHARACTERIZATIONS OF WHAT MR. MEYER'S TESTIFIED TO. I DON'T
12 HAVE AN OBJECTION TO HIM TESTIFYING TO WHAT HE BELIEVES, BUT HE
13 IS TESTIFYING AS TO WHAT WAS MR. MEYER'S MIND.

14 THE COURT: WELL, HE'S REVIEWED MR. MEYER'S REPORT,
15 SO TO THE EXTENT HE'S REVIEWED HIS REPORT AND LISTENED TO HIS
16 TESTIMONY, HE CAN CERTAINLY INTERPRET IT IN HIS WAY. YOU'RE
17 RIGHT, HE CAN'T SPECULATE AS TO WHAT WAS MR. MEYER'S MIND, BUT
18 HE CAN CERTAINLY INTERPRET WHAT HE'S REVIEWED.

19 MR. BOIES: AND AS LONG AS HE SAYS THIS IS WHAT
20 MR. MEYER'S SAID, I DON'T HAVE AN OBJECTION TO IT. WHAT I WOULD
21 ASK IS THAT HE REFER TO WHAT MR. MEYER'S ACTUALLY SAID, NOT HIS
22 STATEMENT OR SUMMARY OF WHAT HE SAID.

23 THE COURT: I THINK IT'S CLEAR THAT, MR. CLARKE,
24 YOU'RE NOT TO SPECULATE AS TO WHAT MR. MEYER'S THOUGHT OR
25 BELIEVED. BUT YOU CAN CERTAINLY REVIEW HIS WORK AND GIVE US
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1549

CLARKE - DIRECT / MITTELSTAEDT

1 HAPPENED IN THAT DOCUMENT. THAT'S JUST AN ASSUMPTION. WELL,
2 LET'S PUT 3,000 HERE. LET'S -- 2,000. 8,000.

3 IT'S JUST AN ASSUMPTION THAT IF WE PUT THIS NUMBER
4 HERE, THIS IS WHAT WILL HAPPEN TO THE REVENUES. GREAT. THAT
5 MEANS NOTHING.

6 Q. OKAY. WHAT ASSUMPTIONS DID MR. MEYER MAKE ABOUT THE
7 COMPARISON BETWEEN BUYING A COMPANY LIKE PEOPLESOFT AND
8 LICENSING SOME OF ITS SOFTWARE?

9 A. AT THE END OF THE DAY, MR. MEYER DIDN'T REALLY DO VERY MUCH
10 WITH THAT. THROUGHOUT THE TESTIMONY -- AND I'M SURE YOU WERE
11 SICK OF HEARING IT -- HE MENTIONED THE ACQUISITION OF PEOPLESOFT
12 FOR \$11 BILLION. AND I THINK THE REASON HE WAS DOING THAT WAS
13 TO TRY AND EXTRACT FROM THAT \$11 BILLION SOME RATIO THAT RELATED
14 TO THE 3,000 CUSTOMERS THAT WE WERE JUST TALKING ABOUT.

15 PEOPLESOFT HAD ABOUT 10,000 CUSTOMERS, SO 3,000 WILL
16 BE 30 PERCENT, AND 30 PERCENT OF 11 BILLION IS A VERY ATTRACTIVE
17 NUMBER. BUT THE ACQUISITION OF A COMPANY HAS NO RELEVANCE TO
18 WHAT WE'RE TALKING ABOUT HERE, WHICH IS THE VALUE OF THE -- THE
19 USE THAT TOMORROWNOW MADE OF A PIECE OF THE INTELLECTUAL
20 PROPERTY THAT WAS ACQUIRED IN THE -- IN THE PEOPLESOFT
21 TRANSACTION.

22 AND ALL OF THE INTELLECTUAL PROPERTY IN THE
23 PEOPLESOFT TRANSACTION WAS A LOT LESS THAN \$11 BILLION. THERE
24 WERE A LOT OF OTHER THINGS IN THIS \$11 BILLION. SO THE
25 11 BILLION IS JUST -- IT'S LIKE -- IT'S LIKE A MAGICIAN, IF YOU

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

1551

CLARKE - DIRECT / MITTELSTAEDT

1 YOUR VIEWS ON HIS WORK.

2 THE WITNESS: THANK YOU.

3 MR. MITTELSTAEDT: PLEASE PROCEED.

4 THE WITNESS: I'M SORRY. I'VE FORGOTTEN THE
5 QUESTION.

6 BY MR. MITTELSTAEDT:

7 Q. IN THE WAY THAT MR. MEYER DID HIS CONTEMPLATION, WHAT
8 ASSUMPTION IS THERE ABOUT WHY CUSTOMERS WOULD GO FROM PEOPLESOFT
9 TO SAP?

10 A. THE ENTIRE BASIS OF THAT ANALYSIS IS THAT ALL OF THE
11 CUSTOMERS THAT MR. MEYER IDENTIFIED WENT TO TOMORROWNOW OR SAP
12 AS A RESULT OF THE INFRINGEMENT. AND HE DID NOT LOOK AT THE
13 BEHAVIOR OF THE CUSTOMERS AT ALL. I DID THAT ANALYSIS. IT WAS
14 VERY TIME-CONSUMING. IT WAS VERY EXPENSIVE FOR MY CLIENT. AND
15 HE DIDN'T DO THAT ANALYSIS. WHAT HE KNOWS ABOUT THE CUSTOMERS'
16 BEHAVIOR, HE LEARNED FROM ME.

17 NOW, HIS CHART WITH THE ZIEMEN DOCUMENT AND THE 3,000
18 HAS SOME OTHER NUMBERS, GOALS, TARGETS AND SO FORTH THAT HE
19 CALLS EXPECTATIONS, BUT THAT CHART DID NOT HAVE THE LOWER
20 NUMBERS IN THE SAP DOCUMENTS, THE 5 PERCENT NICHE OR HIGHER IN
21 THE ZEPECKI DOCUMENT OR THE 370 OR SO CUSTOMERS FROM THE
22 BUSINESS CASE.

23 Q. WHAT -- WHAT'S THE SIGNIFICANCE OF THAT TO YOUR OPINION?

24 A. THE -- THERE'S A CONCEPT IN ACCOUNTING CALLED A FORECAST.
25 AND I DON'T WANT TO GET INTO TOO MUCH TECHNICAL ACCOUNTING, BUT
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1572

CLARKE - DIRECT / MITTELSTAEDT

1 THIS IS WHY THIS ARROW GOES OFF ON THE LEFT-HAND SIDE
2 (INDICATING). THESE ARE ALL ALTERNATIVE WAYS COMPANIES CAN DO
3 WHAT THEY WERE DOING WITH THEIR ORACLE SOFTWARE.
4 SO THE ALTERNATIVES WERE NOT JUST THIRD-PARTY
5 VENDORS. THERE WERE MANY OTHER WAYS, AND YOU -- ON HERE, IN
6 FACT, IT'S -- IT'S MISSING, IS -- SHOULD BE SELF-SUPPORT.
7 SO CUSTOMERS COULD GO ON SELF-SUPPORT. THEY JUST
8 HIRE THEIR OWN PEOPLE AND LOOK AFTER THEIR OWN SYSTEMS. SO THAT
9 SHOULD BE ON THIS LIST. AND IT'S, OF COURSE, ALWAYS AVAILABLE
10 TO THESE COMPANIES -- TO THESE CUSTOMERS.
11 AND THEN THESE ARE ALL -- THESE GUYS OVER HERE
12 (INDICATING), THESE ARE PEOPLE WHO, SAY, MANAGE PAYROLL. SO ONE
13 OF THE THINGS THAT A PEOPLESOFT-TYPE USER MIGHT USE -- MIGHT USE
14 A SOFTWARE FOR IS TO PRODUCE A PAYROLL. WELL, YOU CAN GO TO ADP
15 FOR PAYROLL AND HUMAN RESOURCE MANAGEMENT SERVICES. THEN YOU
16 DON'T NEED A COMPUTER SYSTEM AT ALL. YOU JUST SEND THEM A PIECE
17 OF PAPER, AND THEY INPUT THE DATA AND PRODUCE THE CHECKS.
18 THAT'S TRUE OF ALL OF THOSE, ACCENTURE, DELOITTE, AND
19 SO ON. THOSE ARE BIG WHAT WE CALL SYSTEMS INTEGRATORS. THESE
20 ARE HUGE COMPANIES. AND THIS IS WHAT THEY DO. THEY HELP
21 COMPANIES INSTALL SYSTEMS, SELECT THE SYSTEMS, TRAIN PEOPLE, DO
22 CONSULTING FOR THEM WHEN IT GOES WRONG, AND SO ON.
23 AND THEN INTERESTINGLY, WAY OVER -- EXCUSE ME -- MY
24 POINTER SEEMS TO HAVE STOPPED POINTING -- WAY OVER HERE
25 (INDICATING), YOU'VE GOT COMPANIES THAT SELL SOFTWARE THAT DOES
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1574

CLARKE - DIRECT / MITTELSTAEDT

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.
8 AND THEN ON THE ROYALTY COLUMN, THE COLUMN OVER ON
9 THE RIGHT, I SIMPLY TOOK HALF OF THIS, THE 50 PERCENT, AND
10 CALCULATED THAT ROYALTY. AND THEN BECAUSE THE ROYALTIES WOULD
11 HAVE OR SHOULD HAVE BEEN PAID IN THOSE EARLIER YEARS, WHAT I DID
12 WAS I ADDED INTEREST TO GET IT TO THE DATE OF TRIAL.
13 SO THAT 298,000 IN 2002 WOULD HAVE GROWN TO SOMETHING
14 MORE THAN THAT BY THE -- BY THE DATE OF TRIAL. AND SO I
15 ESTIMATED THE DATE OF TRIAL FOR THE 10TH OF DECEMBER, ACTUALLY.
16 SO WE MIGHT GET LUCKY AND FINISH BEFORE THAT. AND THAT'S THAT
17 INTEREST CALCULATION THERE, THE 5.3 MILLION. AND ADD THOSE TWO
18 TOGETHER, AND THE TOTAL IS 34.8 MILLION.
19 Q. OKAY. AND THAT'S FOR TOMORROWNOW.
20 LET'S TURN TO SAP. THAT'S THE NEXT SLIDE.
21 (DEMONSTRATIVE PUBLISHED TO THE JURY.)
22 BY MR. PICKETT:
23 Q. AND WOULD YOU TELL US HOW YOU CALCULATED THE REASONABLE
24 ROYALTY FROM THIS HYPOTHETICAL NEGOTIATION ON THE SAP SIDE?
25 A. YES. AGAIN, USING THE GEORGIA PACIFIC FACTORS, I CAME UP
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1573

CLARKE - DIRECT / MITTELSTAEDT

1 THE SAME THING. SO WE SAW COMPANIES THAT USED TO BE ON
2 PEOPLESOFT, AND WHAT THEY DID WAS THEY SIMPLY CLOSED THAT DOWN
3 AND WENT TO GREAT LAKES FOR ACCOUNTING. THEY MAY HAVE GONE TO
4 MICROSOFT FOR ERP. THAT'S ANOTHER VENDOR, MUCH CHEAPER, NOT SO
5 CAPABLE. BUT FOR COMPANIES THAT WERE REALLY STRUGGLING TO PAY
6 THE ORACLE MAINTENANCE FEE, A VIABLE OPTION SO THAT ALL THESE
7 WAYS THAT THESE CUSTOMERS COULD HAVE ACHIEVED WHAT THEY HAD TO
8 DO TO KEEP THEIR BUSINESS GOING, WITHOUT USING ORACLE, AND
9 THAT'S VERY, VERY IMPORTANT.
10 Q. OKAY. PUTTING ALL THOSE GEORGIA PACIFIC FACTORS TOGETHER,
11 YOU CAME UP WITH A ROYALTY FOR TOMORROWNOW, CORRECT?
12 A. CORRECT.
13 Q. AND THAT'S 50 PERCENT OF TOMORROWNOW'S REVENUES.
14 A. CORRECT.
15 Q. REVENUES ON WHAT BASE?
16 A. I -- I DID THE ROYALTY ON ALL OF THEIR REVENUES FOR
17 TOMORROWNOW.
18 Q. OKAY.
19 A. I TOOK EVERY SINGLE DOLLAR AND CALCULATED THE ROYALTY ON
20 THAT.
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
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1575

CLARKE - DIRECT / MITTELSTAEDT

1 WITH A 50 PERCENT OF PROFIT RATE, WHICH IS A VERY HIGH RATE.
2 AND I DID A DETAILED ANALYSIS OF THE CUSTOMER BEHAVIOR AND FOUND
3 THAT 82 OF THE 86 CUSTOMERS HAD GONE TO SAP FOR OTHER REASONS,
4 SO THERE ARE ONLY FOUR REMAINING CUSTOMERS.
5 AND I FOUND THE REVENUE FROM SAP'S FINANCIAL
6 INFORMATION FOR THOSE CUSTOMERS. I CALCULATED THE PROFIT. I
7 HAD INFORMATION RELATED TO THE COMPANY'S COSTS, SO I
8 SUBCONTRACTED THE COSTS FROM THE REVENUES. THAT GAVE ME THE
9 PROFIT, AND THEN I TOOK 50 PERCENT OF THAT PROFIT. 50 PERCENT
10 OF THAT IS THAT (INDICATING). ADDED THE 4 UP, CAME TO
11 \$3.8 MILLION.
12 Q. OKAY.
13 NOW, TO WRAP UP THE HYPOTHETICAL LICENSE PART OF
14 THIS, LET ME ASK YOU JUST FINALLY FOR YOUR RESPONSE TO SOME OF
15 MR. MEYER'S CRITICISM.
16 WHEN HE WAS TALKING ABOUT WHY IN HIS VIEW, ALL THE
17 MONEY SHOULD BE PAID UP FRONT AND IT SHOULD BE A LARGER AMOUNT,
18 HE SAID AT PAGE 910,
19 "SAP WAS AWARE THAT BASICALLY ORACLE PAID
20 UPFRONT."
21 IN YOUR VIEW, IS THAT A JUSTIFICATION TO HAVE A
22 PAID-UPFRONT LICENSE RATHER THAN A RUNNING ROYALTY?
23 A. NO. THAT WOULDN'T MAKE ANY SENSE FOR ALL OF THE REASONS
24 THAT I DESCRIBED TO YOU LATE -- EARLIER. ORACLE AND SAP WOULD
25 HAVE BEEN TAKING A HUGE RISK IF THEY'D DONE THAT. AND YOU HAVE
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLARKE - DIRECT / MITTELSTAEDT

1 THAT TOMORROWNOW WOULD NEED A -- A LICENSE -- IT'S CALLED AN
2 ENTERPRISE EDITION LICENSE FOR ORACLE'S DATABASE TO RUN ON EACH
3 OF THOSE PROCESSES. SO THAT GIVES ANOTHER MULTIPLE, AND -- AND
4 THEN THERE'S MAINTENANCE TO BE PAID FOR ON THAT DATABASE. AND
5 SO HE ADDED 172 TIMES THE COST OF THE DATA -- THE MAINTENANCE
6 FOR HOWEVER LONG THEY NEEDED THAT, WHICH IS SOMEWHERE AROUND THE
7 THREE- TO FOUR-YEAR PERIOD.

8 Q. SO IN SUMMARY, HE SAYS, TOMORROWNOW WOULD NEED A DIFFERENT
9 DATABASE, A NEW DATABASE LICENSE FOR EACH OF THE 172
10 ENVIRONMENTS. AND IT WOULD ACTUALLY NEED IT FOR THE SIX CORE
11 PROCESSORS USED FOR EACH OF THOSE CUSTOMERS.

12 A. YES. HE -- HE ACTUALLY COUNTED THE SIX, IS BASED UPON AN
13 AVERAGE. HE CALLED IT AN AVERAGE. NOT ACTUALLY AN AVERAGE.
14 THE AVERAGE IS MORE LIKE FOUR. BUT HE CALLED IT AN AVERAGE
15 STRUCTURE FOR THE COMPUTER AND SAID THAT'S A SIX-CORE COMPUTER,
16 AND YOU NEED -- YOU NEED THE ENTERPRISE EDITION FOR EACH
17 CUSTOMER FOR EACH COMPUTER. AND THAT'S A SUBSTANTIAL DIFFERENCE
18 BETWEEN HE AND I ON THIS PARTICULAR AREA.

19 Q. OKAY. AND LET'S LOOK AT HOW YOU DID IT. AND WE HAVE SLIDE
20 7. IT WILL HELP WALK THROUGH THIS.

21 (DEMONSTRATIVE PUBLISHED TO THE JURY.)

22 BY MR. MITTELSTAEDT:

23 Q. OKAY. IF YOU COULD USE THIS TO DESCRIBE HOW IN YOUR VIEW A
24 REASONABLE ROYALTY FOR THE DATABASE LICENSE SHOULD BE
25 ESTABLISHED.

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

CLARKE - DIRECT / MITTELSTAEDT

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.

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

CLARKE - DIRECT / MITTELSTAEDT

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

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

CLARKE - DIRECT / MITTELSTAEDT

1 AND ORACLE MAKES A -- A PROFIT ON THESE DATABASES OF
2 95 PERCENT, SO YOU TAKE 27 MULTIPLIED BY 40,000, TAKE 27 TIMES
3 8800 FOR EACH YEAR THAT THEY WERE USING THAT EQUIPMENT, AND THEN
4 MULTIPLY BY 95 PERCENT, AND THE VALUE OF USE IS 1.9 MILLION.

5 Q. OKAY. LET'S GO TO THE NEXT SLIDE AND SUMMARIZE WHERE WE ARE
6 ON THE HYPOTHETICAL LICENSE.

7 (DEMONSTRATIVE PUBLISHED TO THE JURY.)

8 BY MR. MITTELSTAEDT:

9 Q. WOULD YOU JUST WALK US THROUGH THIS, AND THEN WE'LL BE READY
10 TO MOVE ON TO LOST PROFITS.

11 A. THIS IS JUST A SUMMARY SLIDE THAT TAKES THE INFORMATION THAT
12 WE'VE JUST GONE OVER. THE TOMORROWNOW REASONABLE ROYALTY, IF
13 YOU REMEMBER, WAS 34.9 MILLION. THE SAP REASONABLE ROYALTY WAS
14 3.8 MILLION, AND THE ORACLE DATABASE ROYALTY WAS 1.9 MILLION.

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.

21 MR. MITTELSTAEDT: OKAY. YOUR HONOR, THIS WOULD BE A
22 GOOD TIME TO BREAK.

23 THE COURT: ALL RIGHT. THANK YOU.

24 LADIES AND GENTLEMEN OF THE JURY, YOU'RE EXCUSED,
25 THEN, FOR 15 MINUTES.

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

1588

CLARKE - DIRECT / MITTELSTAEDT

1 (RECESS TAKEN AT 10:14 A.M.)
 2 (PROCEEDINGS RESUMED AT 10:36 A.M.)
 3 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE
 4 OF THE JURY:)
 5 THE CLERK: PLEASE BE SEATED AND COME TO ORDER.
 6 THE COURT: ALL RIGHT. PLEASE PROCEED.
 7 MR. MITTELSTAEDT: THANK YOU, YOUR HONOR.
 8 LET'S PUT SLIDE 1 UP AGAIN.
 9 Q. OKAY, MR. MEYER -- EXCUSE ME -- MR. CLARKE, WE FINISHED THE
 10 REASONABLE ROYALTY, AND NOW WE'RE GOING TO MOVE TO THE OTHER WAY
 11 OF DOING DAMAGES, AND WE'LL START WITH LOST-SUPPORT PROFITS.
 12 **A. OKAY.**
 13 Q. AND LET'S PUT UP SLIDE 10.
 14 (DEMONSTRATIVE PUBLISHED TO THE JURY.)
 15 BY MR. MITTELSTAEDT:
 16 Q. WHAT IS THAT, SIR?
 17 **A. THIS IS THE DEFINITION OF WHAT I MEAN BY LOST SUPPORT**
 18 **PROFITS.**
 19 Q. SO IT'S SUPPORT PROFITS LOST BY ORACLE AS A RESULT OF THE
 20 INFRINGEMENT, AND IT EXCLUDES PROFITS THAT ORACLE WOULD HAVE
 21 LOST ANYWAY?
 22 **A. THAT'S CORRECT.**
 23 Q. AND THAT MEANS CUSTOMERS WHO WOULD HAVE LEFT ANYWAY, WE
 24 DON'T NEED TO COMPENSATE THEM FOR, AS YOU'VE CALCULATED IT?
 25 **A. THAT'S CORRECT. AND THIS SLIDE HAS ONE OTHER COMPONENT**
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1590

CLARKE - DIRECT / MITTELSTAEDT

1 MR. MITTELSTAEDT: YES, HE HAS REVIEWED -- AND I CAN
 2 LAY A BETTER FOUNDATION.
 3 THE COURT: PLEASE. WELL, NO, MAKE AN OFFER OF PROOF
 4 FIRST.
 5 MR. MITTELSTAEDT: YEAH, THE OFFER OF PROOF IS THAT
 6 HE REVIEWED, ALONG WITH HIS STAFF, ALL OF THESE RECORDS RANGING
 7 FROM CUSTOMER STATEMENTS, CUSTOMER EMAILS, ORACLE DOCUMENTS,
 8 TOMORROWNOW DOCUMENTS. HE LOOKED AT ALL OF THOSE DOCUMENTS AND
 9 REACHED THE CONCLUSION -- REACHED AN OPINION ON WHICH CUSTOMERS
 10 WOULD HAVE LEFT, WHICH ONES ARE WITHIN THE CAUSATION POOL, AND
 11 REACHED AN OPINION ON THAT.
 12 THE COURT: ALL RIGHT. AND I NEED TO SET SOME GROUND
 13 RULES. I'D LIKE TO TALK TO BOTH COUNSEL AT SIDE BAR.
 14 (THE FOLLOWING PROCEEDINGS WERE HEARD AT THE
 15 SIDEBAR:)
 16 THE COURT: OKAY. NOW, WITH REGARD TO THE FIVE
 17 EXHIBITS THAT YOU OBJECTED TO EARLIER, OR YOU DIDN'T, BUT
 18 MR. PICKETT DID, I'VE ALREADY INDICATED HE CAN REFER TO THOSE.
 19 HE CAN REFER TO THE CALCULATIONS.
 20 MR. BOIES: YES.
 21 THE COURT: THOSE DECLARATIONS CONTAIN THE REASONS
 22 WHY THEY LEFT, SO I DON'T QUITE UNDERSTAND HOW TO WORK AROUND
 23 THAT. I MEAN, I'VE ALREADY MADE A RULING WITH REGARD TO THOSE
 24 WITH REGARD TO COWLITZ -- I MEAN, THERE ARE ANY NUMBER OF PIECES
 25 OF EVIDENCE THAT ARE ALREADY IN OR WHICH I'VE ALREADY APPROVED
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1589

CLARKE - DIRECT / MITTELSTAEDT

1 **SINCE YOU ASKED. THIS IS THE TOTAL AMOUNT OF THE LOST SUPPORT**
 2 **PROFITS, THE 19.3 MILLION.**
 3 Q. YES.
 4 OKAY. WHAT WAS YOUR APPROACH IN GENERAL IN
 5 CALCULATING THE LOST PROFITS?
 6 **A. GENERALLY, WHAT I DID WAS -- AND WE REFERRED TO THIS A FEW**
 7 **TIMES ALREADY. I LOOKED AT THE CUSTOMER INFORMATION THAT I HAD**
 8 **TO TRY TO DETERMINE WHY THEY LEFT ORACLE, AND BY LOOKING AT**
 9 **THIS INFORMATION, I WAS ABLE TO SAY THAT SOME OF THESE CUSTOMERS**
 10 **LEFT FOR REASONS OTHER THAN THE ALLEGED ACTIONS, THE COPYRIGHT**
 11 **INFRINGEMENT. AND SO IF THEY DID LEAVE FOR REASONS OTHER THAN**
 12 **THE INFRINGEMENT, I TOOK THEM OUT OF MY ANALYSIS AND DID NOT**
 13 **COMPUTE ANY LOST PROFITS ON THOSE.**
 14 Q. WHEN YOU LOOKED AT ALL THIS INFORMATION ABOUT CUSTOMERS AND
 15 WHY THEY MADE THE DECISIONS THAT THEY DID, HOW DID YOU GO ABOUT
 16 ORGANIZING THAT DATA FOR ALL THOSE CUSTOMERS?
 17 MR. BOIES: YOUR HONOR, WE OBJECT TO HIM TESTIFYING
 18 AS TO WHY CUSTOMERS LEFT ORACLE. THAT IS OUTSIDE HIS EXPERTISE.
 19 SPECULATING AS TO WHAT WAS IN THE MINDS OF THE CUSTOMERS AND WHY
 20 THEY LEFT IS NOT SOMETHING THAT'S PROPER FOR HIS TESTIMONY.
 21 WE HAVE NO OBJECTION TO HIS TESTIFYING AS TO THE
 22 CONSEQUENCES OF A PARTICULAR CUSTOMER LEAVING OR NOT LEAVING.
 23 THAT IS DAMAGE CALCULATION WITHIN HIS EXPERTISE.
 24 THE COURT: OKAY. ALL RIGHT.
 25 RESPONSE?
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1591

CLARKE - DIRECT / MITTELSTAEDT

1 THAT GO TO THAT WHOLE QUESTION OF REASONS.
 2 MR. BOIES: EXACTLY. AND I THINK THE JURY CAN
 3 CONCLUDE FROM THAT THAT CUSTOMERS EITHER DID OR DID NOT LEAVE
 4 BECAUSE OF TOMORROWNOW OR FOR SOME OTHER REASON. THAT'S A
 5 DECISION FOR THE JURY TO MAKE BASED ON THE EVIDENCE THAT IS
 6 ADMITTED.
 7 WHAT I DON'T THINK HE CAN DO IS I DON'T THINK HE CAN
 8 SPECULATE AS TO WHAT WAS IN THE CUSTOMERS' MINDS. IN OTHER
 9 WORDS, WHAT THEY'RE ASKING HIM TO DO AND -- AND I THINK -- I
 10 THINK COUNSEL PUT IT VERY DIRECTLY, HE -- HE AND THE STAFF
 11 LOOKED AT LOTS OF DOCUMENTS.
 12 HE'S NOW PURPORTING TO COME IN AND TELL THE JURY,
 13 BASED ON LOOKING AT ALL THESE DOCUMENTS, THIS IS WHAT I CONCLUDE
 14 IS THE REASON THAT THEY LEFT. THAT'S EXACTLY WHAT I THINK
 15 EXPERTS ARE NOT PERMITTED TO DO, WHICH IS TO TAKE A LOT OF
 16 HEARSAY EVIDENCE AND COME IN AND SAY, THIS IS WHAT I CONCLUDE A
 17 CUSTOMER WOULD OR WOULD NOT HAVE DONE. HE'S NOT AN EXPERT --
 18 THE COURT: EXCEPT HE HAS MADE THE DETERMINATION THAT
 19 A SIZABLE NUMBER OF CUSTOMERS WOULD HAVE LEFT FOR OTHER REASONS.
 20 THAT'S THE BASIS OF HIS ANALYSIS. OKAY? HE HAS TO BE ABLE TO
 21 TESTIFY AS TO HOW HE KNOWS THAT THEY WOULD HAVE LEFT, EITHER
 22 THROUGH INFORMATION THAT WAS PROVIDED, THROUGH DISCOVERY THAT
 23 WAS PROVIDED -- HE HAS TO BE ABLE TO TESTIFY AS TO HOW HE WAS
 24 ABLE TO COME TO HIS CONCLUSION.
 25 WHILE I AGREE WITH YOU THAT THE ACTUAL REASONS CAN'T
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLARKE - DIRECT / MITTELSTAEDT

1 COME THROUGH HIS MOUTH, I MEAN, THOSE ARE THE AT-RISK REPORTS,
2 REASONS, ET CETERA. THE ACTUAL REASONS HE CANNOT TESTIFY ABOUT.
3 BUT HE HAS TO BE ABLE TO TESTIFY AS TO THE FACT THAT HE HAD
4 EVIDENCE UPON WHICH TO MAKE A CONCLUSION THEY WOULD --

(SIMULTANEOUS COLLOQUY.)

6 MR. BOIES: YEAH, AND I AGREE THAT HE CAN, FOR
7 EXAMPLE, SAY THAT IF THE JURY CONCLUDES THAT ALL OF THESE PEOPLE
8 EXCEPT FOR FOUR WOULD HAVE LEFT, THEN THE DAMAGE CONSEQUENCES
9 ARE THIS. I AGREE HE CAN TESTIFY TO THAT. THAT'S WHAT HE'S UP
10 HERE TO DO.

11 BUT WHAT I THINK HE CAN'T DO IS SAY ALL OF THESE
12 CUSTOMERS EXCEPT THESE FOUR WOULD HAVE LEFT BECAUSE THAT IS WHAT
13 IS REQUIRING HIM TO MAKE A JUDGMENT AS TO WHY THE CUSTOMERS HAVE
14 LEFT AND --

15 THE COURT: BUT HE'S ALREADY TESTIFIED 84 OF THE 86,
16 RIGHT, LEFT FOR OTHER REASONS? UPON WHAT DOES HE -- DOES HE
17 BASE THAT CONCLUSION? IT'S OBVIOUSLY SOMETHING THAT'S BEEN
18 PROVIDED IN THE RECORD. IT'S WHAT HE'S RELIED UPON, AND HE HAS
19 TO BE ABLE TO TESTIFY TO THAT.

20 MR. BOIES: EXCEPT I'M -- I'VE ALWAYS BELIEVED --
21 THIS WAS THE POINT I WAS MAKING THIS MORNING, IS THAT WHEN HE
22 GETS UP TO TESTIFY AS TO HOW MANY CUSTOMERS WOULD OR WOULD NOT
23 HAVE LEFT, THAT'S SOMETHING THAT'S WAY BEYOND HIS EXPERTISE AND
24 INAPPROPRIATE FOR AN EXPERT TO BE TESTIFYING TO.

25 THE COURT: BUT HE CAME TO THAT CONCLUSION.

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

CLARKE - DIRECT / MITTELSTAEDT

1 CALCULATION. OKAY.

2 MR. BOIES: YEAH, I UNDERSTAND WHAT THE COURT'S
3 SAYING. I THINK -- ANOTHER POSSIBLE WAY TO DO IT WOULD BE TO
4 ALLOW HIM TO TESTIFY TO HIS DAMAGE CONCLUSIONS SAYING THIS IS
5 BASED ON THE ASSUMPTION THAT THESE MANY CUSTOMERS WOULD HAVE
6 LEFT.

7 THE COURT: I THINK HE CAN GO ONE STEP FURTHER THAN
8 THAT AND SAY THAT HE CONCLUDED THAT THEY WOULD HAVE LEFT FROM
9 OTHER REASONS, FOR REASONS THAT ARE CONTAINED IN ALL OF THE
10 VOLUMINOUS DOCUMENTS THAT HE --

11 MR. BOIES: THAT'S IN EVIDENCE IN THE CASE.

12 THE COURT: THAT'S RIGHT.

13 MR. BOIES: BUT HE CAN'T GO INTO THE REASONS.

14 THE COURT: YES, I AGREE WITH THAT, WITH THE

15 EXCEPTION OF THE FEW DOCUMENTS THAT CAN BE EXAMINED SUCH AS THE
16 DECLARATIONS, HE CANNOT GIVE THE REASONS EXCEPT OTHER THAN THEY
17 WERE FOR REASONS OTHER THAN THE INFRINGEMENT OR WANTING TO GO TO
18 TOMORROWNOW OR WHATEVER WAY YOU WANT TO FRAME IT.

19 DO YOU UNDERSTAND THAT? HE CAN GIVE US HIS

20 CONCLUSIONS THAT THE EVIDENCE THAT HE HAS BEEN GIVEN SUPPORTS
21 HIS CONCLUSION THAT THEY WOULD HAVE GONE FOR OTHER REASONS.

22 MR. MITTELSTAEDT: YEAH.

23 THE COURT: OKAY. BUT THE ACTUAL REASONS, SUCH AS

24 ALL OF THOSE REASONS THAT ARE GIVEN ON THE AT-RISK REPORT, HE
25 CAN'T TESTIFY TO THOSE REASONS.

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

CLARKE - DIRECT / MITTELSTAEDT

1 MR. BOIES: I KNOW, BUT WHAT I'M SAYING IS HE DOESN'T
2 HAVE A BASIS FOR COMING TO THAT CONCLUSION, AND HE CERTAINLY --
3 THE -- THE FACT THAT HE READ ALL THESE DOCUMENTS -- I MEAN, SEE,
4 THE THING IS WE NOW KNOW FROM THE OFFER OF PROOF THAT WAS JUST
5 MADE THAT WHAT HE'S GOING TO DO IS HE'S GOING TO TESTIFY THAT HE
6 READ ALL THESE DOCUMENTS, HIS STAFF READ ALL THESE DOCUMENTS,
7 AND BASED ON ALL THESE DOCUMENTS, HE CONCLUDES THAT THESE PEOPLE
8 WOULD HAVE -- CERTAIN PEOPLE WOULD HAVE LEFT.

9 THE COURT: THAT'S WHAT HE'S GOING TO TESTIFY.

10 MR. BOIES: I KNOW, BUT WHAT I'M SAYING IS I THINK
11 THAT IS WHAT IS NOT POSSIBLE FOR AN EXPERT TO DO, PARTICULARLY
12 AN EXPERT THAT DOESN'T HAVE ANY --

13 THE COURT: I AM NOT GOING TO DISALLOW HIM FROM
14 TESTIFYING TO THAT. I'M NOT GOING TO TELL -- I'M NOT GOING TO
15 ORDER DEFENSE TO NOT ASK HIM THAT QUESTION. THAT IS THE ESSENCE
16 OF THE DEFENSE CASE, AND I'VE ALREADY SAID THE UNDERLYING
17 EVIDENCE CAN (SIC) COME IN, SUCH AS THE CUSTOMER STATEMENTS
18 THEMSELVES. SO YOU'RE RIGHT, HE CANNOT TESTIFY AS TO THE
19 REASONS. HE CAN ONLY TESTIFY AS TO HIS CONCLUSION THAT THEY
20 WERE NOT RELATED TO THE INFRINGEMENT.

21 THERE WERE OTHER REASONS WITH THE EXCEPTION OF FEW
22 DOCUMENTS THAT I'VE SAID THAT YOU CAN GET IN AND THE FEW
23 CUSTOMERS THAT WE'VE ALREADY HEARD TESTIFY, FOR INSTANCE.

24 OKAY. SO HE CAN TESTIFY AS TO HIS CONCLUSIONS THAT
25 THEY WOULD HAVE GONE -- I MEAN, THAT'S THE BASIS FOR YOUR

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

CLARKE - DIRECT / MITTELSTAEDT

1 MR. MITTELSTAEDT: BUT IT'S STUFF THAT HE COULD RELY
2 ON AS AN EXPERT --

3 THE COURT: YES.

4 MR. MITTELSTAEDT: -- TO HELP HIM FORM HIS OPINION.

5 THE COURT: YES.

6 MR. MITTELSTAEDT: WHICH IS -- I MEAN, IT MAY NOT
7 COME IN FOR THE TRUTH OF THE MATTER, BUT I WANT TO ASK HIM
8 WHAT'S THE BASIS FOR THAT CONCLUSION.

9 MR. BOIES: THAT'S EXACTLY WHAT I -- I DON'T THINK HE
10 CAN DO. HE CAN'T GIVE THE REASONS, WHETHER YOU TALK ABOUT IT
11 FOR TRUTH OR FOR THE BASIS, HE DOESN'T HAVE EXPERTISE. THAT'S
12 WHY I WANTED TO KNOW WHAT THE SCOPE OF THEIR -- SCOPE OF THEIR
13 OFFER OF EXPERTISE WAS.

14 THE COURT: HE CAN GIVE THE REASONS THAT THEY HAD
15 NOTHING TO DO WITH TOMORROWNOW'S INFRINGEMENT. OKAY. BUT THE
16 ACTUAL DETAILS OF IT, YOU KNOW, THE DETAILS THAT ARE THOSE
17 THINGS THAT ARE INCLUDED IN THE AT-RISK REPORT, HE CAN'T GET
18 INTO THOSE BECAUSE THAT'S JUST ANOTHER WAY OF GETTING THE
19 HEARSAY IN.

20 MR. MITTELSTAEDT: OKAY. THERE ARE THREE OR FOUR
21 CUSTOMERS FOR WHICH WE HAVE ORACLE DOCUMENTS -- AND I'M JUST
22 PREVIEWING THAT -- WITH SOME OF THOSE DEPENDING ON HOW THE
23 EXAMINATION GOES, I MAY ASK HIM TO COMMENT ON THOSE, 'CAUSE I
24 THINK THE DOCUMENT -- THE UNDERLYING DOCUMENT IS ADMISSIBLE.
25 MR. CUMMINS IS THE AUTHOR OF AT LEAST TWO OF THEM, AND HE'S A
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1596

CLARKE - DIRECT / MITTELSTAEDT

1 HIGH ENOUGH LEVEL, I THINK, THOSE COME IN AS ADMISSIONS.
 2 THE COURT: THOSE, I DON'T HAVE ANY PROBLEM WITH.
 3 IT'S THE CUSTOMER --
 4 MR. MITTELSTAEDT: UNDERSTOOD.
 5 THE COURT: IT'S THE CUSTOMER INFORMATION I HAVE --
 6 MR. MITTELSTAEDT: UNDERSTOOD.
 7 THE COURT: -- SOME LIMIT -- I KNOW I HAVEN'T BEEN
 8 EXACTLY PRECISE, BUT IT'S THE DETAILS THAT ARE CONTAINED ON
 9 SOMETHING LIKE THE AT-RISK REPORT. HE CANNOT TESTIFY TO THOSE,
 10 ALTHOUGH HE CAN TESTIFY TO THE CONCLUSIONS HE DREW FROM THOSE.
 11 MR. MITTELSTAEDT: OKAY.
 12 MR. BOIES: THANK YOU.
 13 THE COURT: OKAY?
 14 (END SIDEBAR ON THE RECORD.)
 15 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE
 16 OF THE JURY:)
 17 BY MR. MITTELSTAEDT:
 18 Q. THE QUESTION WAS, WHEN YOU GATHERED AND REVIEWED ALL OF THIS
 19 INFORMATION, HOW DID YOU GO ABOUT ORGANIZING IT?
 20 A. EVENTUALLY, I DEVELOPED WHAT I CALLED POOLS OR BUCKETS INTO
 21 WHICH I WOULD PLACE THE CUSTOMERS THAT EXHIBITED THE SAME SORT
 22 OF STORY. SO I DIDN'T START OFF WITH THOSE, BUT AS I GATHERED
 23 INFORMATION ABOUT CUSTOMERS, I REALIZED THAT A LOT OF THEM HAD
 24 THE SAME -- THEY WERE SAYING THE SAME THINGS AND DOING THE SAME
 25 THINGS. SO I STARTED TO GROUP THEM -- EVENTUALLY CALLED THEM
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1598

CLARKE - DIRECT / MITTELSTAEDT

1 Q. OKAY. LET'S GO TO THE NEXT SLIDE. AND THIS IS A LIST OF
 2 YOUR EXCLUSION BUCKETS.
 3 (DEMONSTRATIVE PUBLISHED TO THE JURY.)
 4 BY MR. MITTELSTAEDT:
 5 Q. AND WOULD YOU USE THIS TO DESCRIBE TO US IN MORE DETAIL THE
 6 VARIOUS EXCLUSION BUCKETS OR POOLS THAT YOU USED, WHICH ONES
 7 MR. MEYER AGREED WITH, AND WHERE YOU DIFFERED?
 8 A. YES. THE -- THE TOP ONE, TWO, THREE, FOUR, FIVE -- THE TOP
 9 SIX BUCKETS ON THAT -- ON THAT SCHEDULE, WE AGREE ON. THAT, WE
 10 DON'T HAVE ANY DIFFERENCE ABOUT THOSE.
 11 SO "REINSTATEMENT TO RELICENSE" MEANS THAT THE
 12 CUSTOMER WENT BACK TO ORACLE OR RELICENSED ORACLE SOFTWARE, AND
 13 SO ORACLE DIDN'T LOSE ANYTHING FOR THOSE CUSTOMERS. SO
 14 MR. MEYER AND I EXCLUDED ALL 26 OF THOSE CUSTOMERS.
 15 SOME CUSTOMERS NEVER EVEN LEFT ORACLE, SO ALTHOUGH
 16 THEY WERE A TOMORROWNOW CUSTOMER, THEY DIDN'T STOP PAYING ORACLE
 17 AT ANY TIME. SO THOSE WERE NOT LOST-PROFITS CUSTOMERS EITHER.
 18 ORACLE DIDN'T LOSE ANYTHING ON THOSE. THERE WERE 54 OF THOSE.
 19 THEN SOME OF THESE CUSTOMERS WEREN'T EVEN CUSTOMERS,
 20 AND WE EXCLUDED -- WE BOTH EXCLUDED 3 OF THOSE.
 21 AND THEN THE "PRODUCT MISMATCH," WHAT THAT MEANS IS
 22 THEY WERE SUPPORTING ONE PRODUCT AT ORACLE AND THEN SUPPORTED A
 23 DIFFERENT PRODUCT AT TOMORROWNOW. SO BECAUSE THERE WAS NO REAL
 24 LINK BETWEEN THOSE -- THOSE PRODUCTS THAT WERE BEING SUPPORTED,
 25 WE EXCLUDED THOSE.
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1597

CLARKE - DIRECT / MITTELSTAEDT

1 POOLS OR BUCKETS -- AND GAVE EACH BUCKET A NAME, AND I DON'T
 2 KNOW HOW MUCH WE'RE GOING TO SPEND TALKING ABOUT THOSE.
 3 Q. OKAY.
 4 I'M JUST GOING TO GET TO YOUR CONCLUSION FIRST. IF
 5 WE CAN GO TO THE NEXT SLIDE, SLIDE 11.
 6 (DEMONSTRATIVE PUBLISHED TO THE JURY.)
 7 BY MR. MITTELSTAEDT:
 8 Q. WOULD YOU EXPLAIN YOUR CONCLUSION TO US ON THE AMOUNT OF
 9 LOST SUPPORT PROFITS USING THIS CHART.
 10 A. YES, HERE, I HAVE TWO COLUMNS WITH MR. MEYER'S NAME AT THE
 11 TOP OF ONE, AND MY NAME AT THE TOP OF THE OTHER. AND YOU CAN
 12 SEE THAT THE TOTAL CUSTOMERS THAT WE BOTH START WITH ARE THE
 13 SAME, 358 THAT YOU'VE HEARD SO MUCH ABOUT.
 14 AND THEN THERE WERE CERTAIN EXCLUSION POOLS OR
 15 BUCKETS THAT MR. MEYER IDENTIFIED AND I IDENTIFIED, AND WE
 16 AGREED ON THOSE. SO THERE'S NO DISPUTE AS TO THE NATURE OF THAT
 17 PARTICULAR EXCLUSION.
 18 AS YOU CAN SEE FROM THE -- THE DIFFERENCE IN THE
 19 NUMBERS, THERE'S A SLIGHT DIFFERENCE IN -- IN WHO WE THINK
 20 SHOULD BE IN THOSE POOLS, BUT THE PRINCIPLE OF THE POOLS IS
 21 ESTABLISHED.
 22 THEN THESE OTHER EXCLUSIONS ARE 63 OTHER CUSTOMERS
 23 THAT I THINK LEFT ORACLE FOR REASONS OTHER THAN THE COPYRIGHT
 24 INFRINGEMENT AND -- KNOW THAT WE'RE GOING TO TALK ABOUT AT LEAST
 25 SOME OF THOSE.
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1599

CLARKE - DIRECT / MITTELSTAEDT

1 THE "NON-ASSOCIATION" IS 1, AND THAT MEANS THAT
 2 IT'S -- IT'S A COMPANY AND WE'RE NOT QUITE SURE WHAT THE
 3 RELATIONSHIP OF IT IS TO THE CASE.
 4 AND THEN "CAUSATION," MR. MEYER HAS 3 THERE. I AGREE
 5 WITH THOSE 3. BUT THERE ARE OTHERS THAT I THINK OUGHT TO GO
 6 INTO THIS EXCLUSION POOL. AND MANY OF THEM ARE DEALT WITH ON
 7 THIS NEXT SECTION, WHICH SAYS WE AGREE IN PRINCIPLE WITH THE
 8 SERVICE GAP. SO IF THE CUSTOMER WAS OFF ORACLE SUPPORT FOR A
 9 PERIOD OF TIME, IT COULDN'T HAVE BEEN TOMORROWNOW THAT CAUSED
 10 THEM TO LEAVE. AND THERE WAS EXTENSIVE DEBATE BETWEEN
 11 MR. MITTELSTAEDT AND MR. MEYER WHEN HE WAS TESTIFYING LAST WEEK
 12 ABOUT THAT GAP AND HOW LONG THAT GAP SHOULD BE.
 13 SO WE AGREE IN PRINCIPLE THAT IF THERE IS A GAP, THEY
 14 SHOULD BE EXCLUDED, BUT WE -- WE DISAGREE ON THE LENGTH OF THAT
 15 GAP.
 16 AND THEN THESE OTHER POOLS, THE BOTTOM 4, WE DON'T
 17 AGREE ON AT ALL. SO THIS IS MY VIEW OF WHAT OUGHT TO HAPPEN.
 18 "SERVICE EVALUATION" MEANS THAT THE COMPANY WAS OUT
 19 LOOKING AT OTHER VENDORS, OTHER WAYS TO GET ITS SUPPORT FOR ITS
 20 ORACLE SYSTEMS. THERE WERE 41 OF THOSE. AND I EXCLUDED THEM
 21 AND MR. MEYER DIDN'T EXCLUDE ANY OF THEM.
 22 THE "PARENT MANDATE" MEANS THAT AN ACQUISITION HAD
 23 OCCURRED, AND THE COMPANY WAS TOLD BY ITS NEW OWNER THAT -- TO
 24 CHANGE ITS SOFTWARE SYSTEMS. SO IN MY VIEW, THAT CLEARLY COULD
 25 NOT BE CAUSED BY TOMORROWNOW. MR. MEYER LEFT THAT ONE IN.
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLARKE - DIRECT / MITTELSTAEDT

1 THE OTHER IS JUST -- I COULDN'T PUT THEM INTO -- INTO
 2 BUCKETS BECAUSE THEY WERE ALL A LITTLE BIT DIFFERENT, SO THE
 3 "OTHER" POOL CATCHES ALL OF THOSE. THERE ARE 8 OF THOSE.
 4 AND THEN THIS "JOINT EXCLUDE" AT THE BOTTOM HERE
 5 MEANS THAT SOME COMBINATION OF FACTORS INDICATED THAT THEY
 6 SHOULD BE EXCLUDED. AND AGAIN, HE AND I DISAGREE ON THIS POOL
 7 ENTIRELY.
 8 Q. OKAY. LET'S GO TO "SERVICE GAP." IF WE CAN GO TO SLIDE 13.
 9 (DEMONSTRATIVE PUBLISHED TO THE JURY.)
 10 BY MR. MITTELSTAEDT:
 11 Q. WHAT DOES THIS SLIDE SHOW?
 12 A. THIS SLIDE SHOWS ALL OF THE CUSTOMERS THAT I'M EXCLUDING FOR
 13 SERVICE GAP. AND YOU SEE THE DIFFERENT COLORS ON HERE. THE TWO
 14 BRIGHT ORANGE ONES IN THE MIDDLE, THE LONG BARS THERE, WERE TWO
 15 CUSTOMERS THAT MR. MEYER EXCLUDED. AND THEY WERE EVERDREAM AND
 16 POWERWAY. AND THEY BOTH WERE OFF ORACLE SERVICE FOR ABOUT FOUR
 17 YEARS OR SO. AND THEN WENT TO TOMORROWNOW.
 18 IN MY VIEW AND IN HIS, SO WE AGREE ON THIS, IF YOU
 19 HAVE A -- A GAP OF FOUR YEARS, TOMORROWNOW COULDN'T HAVE BEEN
 20 THE CAUSE OF YOU LEAVING IN THE FIRST PLACE. SO THEY -- ORACLE
 21 DIDN'T LOSE ANY LOST -- ANY PROFITS AS A RESULT OF THAT.
 22 THE PALER ORANGE, THE LITTLE SHORT ONES, THOSE ARE
 23 THE THREE COMPANIES THAT WERE LESS THAN A YEAR. SO THE VERY END
 24 OF THIS SLIDE IS AT SIX MONTHS. SO EVERYTHING STARTS AT SIX
 25 MONTHS. SO THESE WERE LESS THAN 12 MONTHS' GAPS. AND IF YOU
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLARKE - DIRECT / MITTELSTAEDT

1 A. JUST THE TWO BRIGHT ORANGE ONES IN THE MIDDLE THERE.
 2 Q. OKAY. SO IN HIS TRIAL TESTIMONY AT PAGE 1061, HE SAID.
 3 "SO IF THE GAP WAS YEAR OR LESS, I PUT THEM IN
 4 LOST PROFITS."
 5 IS THAT ACCURATE?
 6 A. NO.
 7 Q. LOOKING AT THIS, WHAT CUTOFF DOES IT LOOK LIKE HE USED?
 8 A. IT LOOKED LIKE HE USED FOUR YEARS, ALTHOUGH HE SAID HE
 9 DIDN'T HAVE A HARD CUTOFF.
 10 Q. OKAY.
 11 BUT HE CUT OFF THE TWO THAT WAITED FOUR YEARS TO
 12 LEAVE, RIGHT?
 13 A. CORRECT.
 14 Q. AND HE LEFT ON ONE THAT WAITED 54 MONTHS.
 15 A. THAT'S CORRECT.
 16 Q. HE ALSO SAID AT PAGE 1062,
 17 "SO I THINK FOR THE JURY TO KNOW IS THAT
 18 BASICALLY 85 PERCENT OF MINE WERE A YEAR LESS GAP,
 19 AND FROM MY PERSPECTIVE, THEY SHOULD STAY IN LOST
 20 PROFITS."
 21 DOES THAT HAVE ANYTHING TO DO WITH WHAT CUTOFF HE
 22 ACTUALLY USED?
 23 A. NO, IF I WAS GUESSING WHAT THAT MEANT, IT WAS REFERRING TO
 24 ALL OF THE CUSTOMERS THAT WERE INCLUDED AND THAT THEY --
 25 85 PERCENT OF THEM WENT TO TOMORROWNOW WITHIN THAT PERIOD OF
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLARKE - DIRECT / MITTELSTAEDT

1 RECALL, MR. MEYER SAID TO YOU, 85 PERCENT OF MY CUSTOMERS WERE
 2 WITHIN -- I THINK HE SAID SIX MONTHS, AND -- I BEG YOUR
 3 PARDON -- A YEAR. 85 PERCENT OF HIS CUSTOMERS WERE WITHIN A
 4 YEAR. AND I THINK YOU -- YOU MAY HAVE BEEN MISLED BY THAT IN
 5 THAT CLEARLY THAT'S NOT 85 PERCENT OF THIS GROUP. I THINK WHAT
 6 HE WAS REFERRING TO ISN'T QUITE CLEAR.
 7 BUT YOU CAN SEE THAT THESE CUSTOMERS, THE GREEN
 8 ARROW -- BARS HERE GO OUT WAY PAST 12 MONTHS FOR MANY OF THESE
 9 CUSTOMERS, AND THERE ARE A COUPLE THAT ARE RIGHT AT 12 MONTHS.
 10 SO WHAT I'M TRYING TO SHOW HERE IS HOW LONG THESE
 11 CUSTOMERS HAVE BEEN OFF, AND MY CONCLUSION THAT IF THEY'VE BEEN
 12 OFF FOR MORE THAN SIX MONTHS, AND THEY RUN WITH NO SUPPORT FROM
 13 ORACLE AND NO SUPPORT FROM ANYONE ELSE FOR SIX MONTHS,
 14 TOMORROWNOW COULD NOT HAVE BEEN THE CAUSE OF THEM LEAVING
 15 ORACLE.
 16 SO THEY EVENTUALLY WENT TO TOMORROWNOW. BUT THEY --
 17 THEY LEFT ORACLE, WHICH IS THE KEY THING, FOR SOMETHING OTHER
 18 THAN THAT.
 19 Q. OKAY. SO THE CUSTOMERS THAT YOU EXCLUDED ARE WHICH ONES?
 20 ARE THEY SHOWN ON HERE?
 21 A. THE ONES THAT I EXCLUDED ARE ALL OF THESE.
 22 Q. OKAY. BECAUSE THEY LEFT ORACLE AND THEN WAITED SIX MONTHS
 23 OR LONGER TO GO TO TOMORROWNOW?
 24 A. CORRECT.
 25 Q. AND, MR. MEYER, WHICH ONES OF THESE DID HE EXCLUDE?
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLARKE - DIRECT / MITTELSTAEDT

1 TIME.
 2 Q. OKAY.
 3 LET'S GO TO SLIDE 18.
 4 (DEMONSTRATIVE PUBLISHED TO THE JURY.)
 5 BY MR. MITTELSTAEDT:
 6 Q. YOU REFERRED TO THE SERVICE EVALUATION BUCKET OF CUSTOMERS
 7 YOU EXCLUDED. DOES THIS SLIDE LIST THE CUSTOMERS THAT YOU
 8 EXCLUDED ON THAT BASIS?
 9 A. YES, IT DOES.
 10 Q. AND THEN LET'S GO TO SLIDE 20.
 11 (DEMONSTRATIVE PUBLISHED TO THE JURY.)
 12 BY MR. MITTELSTAEDT:
 13 Q. DOES THIS LIST OTHER COMPANIES THAT YOU EXCLUDED, ONE OF
 14 THEM FOR PARENT MANDATE?
 15 A. YES.
 16 Q. AND I THINK YOU'VE DESCRIBED "PARENT MANDATE." THAT'S WHERE
 17 THE PARENT TELLS THEM TO DO SOMETHING?
 18 A. THAT'S CORRECT.
 19 Q. THE -- NEW COMPANY THAT'S ACQUIRED THEM?
 20 A. THAT'S CORRECT.
 21 Q. OKAY.
 22 AND THEN LET'S GO TO SLIDE 21. YOU MENTIONED THE
 23 "JOINT EXCLUDE" BUCKET. COULD YOU WALK US THROUGH WHAT THAT
 24 MEANS, USING THIS CHART?
 25 A. YES. WHAT I REALIZED AS I WAS GATHERING THE INFORMATION WAS
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1604

CLARKE - DIRECT / MITTELSTAEDT

1 THAT THERE WERE MANY POSSIBLE REASONS THAT COMPANIES MIGHT HAVE
2 LEFT ORACLE. BUT THEY WEREN'T SUFFICIENTLY ON POINT FOR ME TO
3 SAY, BASED UPON THAT, I'M GOING TO EXCLUDE THEM.
4 SO I TOYED WITH ALL KINDS OF WAYS OF DOING THIS,
5 TRYING TO MAKE AN APPROPRIATE JUDGMENT AS TO WHETHER THESE
6 CUSTOMERS WOULD HAVE LEFT. AND THE METHODOLOGY, I DECIDED UPON
7 AT THE END OF THE DAY WAS YOU SEE RIGHT AT THE TOP OF THE TOP
8 BOX THERE, THESE WERE CUSTOMERS THAT HAD A REASON TO LEAVE
9 ORACLE.
10 SO IF THEY HAD A REASON TO LEAVE -- AND THEN LOOK AT
11 THE NEXT BOX DOWN, SAYS, "EVALUATED EITHER SELF-SERVICE OR OTHER
12 THIRD-PARTY ALTERNATIVES. SO THEY -- WE KNEW THEY HAD A REASON
13 TO LEAVE, AND THEN THEY ACTED UPON THAT -- THAT REASON BY DOING
14 THIS EVALUATION.
15 AND, REMEMBER, THE THIRD LEG OF THIS, WE KNOW THEY
16 ALL ACTUALLY DID LEAVE. THEY ALL WENT TO TOMORROWNOW. SO IF
17 THEY DID ANY OF THESE THINGS IN THE TOP BOX, PLUS EITHER OF
18 THESE THINGS IN THE SECOND BOX, THEN I THINK THAT WAS EVIDENCE
19 ENOUGH FOR ME TO DECIDE THAT THEY SHOULD BE EXCLUDED FROM THE
20 LOST PROFITS ANALYSIS. AND THERE WERE 38 OF THEM IN TOTAL.
21 (CONTINUED NEXT PAGE; NOTHING OMITTED.)
22
23
24
25

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

1606

CLARKE - DIRECT / MR. MITTELSTAEDT

1 REPRESENTATIVE OF A LAW FIRM BAKER & BOTTS ABOUT HOW THEY
2 DECIDED TO GO TO TOMORROWNOW.
3 FOR NOW, I JUST WANT YOU TO ASSUME SOME INFORMATION
4 AND THEN I AM GOING TO ASK YOU WHETHER YOU THINK BAKER & BOTTS
5 SHOULD BE INCLUDED OR EXCLUDED FROM THE COMPENSATION.
6 I WANT YOU TO ASSUME THAT THEIR VIEW WAS THAT
7 PEOPLESFT SUPPORT WAS NOT GOOD, THEY DIDN'T HAVE ANY PLANS TO
8 UPGRADE, THEY THOUGHT FUSION, ORACLE'S NEW PRODUCT, CAUSED
9 CONCERN FOR THEM, THEY STARTED TOMORROWNOW SUPPORT IN AUGUST OF
10 2006, THEY CONSIDERED OTHER THIRD PARTY PROVIDERS, AND AFTER
11 TOMORROWNOW SHUT DOWN, THEY WENT TO CEDARCRESTONE FOR
12 MAINTENANCE SUPPORT.
13 AS YOU DECIDED WHICH COMPANIES TO PUT IN WHICH
14 BUCKETS, WOULD YOU EXCLUDE OR INCLUDE BAKER & BOTTS?
15 **A. BAKER & BOTTS IS ALMOST A POSTER CHILD OF WHY YOU WOULD
16 EXCLUDE A CUSTOMER. THEY HAD MANY REASONS TO LEAVE AND
17 EVALUATED THIRD PARTY ALTERNATIVES. AND ABSENT TOMORROWNOW,
18 WOULD HAVE LEFT ORACLE ANY WAY, IN MY VIEW.**
19 Q. LET'S GO TO SLIDE 24.
20 (SLIDE DISPLAYED ON SCREEN.)
21 DOES THIS LIST THE RESULTS OF YOUR REVIEW OF THE
22 EVIDENCE AS TO WHICH COMPANIES FELL INTO WHAT YOU CALL THE
23 "JOINT EXCLUDE" BUCKET?
24 **A. YES, IT DOES.**
25 Q. AND THEN LET'S GO TO SLIDE 25.
DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

1605

CLARKE - DIRECT / MR. MITTELSTAEDT

1 BY MR. MITTELSTAEDT:
2 Q. AND JUST GIVE US A FEW OF THE REASONS THAT YOU USED WHERE
3 CUSTOMERS HAD REASON TO LEAVE ORACLE?
4 **A. THE ORACLE PEOPLE THEMSELVES MAINTAINED --**
5 Q. ACTUALLY, SIR, LET ME JUST ASK YOU, WITHOUT REFERRING TO
6 DOCUMENTS, JUST TO -- I AM REALLY JUST ASKING YOU TO SAY SOME
7 OF THOSE THAT ARE ON THE SCREEN.
8 **A. OKAY.**
9 **IF YOU HAD NO INTENT TO UPGRADE, FOR EXAMPLE, ONE OF**
10 **THE BIG THINGS YOU WERE BUYING WHEN YOU WERE PAYING FOR**
11 **CONTINUING SUPPORT AT ORACLE WOULD BE WHEN AN UPGRADE TO YOUR**
12 **SYSTEM CAME OUT, YOU WOULD GET THAT UPGRADE. SO IF YOU HAD NO**
13 **INTENT TO UPGRADE, THAT MIGHT CAUSE YOU TO SAY, "WHY AM I**
14 **PAYING ALL OF THIS MONEY? I AM HAPPY WITH THE SYSTEM I'VE GOT**
15 **AND PAYING FOR SOMETHING I WILL NEVER GET." SO, THAT WILL BE**
16 **ONE WAY THEY MIGHT HAVE A REASON TO LEAVE ORACLE.**
17 **QUITE A NUMBER OF COMPANIES, AND SOME OF THEM WERE**
18 **CITIES, WERE IN FINANCIAL DISTRESS. THEY DIDN'T HAVE THE MONEY**
19 **ANY LONGER TO PAY FOR SUPPORT. AND SOME OF THESE COMPANIES**
20 **SAID, "YOU KNOW, WE REALLY LIKE ORACLE. WE LIKE THE SYSTEM.**
21 **WE SIMPLY CAN'T AFFORD IT ANYMORE." MAYBE SOME OF THEM EVEN**
22 **WENT BANKRUPT. SO IF THEY WERE IN FINANCIAL DISTRESS, THAT'S**
23 **VERY MUCH A REASON FOR THEM WANTING TO LEAVE.**
24 Q. OKAY.
25 THE JURY LATER WILL HEAR TESTIMONY FROM A
DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

1607

CLARKE - DIRECT / MR. MITTELSTAEDT

1 (SLIDE DISPLAYED ON SCREEN.)
2 ACTUALLY, GO BACK ONE. YOU HAVE LEXMARK
3 INTERNATIONAL THERE.
4 DO YOU SEE THAT?
5 **A. I DO.**
6 Q. OKAY. AND THE TESTIMONY OF MR. O'DONNELL WAS PLAYED
7 YESTERDAY. LET'S GO TO THE NEXT SLIDE, SLIDE 25.
8 (SLIDE DISPLAYED ON SCREEN.)
9 THIS IS RESTATEMENT/RELICENSE. IS THIS A -- THIS
10 SHOWS THE LIST OF CUSTOMERS IN THAT CATEGORY?
11 **A. IT DOES.**
12 Q. THIS IS A CATEGORY THAT IS AGREED TO BY ORACLE, RIGHT?
13 **A. CORRECT.**
14 Q. AND THE NEXT SLIDE, 26, THESE ARE CUSTOMERS THAT NEVER
15 LEFT ORACLE?
16 (SLIDE DISPLAYED ON SCREEN.)
17 **A. THAT'S RIGHT.**
18 Q. AGAIN, THIS IS A CATEGORY, AT LEAST, THAT IS AGREED TO BY
19 ORACLE?
20 **A. CORRECT.**
21 Q. AND THEN SLIDE 27, IS ENTITLED "OTHER". AND THIS IS THE
22 BUCKET YOU TALKED ABOUT WHERE CUSTOMERS, AS YOU REVIEWED THE
23 RECORDS, HAD A VARIETY OF REASONS?
24 (SLIDE DISPLAYED ON SCREEN.)
25 **A. YES.**
DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

CLARKE - DIRECT / MR. MITTELSTAEDT

- 1 Q. WHAT IS INCLUDED IN THIS BUCKET, IF YOU WOULD?
- 2 A. I AM SORRY, I HAD INTERMITTENT MICROPHONE THERE.
- 3 THE REASON IS GIVEN ON THE LEFT AND THE CUSTOMER
- 4 THAT THAT APPLIES TO IS GIVEN ON THE RIGHT.
- 5 Q. OKAY. SO YOU HAVE ALREADY TALKED ABOUT THOSE CATEGORIES?
- 6 A. YES.
- 7 Q. THAT IS JUST THE LISTING OF THE CUSTOMERS?
- 8 A. YES. THESE ARE ONES THAT ESSENTIALLY MR. MEYER AGREED
- 9 WITH. AND THE CAUSATION CATEGORY AND NONASSOCIATION, THESE ARE
- 10 HIS TERMS ACTUALLY.
- 11 Q. OKAY.
- 12 NOW, ONCE YOU DECIDED WHICH CUSTOMERS TO INCLUDE AND
- 13 WHICH TO EXCLUDE, THEN YOU HAD TO DECIDE WHAT TIME PERIOD TO
- 14 CALCULATE DAMAGES FOR, CORRECT?
- 15 A. CORRECT.
- 16 Q. AND WHAT TIME PERIOD DID YOU USE?
- 17 A. FROM WHENEVER THEY WENT TO TOMORROWNOW TILL THE TIME THEY
- 18 LEFT TOMORROWNOW. FOR MANY OF THEM THAT WOULD HAVE BEEN RIGHT
- 19 AROUND 10/31/08.
- 20 Q. WHEN TOMORROWNOW SHUT DOWN?
- 21 A. CORRECT.
- 22 Q. WHY DID YOU USE THAT TIME PERIOD?
- 23 A. WELL, THE START OF THAT TIME PERIOD IS WHENEVER THEY WERE
- 24 GETTING SERVICE FROM TOMORROWNOW INSTEAD OF ORACLE. SO WHEN
- 25 ORACLE LAST GOT PAID AND THEIR SERVICE TERMINATED IS WHEN I

DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

CLARKE - DIRECT / MR. MITTELSTAEDT

- 1 Q. MR. CLARKE, HOW DID YOU CALCULATE THAT 23 PERCENT?
- 2 A. I USED A DOCUMENT CALLED THE "AT RISK REPORT," THE "ORACLE
- 3 AT RISK REPORT," AND I DID SOME -- I EXCLUDED ANY EFFECT OF
- 4 TOMORROWNOW IN THAT. SO I WAS ONLY LOOKING AT THE
- 5 NONTOMORROWNOW CUSTOMERS. AND I CALCULATED HOW MANY OF THEM
- 6 LEFT EACH YEAR.
- 7 Q. AND THEN THE FINAL STEP IS PROFIT MARGIN?
- 8 A. YES. THAT'S THE PROFIT MARGIN THAT THEY MAKE ON THESE
- 9 COPYRIGHTS.
- 10 Q. OKAY. AND LET'S WALK THROUGH JUST ONE EXAMPLE OF YOUR
- 11 CALCULATION. IF WE CAN HAVE THE NEXT SLIDE.
- 12 (SLIDE DISPLAYED ON SCREEN.)
- 13 AND DESCRIBE THIS TO US, PLEASE.
- 14 A. THIS IS A CALCULATION FOR THE CITY OF HUNTSVILLE. THE
- 15 LAST YEAR AT ORACLE THEY PAID \$111,000. AND SO THAT WAS MY
- 16 STARTING POINT.
- 17 I ASSUME THAT HAD THEY STAYED AT ORACLE, THAT ORACLE
- 18 WOULD HAVE KEPT ON GENERATING SOME INCOME. BUT THAT INCOME
- 19 WOULD HAVE GONE UP BY 3 PERCENT EVERY YEAR. AND THERE WAS A
- 20 PROBABILITY THAT THE CUSTOMER WOULD HAVE QUIT IN THAT YEAR,
- 21 TERMINATED ITS SERVICE ANYWAY. SO THAT'S WHAT THE 3 PERCENT
- 22 AND THE MINUS 22 PERCENT ARE.
- 23 IF YOU JUST DO THE MATH THEN ON THE 111, IT BECOMES
- 24 89,000 IN '05, 71,000 IN '06, 57,000 IN '07 AND 2008 IS A SHORT
- 25 PERIOD, SO THAT'S WHY IT SAYS "PRORATED". IT WASN'T A WHOLE

DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

CLARKE - DIRECT / MR. MITTELSTAEDT

- 1 BEGAN THE DAMAGES. AND I ENDED IT AT THE EARLIER OF WHENEVER
- 2 THE CUSTOMER LEFT TOMORROWNOW OR THAT 10/31/08 DATE.
- 3 Q. AND WHAT -- DID MR. MEYER ALSO USE THAT TIME PERIOD FOR
- 4 ONE OF HIS CALCULATIONS?
- 5 A. YES, HE DID.
- 6 Q. AND THEN DID HE USE AN ALTERNATIVE OUT TO 2015?
- 7 A. YES.
- 8 Q. OKAY. LET'S GO TO SLIDE 28.
- 9 (SLIDE DISPLAYED ON SCREEN.)
- 10 AND DOES THIS SHOW HOW YOU DID YOUR CALCULATIONS FOR
- 11 LOST PROFIT SUPPORT -- OR LOST SUPPORT PROFITS?
- 12 A. YES, IT DOES.
- 13 Q. CAN YOU WALK US THROUGH IT, PLEASE?
- 14 A. SO, CALCULATING THE REVENUE AS I JUST DESCRIBED IT, WITH
- 15 THE LAST REVENUE BEING IN OCTOBER OF '08, I THEN ADDED GROWTH
- 16 TO THAT. GROWTH REALLY IS BECAUSE THE PRICES GO UP EVERY YEAR.
- 17 SO THERE'S AN INCREASING PRICE OVER TIME. AND THAT'S TYPICALLY
- 18 AROUND 3 PERCENT.
- 19 AND THEN ATTRITION IS REFLECTING THE FACT THAT
- 20 CUSTOMERS DON'T ALWAYS STAY. SO THERE IS A PROBABILITY THAT
- 21 CUSTOMERS WILL LEAVE IN ANY PARTICULAR PERIOD. FOR THESE
- 22 PARTICULARLY HIGH RISK CUSTOMERS, THAT PROBABILITY IS
- 23 22.9 PERCENT.
- 24 SO, AT 22.9 PERCENT OF THESE CUSTOMERS LEAVE EVERY
- 25 YEAR. AND SO THAT HAS TO BE FACTORED INTO THE ANALYSIS.

DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

CLARKE - DIRECT / MR. MITTELSTAEDT

- 1 YEAR.
- 2 AND THAT GIVES YOU TOTAL REVENUES. THE -- THIS IS
- 3 THE REVENUE THAT ORACLE GENERATES DIRECTLY FROM THE CUSTOMER.
- 4 BUT WHAT'S AT ISSUE IN THIS CASE IS ONLY THE
- 5 COPYRIGHTS. AND THEY ARE ALL OWNED BY A COMPANY CALLED OIC.
- 6 AND ONLY 39 PERCENT OF THAT \$226,000 FLOWS TO OIC. THE REST
- 7 GOES FOR RUNNING THE COMPANY AND OTHER PURPOSES. BUT OIC, THE
- 8 ONE PLAINTIFF IN THIS CASE NOW, GETS THAT 88,000, WHICH IS
- 9 39 PERCENT OF THE 226.
- 10 THEY MAKE A PROFIT OF 95 PERCENT. AND SO I
- 11 MULTIPLIED THE 95 PERCENT BY THE 88,000 AND THAT GIVES ME
- 12 83,000.
- 13 AND THEN I DISCOUNT THAT TO ALLOW FOR THE TIME VALUE
- 14 OF MONEY, AS WE TALKED ABOUT EARLIER, AND SOME RISK. AND
- 15 THAT'S 71,000. AND THEN ADDING INTEREST AGAIN GETS US TO
- 16 88,000 AS OF THE DATE OF TRIAL.
- 17 Q. OKAY.
- 18 AND THEN THE NEXT SLIDE SHOWS THE TOTAL WHEN YOU DO
- 19 THAT FOR ALL 206 CUSTOMERS THAT YOU INCLUDED IN THE -- THIS
- 20 DAMAGE CALCULATION, CORRECT?
- 21 (SLIDE DISPLAYED ON SCREEN.)
- 22 A. THAT'S CORRECT.
- 23 Q. AND THE GRAND TOTAL IS 19.3 MILLION?
- 24 A. CORRECT.
- 25 Q. OKAY. THAT FINISHES LOST SUPPORT PROFITS.

DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

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 11
)	
SAP AG, ET AL.,	)	PAGES 1880 - 2020
)	
DEFENDANTS.	)	OAKLAND, CALIFORNIA
	)	FRIDAY, NOVEMBER 19, 2010

CERTIFIED COPY

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

1 ALL RIGHT. THEN MOVING TO VICARIOUS INFRINGEMENT
 2 AND CONTRIBUTORY INFRINGEMENT.
 3 I NOTE THAT IN PLAINTIFFS' 5B, YOU REMOVED THE
 4 INDUCED FROM THE SECOND ELEMENT AND WENT WITH JUST MATERIALLY
 5 CONTRIBUTED TO, WHICH IS CONSISTENT WITH OUR EARLIER
 6 INSTRUCTION. SO THAT'S GOOD.
 7 YOU HAVE TWO. ONE FOR CONTRIBUTORY AND ONE FOR
 8 VICARIOUS. AND IN COMPARISON WITH THE DEFENDANTS' PROPOSED
 9 5A -- LET ME SEE IF I CAN FIND THAT.
 10 MR. LANIER: I THINK IT'S THE PAGE NUMBER 11 OF THE
 11 DOCUMENT, YOUR HONOR.
 12 THE COURT: OKAY. PAGE NUMBER 11.
 13 I HAVE A PROBLEM WITH THE DEFENDANTS' PROPOSED.
 14 MR. LANIER: OUR INSTRUCTION WAS SUBMITTED BEFORE WE
 15 HAD THE EXTENSIVE DISCUSSIONS LEADING UP TO THE SO-CALLED
 16 CURATIVE INSTRUCTION THAT WAS GIVEN. SO THIS INSTRUCTION
 17 PROPOSED BEFORE THEN IS INCONSISTENT WITH THAT ONE, YOUR HONOR,
 18 I ACKNOWLEDGE. AND I THINK, FRANKLY, ON REVIEWING IT, WE CAN
 19 LIVE WAS 5B.
 20 IT APPEARS CONSISTENT WITH PLAINTIFFS' 5B. IT
 21 APPEARS CONSISTENT WITH THE CURATIVE INSTRUCTION, AND THEN WE
 22 ARE DONE WITH IT.
 23 THE COURT: WELL, AND 5A.
 24 MR. LANIER: AND 5A AS WELL.
 25 THE COURT: 5A AND B. ALL RIGHT. SO PLAINTIFFS' 5A
 DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

1 ARE ONLY ADDED IF THERE'S A LOST PROFIT ELECTION BY THE JURY AS
 2 OPPOSED TO A HYPOTHETICAL LICENSE?
 3 MR. LANIER: THAT'S CORRECT, YOUR HONOR. AND THAT'S
 4 BECAUSE, UNDER THE LAW, YOU'RE ENTITLED TO AWARD BOTH ACTUAL
 5 DAMAGES AND INFRINGER'S PROFITS TO THE EXTENT THAT THE
 6 INFRINGER'S PROFITS AREN'T ALREADY INCLUDED IN THE ACTUAL
 7 DAMAGES. AND, MORE IMPORTANTLY ALSO, BECAUSE AS ARGUED BY
 8 PLAINTIFFS AND DISCLOSED IN THE PRETRIAL STATEMENT, ET CETERA,
 9 WERE THEY TO BE AWARDED DAMAGES BASED ON THE HYPOTHETICAL
 10 LICENSE, THAT COVERS BOTH.
 11 SO THE CHOICE THE JURY IS BEING GIVEN IS TAKE THE
 12 LICENSE APPROACH, AWARD ONE NUMBER BASED ON THE LICENSE, AND
 13 YOU CAN ARGUE WHAT THE NUMBER SHOULD BE, BUT AWARD A NUMBER
 14 BASED ON THE LICENSE, OR AWARD TWO NUMBERS, LOST PROFITS PLUS
 15 INFRINGER'S PROFITS. THAT'S THE CHOICE.
 16 SO THAT'S WHY OUR SPECIAL VERDICT FORM WAS SET UP TO
 17 SAY, DO THIS IF YOU DO THE LOST PROFITS NUMBER, THEN GET TO
 18 QUESTION TWO. IF YOU DO THE LICENSE NUMBER, SIGN AND RETURN.
 19 THE COURT: OKAY.
 20 WHAT'S THE PLAINTIFFS' POSITION?
 21 MR. BOIES: FIRST, I THINK THE LAW IS CLEAR THAT THE
 22 PLAINTIFF IS ENTITLED TO BOTH ACTUAL DAMAGES PLUS INFRINGER'S
 23 PROFITS UNLESS THE ACTUAL DAMAGES HAS ALREADY SOMEHOW CAPTURED
 24 THE INFRINGER'S PROFITS.
 25 THE COURT: RIGHT.
 DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

1 AND B WILL BE GIVEN. AND THE DEFENDANTS' 5A IS WITHDRAWN.
 2 MR. LANIER: CORRECT, YOUR HONOR. THANK YOU.
 3 THE COURT: OKAY. ALL RIGHT.
 4 NOW TURNING TO NUMBER 6.
 5 WHY DON'T I JUST TELL YOU THE DIFFICULTY I AM HAVING
 6 JUST GENERALLY WITH THE OVERALL DAMAGES CONCEPT.
 7 IT'S UNCLEAR TO ME WHETHER PLAINTIFF IS TAKING THE
 8 POSITION THAT THE JURY DOES NOT -- IS NOT GOING TO BE REQUIRED
 9 TO ELECT BETWEEN LOST PROFITS AND THE HYPOTHETICAL LICENSE.
 10 THE DEFENSE INSTRUCTIONS ARE PRETTY CLEAR. THE
 11 PROPOSED INSTRUCTIONS ARE PRETTY CLEAR THAT -- AND I THINK IT'S
 12 CONSISTENT WITH THE WITNESS' TESTIMONY FOR THE MOST PART, THAT
 13 THE JURY WILL BE ASKED TO MAKE A DECISION WITH RESPECT TO
 14 ACTUAL DAMAGES, AS TO WHETHER OR NOT ACTUAL DAMAGES SHOULD BE
 15 ESTABLISHED BY VIRTUE OF THE HYPOTHETICAL LICENSE OR BY
 16 ORACLE'S LOST PROFITS. ALL RIGHT?
 17 IF THE JURY DETERMINES THAT LOST PROFITS IS A BETTER
 18 MEASURE OF DAMAGES, GIVEN THE FACTS OF THIS CASE, THEN THEY
 19 WILL HAVE TO DETERMINE WHICH MEASURE THAT PROFFERED BY ORACLE
 20 OR THAT PROFFERED BY THE DEFENDANT. AND THEN THE JURY WILL
 21 HAVE TO TURN TO THE QUESTION OF THE INFRINGER'S PROFITS.
 22 IT'S NOT CLEAR TO ME FROM THE DEFENDANTS'
 23 INSTRUCTIONS WHETHER OR NOT YOU'RE TAKING THE POSITION THAT --
 24 FROM THE VERDICT FORM IT'S NOT CLEAR.
 25 ARE YOU TAKING THE POSITION THAT INFRINGER'S PROFITS
 DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

1 MR. BOIES: WE BELIEVE THAT THE PLAINTIFF ACTUALLY
 2 HAS THE RIGHT TO ELECT THE HYPOTHETICAL LICENSE, AND THAT THE
 3 RIGHT WAY FOR IT TO GO TO THE JURY IS TO GO TO THE JURY BASED
 4 ON A QUESTION OF WHAT WAS THE ACTUAL DAMAGES BASED ON A
 5 HYPOTHETICAL LICENSE. BECAUSE WE BELIEVE THE PLAINTIFF HAS THE
 6 RIGHT TO ELECT THAT FORM OF DAMAGES AS OPPOSED TO LOST PROFITS.
 7 SO, WHAT WE REALLY BELIEVE THE JURY SHOULD BE
 8 INSTRUCTED IS THAT ON THE ACTUAL DAMAGES ASPECT, THEY OUGHT TO
 9 VALUE THE HYPOTHETICAL LICENSE. AND THEY HAVE TWO ALTERNATIVE
 10 VALUES FOR THE HYPOTHETICAL LICENSE.
 11 IF THE JURY WERE TO BE GIVEN A CHOICE BETWEEN A
 12 HYPOTHETICAL LICENSE AND LOST PROFITS, THEN IT'S CLEAR THAT THE
 13 LOST PROFITS ESTIMATE OF THE TWO EXPERTS DO NOT INCLUDE
 14 INFRINGER PROFITS.
 15 IT IS LESS CLEAR WHETHER THE HYPOTHETICAL LICENSE
 16 DOES OR DOES NOT INCLUDE INFRINGER PROFITS, AND I THINK IT
 17 DEPENDS, TO SOME EXTENT, ON HOW YOU INTERPRET WHAT THE TWO
 18 EXPERTS HAVE SAID --
 19 THE COURT: WHAT YOUR EXPERT HAS SAID. I MEAN,
 20 YOU'RE ATTEMPTING TO ESTABLISH THE HYPOTHETICAL LICENSE.
 21 MR. BOIES: THEY HAVE A HYPOTHETICAL LICENSE --
 22 THE COURT: BUT I WOULD MAKE A DETERMINATION BASED
 23 ON WHETHER OR NOT YOUR EXPERT HAS INCLUDED IT IN HIS
 24 CALCULATION.
 25 WHAT'S YOUR VIEW OF THE EVIDENCE?
 DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

1956

1 MR. BOIES: I THINK HE HAS NOT INCLUDED THE
2 INFRINGING PROFITS AS PART OF THE HYPOTHETICAL LICENSE. I
3 THINK THE WAY HE CONSTRUCTS THE HYPOTHETICAL LICENSE IS ON THE
4 VALUE AT THE TIME OF THE INFRINGEMENT COMMENCEMENT, THAT IS,
5 JANUARY 19TH, AND HE VALUES WHAT IT WAS THAT WAS TAKEN AWAY.
6 AND THE WAY THE COURTS HAVE DESCRIBED THE
7 HYPOTHETICAL LICENSE CALCULATIONS IS YOU -- THE HOLDER OF THE
8 COPYRIGHT IS BEING DEPRIVED OF THE VALUE OF THE LICENSE THAT
9 OTHERWISE WOULD HAVE BEEN SOLD. SO THAT IF THEY HAD DONE WHAT
10 THE PROCESS CONTEMPLATES, WHICH IS, THEY HAD PURCHASED THIS
11 LICENSE, HOW MUCH WOULD THEY HAVE PAID FOR IT.
12 THAT IS SEPARATE BECAUSE THAT'S AN ACTUAL DAMAGES
13 CALCULATION. THAT IS SEPARATE FROM WHAT PROFITS THEY MAKE IN
14 TERMS OF INFRINGEMENT LATER.

15 MR. LANIER: YOUR HONOR, SEVERAL RESPONSES BRIEFLY.
16 FIRST OF ALL, AS PRESENTED BY THE PLAINTIFFS'
17 EXPERT, IT WAS THE ONE AND SOLE NUMBER FOR WHICH HE OFFERED ANY
18 DAMAGE CALCULATION.
19 SECOND, HE DID TESTIFY, AND I WILL HAVE TO LOOK AT
20 THE RECORD, THAT THIS WAS INTENDED TO CAPTURE THE VALUE TO SAP.
21 AND THAT'S REALLY THE KEY POINT HERE, THE FAME OF THE
22 CROSS-EXAMINATION THAT JUST HAPPENED. THE CLEAR ARGUMENT AND
23 EVIDENCE THAT PLAINTIFFS ARE ATTEMPTING TO PRESENT IS THAT SAP
24 WOULD HAVE AGREED TO THIS LICENSE BECAUSE OF ALL THE PROFITS
25 SAP WOULD HAVE MADE -- THAT WAS THAT LAST DIALOGUE ON THE
DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

1958

1 THINK, I THINK THE LAW IS CLEAR THAT ACTUAL DAMAGES IS SEPARATE
2 FROM INFRINGER PROFITS EXCEPT TO THE EXTENT THAT THE
3 CALCULATION OF THE ACTUAL DAMAGES INCLUDES INFRINGER PROFITS.
4 I WOULD AGREE THAT THE HYPOTHETICAL LICENSE, AS
5 DEFINED PRECISELY BY OUR EXPERT, DOES INCLUDE THAT. BUT IF YOU
6 HAVE -- IF THE JURY CONCLUDES HYPOTHETICAL LICENSE BUT WE'RE
7 NOT GOING TO GIVE THE \$1.65 BILLION, WE ARE GOING TO COME TO A
8 VALUATION BASED ON SOME OTHER VIEW OF THE EVIDENCE, THEN I
9 THINK THE JURY HAS TO MAKE A SEPARATE DETERMINATION AS TO
10 WHETHER INFRINGER'S PROFITS IS OR IS NOT INCLUDED.

11 THE COURT: OKAY.
12 MR. LANIER: JUST A COUPLE OF POINTS, YOUR HONOR,
13 AND THEN MR. MC DONNELL MAY HAVE MORE TO ADD.
14 THREE THINGS. FIRST, THE PRACTICAL POINT IS, WHEN
15 ONE ROLLS THE DICE, ONE ENDS UP WITH WHERE THE DICE FALL.
16 THEY'VE ELECTED TO PURSUE AND PRESENT JUST ONE OF THE TWO
17 APPROACHES THAT THEIR OWN EXPERT HAD TAKEN. THERE IS EVIDENCE
18 ABOUT THE SECOND APPROACH THEIR EXPERT TOOK IN THE RECORD
19 ELICITED ON CROSS-EXAMINATION, SO THOSE NUMBERS ARE THERE.
20 THEY ARE AVAILABLE TO THE JURY. AND SO THE JURY COULD ACTUALLY
21 AWARD LOST PROFITS AND INFRINGER'S PROFITS BASED ON PLAINTIFFS'
22 OWN ANALYSIS ON EVIDENCE IN THE RECORD.
23 THE SECOND POINT IS THAT THE -- IN THEIR STATEMENT
24 OF RELIEF SOUGHT IN THE PRETRIAL STATEMENT, ORACLE SAID ON THE
25 COPYRIGHT CLAIMS, HERE'S WHAT WE ARE SEEKING. AND IT DID NOT
DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

1957

1 PROJECTIONS AND ASSUMPTION DOCUMENTS, FOR EXAMPLE.
2 THERE IS NO QUESTION THAT NOT ONLY DID THEY DISCLOSE
3 IN THE PRETRIAL STATEMENT THE FAIR MARKET LICENSE AS THE ONE
4 REMEDY THEY WOULD GET ON COPYRIGHT IF THAT WAS AWARDED BY THE
5 JURY, THAT'S HOW THE EVIDENCE HAS COME IN, BOTH FACTUALLY AND
6 FROM THE OPINION TESTIMONY AS WELL.
7 MR. BOIES: THERE IS ONE QUALIFICATION TO THAT THAT
8 I THINK IS IMPORTANT, YOUR HONOR.
9 IF THE JURY WERE TO COME BACK AND AWARD THE
10 \$1.65 BILLION THAT MR. MEYER PROPOSED, I THINK I WOULD AGREE
11 WITH COUNSEL THAT THE BETTER VIEW OF THE EVIDENCE WOULD BE THAT
12 THAT INCLUDES INFRINGER PROFITS.
13 HOWEVER, IF THEY CAME BACK WITH 897 MILLION OR SOME
14 OTHER NUMBER LIKE THAT, THEN THAT IS NOT SOMETHING THAT
15 INCLUDES INFRINGER PROFITS.
16 SO, I THINK THERE ARE PROBABLY TWO STEPS IN THE
17 JURY'S ANALYSIS. ONE STEP IS IF THEY COME BACK IN AWARDING THE
18 HYPOTHETICAL LICENSE BASED ON WHAT MR. MEYER HAS PROPOSED,
19 WHICH IS THE \$1.65 BILLION, I THINK I WOULD AGREE THAT THAT
20 INCLUDES THE INFRINGER'S PROFITS.
21 HOWEVER, THAT IS NOT A NECESSARY ELEMENT OF A
22 HYPOTHETICAL LICENSE. AND IF THEY COME BACK WITH SOME OTHER
23 NUMBER, THE JURY IS GOING TO HAVE TO DETERMINE FOR ITSELF
24 WHETHER THAT OTHER NUMBER, DEPENDING ON HOW THE JURY ARRIVES AT
25 IT, DOES OR DOES NOT INCLUDE INFRINGER PROFITS. BECAUSE I
DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930


1959

1 RESERVE RIGHTS OR SAY THAT'S ONLY IF IT'S THIS BIG A NUMBER, IT
2 SAID, HERE'S WHAT WE ARE SEEKING. AND IT HAS CONSISTENTLY
3 DISCLOSED THE LICENSE THEORY AS THE ONE RECOVERY YOU WOULD GET
4 ON THE COPYRIGHT CLAIM. THERE, OF COURSE, HAS BEEN OTHER
5 CLAIMS, BUT THEY ARE NOT NECESSARY TO ADDRESS AT THIS POINT.
6 SO BOTTOM LINE, I CERTAINLY APPRECIATE THE PRACTICAL
7 ANALYSIS MR. BOIES IS GIVING. OF COURSE, IF THE NUMBER ISN'T
8 BIG ENOUGH, THEY WON'T FEEL LIKE THEY GOT WHOLLY COMPENSATED,
9 BUT THAT'S NOT THE ISSUE FOR THE COURT.
10 THE ISSUE IS, DOES THE FAIR MARKET VALUE LICENSE, AS
11 PRESENTED BY PLAINTIFFS', SUBSTITUTE FOR THE OTHER TWO MEASURES
12 OF DAMAGES THAT ARE POSSIBLE, IT DOES AS PRESENTED BY THEM.
13 THE JURY, WE THINK, SHOULD BE ALLOWED TO BE GIVEN THE CHOICE
14 AND THERE IS EVIDENCE IN THE RECORD OF BOTH SIDE'S POSITIONS ON
15 THAT ALTERNATIVE APPROACH.
16 THE COURT: OKAY. ALL RIGHT. ANYTHING ELSE ON THAT
17 ONE?
18 MR. BOIES: NO, YOUR HONOR.
19 THE COURT: I AGREE WITH DEFENDANTS. I THINK THAT
20 THE HYPOTHETICAL LICENSE DOES INCLUDE THE INFRINGER'S PROFITS
21 REGARDLESS OF WHAT NUMBER THE JURY COMES BACK WITH. SO THAT
22 SETTLES THAT PART OF IT.
23 BUT YOU RAISED ANOTHER SUB-ISSUE THAT I WOULD LIKE
24 TO HEAR YOU ALL OPINE ON, AND THAT IS THE WHOLE QUESTION OF
25 WHETHER OR NOT THE JURY GETS TO MAKE THE ELECTION.
DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

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

Certified Copy

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

Page 2022

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

APPEARANCES

FOR DEFENDANTS: JONES DAY
SILICON VALLEY OFFICE
1755 EMBARCADERO ROAD
PALO ALTO, CALIFORNIA 94303
BY: THARAN GREGORY LANIER,
JACQUELINE LEE, ATTORNEYS AT LAW

JONES DAY
555 CALIFORNIA STREET, 26TH FLOOR
SAN FRANCISCO, CALIFORNIA 94104
BY: ROBERT A. MITTELSTAEDT,
JASON MCDONELL, ATTORNEYS AT LAW

JONES DAY
717 TEXAS, SUITE 3300
HOUSTON, TEXAS 77002-2712
BY: SCOTT W. COWAN,
NICOLE M. PERRY, ATTORNEYS AT LAW

ALSO PRESENT: CHRISTOPHER H. GILLESPIE
MICHAEL A. PHARO
ALAN RUFFIER
DAVID SCHLAIFER

--000--

Page 2023

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

INDEX

PAGE VOL.

CLOSING ARGUMENT BY MR. BOIES 2038 12

CLOSING ARGUMENT BY MR. MITTELSTAEDT 2104 12

REBUTTAL CLOSING ARGUMENT BY MR. BOIES 2173 12

EXHIBITS

DEFENDANTS' EXHIBITS W/DRAWN IDEN EVID VOL

A1738 2229 12

A1815 2229 12

A646 2229 12

A9332 2229 12

A9500 through -9506 2229 12

A9507 THROUGH -9509 2229 12

A9510 2229 12

A9511 THROUGH -9547 2229 12

--000--

Page 2024

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

MONDAY, NOVEMBER 22, 2010 8:22 A.M.

PROCEEDINGS

(THE FOLLOWING PROCEEDINGS WERE HEARD OUT OF THE
PRESENCE OF THE JURY:)

THE CLERK: CALLING CIVIL CASE NO. 07-1658, ORACLE,
U.S.A., ET AL. VS. SAP AG, ET AL.

THE COURT: ALL RIGHT. GOOD MORNING, COUNSEL.

MR. LANIER: MORNING, YOUR HONOR.

MR. BOIES: MORNING, YOUR HONOR.

ALL RIGHT. I DIDN'T GET AN OPPORTUNITY TO -- I
LOOKED ON PACER LAST NIGHT ABOUT 4:30. YOU ALL HADN'T FILED THE
JURY INSTRUCTIONS. I DID GET THE VERDICT FORMS, SO I READ THEM
THIS MORNING. AND I'VE GONE OVER EVERYTHING. I'M PREPARED TO
RULE ON IT. YOU ALL HAVE SUBMITTED YOUR OBJECTIONS.

IS THERE ANYTHING ELSE YOU WISH TO SAY FOR THE RECORD
BEFORE I TELL YOU WHICH ONES WE'RE GOING TO USE?

MR. LANIER: NO, WE'RE PREPARED TO SUBMIT UNLESS YOUR
HONOR HAS QUESTIONS.

MR. BOIES: NOTHING -- NOTHING FURTHER, YOUR HONOR.

THE COURT: ALL RIGHT. WITH REGARD TO THE JURY
INSTRUCTIONS, THE MAIN DISPUTE BEING WHETHER OR NOT THE WORD
"FULL" SHOULD GO IN. GIVEN THAT THAT WAS LANGUAGE QUOTED THAT
SAID ON FRIDAY AND IT DOESN'T APPEAR TO BE IN THE JURY
INSTRUCTION, I'M NOT GOING TO SERVE AS THE MODEL FOR JURY
INSTRUCTIONS. I'M SIMPLY GOING TO GIVE IT AS WRITTEN BY THE

Page 2025

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

DEFENDANTS WITHOUT THAT INSERTION.

WITH REGARD TO THE SPECIAL VERDICT FORMS, I THINK

YOU'RE PRETTY MUCH BOTH SAYING THE SAME THING. I THINK THE

DEFENDANTS' IS CLEAR. IT WILL BE EASIER FOR THE JURY TO FOLLOW,

SO I'M GOING TO USE THE DEFENSE VERDICT FORM.

ALL RIGHT. IS THERE ANYTHING ELSE THIS MORNING?

MR. LANIER: THERE WERE A COUPLE OF OBJECTIONS THAT

EACH SIDE HAD TO THE OTHERS' SLIDES OR DEMONSTRATIVES FOR

CLOSING. AND WE'RE PREPARED TO ADDRESS -- NOT ALL OF THEM BUT

JUST A COUPLE OF THE MAJOR ONES, AND THEY MAY HAVE SOME AS WELL.

THE COURT: OKAY. LET'S DO THAT.

MR. LANIER: ALL RIGHT.

MR. BOIES: YOUR HONOR, COULD I JUST -- I DON'T WANT

THIS TO SLIP BY INADVERTENTLY. WE HAD AN ISSUE -- WE HAD PUT IN

OUR INSTRUCTIONS THE LANGUAGE IN TERMS OF THE FAIR MARKET VALUE

LICENSE AS PRESENTED BY PLAINTIFFS.

THE COURT: YEAH. I DON'T -- I'M NOT GOING TO GIVE

THAT ONE. I DON'T THINK THAT'S AT ALL NECESSARY.

MR. BOIES: OKAY. THE COURT DOES UNDERSTAND THE

EFFECT OF COMBINING THAT WITH TAKING THE DEFENDANTS' VERDICT

FORM?

THE COURT: YEAH.

MR. BOIES: OKAY.

THE COURT: YEAH. OKAY. ANYTHING ELSE?

LET'S TALK ABOUT THE EXHIBITS SO WE CAN GET STARTED

<p style="text-align: right;">Page 2130</p> <p>1 REMEMBER, MR. MEYER TESTIFIED THAT HE WAS THE EXPERT 2 FOR BOEING AIRLINE IN A PATENT INFRINGEMENT CASE BROUGHT BY THE 3 FEDERAL GOVERNMENT AGAINST BOEING FOR USING A LITTLE PIECE OF 4 SOMETHING IN THE SPACE SHUTTLE. 5 AND IN THAT CASE, MR. MEYER TRIED TO FIGURE OUT 6 WHAT'S THE VALUE OF THIS LITTLE PIECE OF THING THAT WAS USED IN 7 THE SPACE SHUTTLE. HE SAID, WELL, IT SHOULD BE A RUNNING 8 ROYALTY AND IT SHOULD BE, HE SAID, 3.75 PERCENT. THE JUDGE 9 SAID THAT WAS THREE TIMES TOO HIGH AND IT WAS INFLATED, AND ALL 10 OF THAT. BUT THE KEY POINT IS EVEN IN THAT CASE, MR. MEYER 11 DIDN'T SAY, WELL, LET'S TRY AND VALUE THE VALUE OF THE SPACE 12 SHUTTLE PROGRAM. IN THAT CASE, HE RECOGNIZED HE COULD ONLY -- 13 ALL HE COULD DO WAS PUT A VALUE ON THE THING THAT WAS 14 INFRINGED. 15 IN THIS CASE, BY USING DOCUMENTS LIKE THIS, 16 (INDICATING) THEY ARE TRYING TO PUT A VALUE ON THE WHOLE SAFE 17 PASSAGE PROGRAM, NOT JUST ON THE VALUE OF A LICENSE THAT SAP 18 WOULD HAVE PAID TO OPERATE TOMORROWNOW. 19 WHAT THEY ARE BASICALLY ASSUMING IS WITHOUT 20 TOMORROWNOW, THESE NUMBERS WOULD HAVE BEEN ZERO. THEY WOULD 21 HAVE BEEN ZERO BECAUSE THERE'S NO VALUE TO SAFE PASSAGE, NO 22 VALUE TO THIS EARLY PROPOSAL UNDER SAFE PASSAGE OTHER THAN 23 TOMORROWNOW, SO THE NUMBERS WOULD BE ZERO. THAT'S OBVIOUSLY 24 NOT RIGHT. A LOT OF PEOPLE BUY A LOT OF SOFTWARE FROM SAP 25 WITHOUT ANYTHING TO DO WITH TOMORROWNOW.</p>	<p style="text-align: right;">Page 2132</p> <p>1 SEGMENT OF CUSTOMERS, PROVIDED TOMORROWNOW CAN MANAGE TO 2 CONTINUE TO OPERATE AS STRUCTURED TODAY -- AND WE KNOW THERE'S 3 PROBLEMS WITH THAT -- IT CAN BE A PROFITABLE NICHE BUSINESS, 4 UNCLEAR IF IT'S 5 PERCENT NICHE OR BIGGER. 5 SO WHAT ZEPECKI IS TALKING ABOUT AT THE TIME IS A 6 MARKET THAT MAY BE 5 PERCENT OR BIGGER. AND 5 PERCENT OF 7 10,000 IS 500. IT'S NOT THE 3,000 THAT'S IN THE ZIEMEN 8 DOCUMENT. 9 AND THEN ZEPECKI, WHEN HE TESTIFIED HERE, HE'S ASKED 10 ABOUT THE -- HIS DOCUMENT WHERE HE SAYS: 11 IT MAKES SENSE, THIS TOMORROWNOW IDEA, HALF RATE 12 MAINTENANCE, MAKES SENSE FOR A SEGMENT OF 13 CUSTOMERS. 14 DID YOU HAVE A SEGMENT OF CUSTOMERS IN MIND? 15 I THOUGHT THAT ONLY SOME CUSTOMERS WOULD 16 CONSIDER THIS TO BE APPEALING. BECAUSE IT WAS 17 LIMITED, IT ONLY DID A FEW THINGS THAT I 18 THOUGHT -- THAT I ONLY THOUGHT SOME CUSTOMERS 19 MIGHT EVEN CONSIDER. 20 AND AT THE BOTTOM: 21 MY BEST ESTIMATE WAS THAT ROUGHLY 5 PERCENT OF 22 THE PEOPLESFT ENTERPRISE CUSTOMERS MIGHT FIND 23 THIS TOMORROWNOW APPROACH APPEALING. 24 MR. MEYER IGNORED THAT. 25 (SLIDE DISPLAYED ON SCREEN.)</p>
<p style="text-align: right;">Page 2131</p> <p>1 (SLIDE DISPLAYED ON SCREEN.) 2 OKAY. THIS IS MR. ZIEMEN WHO WROTE THE DOCUMENT. 3 AND WHAT HE SAYS -- THE QUESTION IS: 4 YOU DON'T KNOW IF THE ABILITY OF SAP TO OFFER 5 CUSTOMERS THE ABILITY TO GET OFF ORACLE 6 MAINTENANCE WITH TOMORROWNOW AND THEN BE WELL 7 POSITIONED WITH AN EXISTING LOWER RISK SAP 8 RELATIONSHIP WAS AN ATTRACTIVE FEATURE OF THE 9 DEAL? 10 AND MR. ZIEMEN SAYS: THAT WASN'T PROVEN AT THE 11 TIME. 12 HE HAD HOPES THAT TOMORROWNOW WOULD HELP THE SAFE 13 PASSAGE PROGRAM, BUT IT CERTAINLY WASN'T PROVEN AT THE TIME. 14 AND IF IT WASN'T PROVEN AT THE TIME, WHY WOULD A REASONABLE 15 BUYER OF A LICENSE IN SAP'S POSITION HAD BEEN WILLING TO PAY 16 THE KIND OF MONEY THEY ARE TALKING ABOUT? 17 OKAY. IN ADDITION TO REALLY, REALLY BADLY 18 MISCHARACTERIZING THAT ZIEMEN DOCUMENT, WHAT ELSE DID MR. MEYER 19 DO WRONG? ONE OF THE THINGS IS HE IGNORED THE OTHER DOCUMENTS 20 IN SAP'S FILES AT THE TIME. 21 (SLIDE DISPLAYED ON SCREEN.) 22 THIS IS THE ZEPECKI DOCUMENT, PLAINTIFFS' EXHIBIT 7. 23 THIS LEADS UP TO THE BUSINESS PLAN, THE ACTUAL BUSINESS PLAN 24 FOR TOMORROWNOW. AND IN HERE MR. ZEPECKI SAYS, TOMORROWNOW'S 25 MODEL, HE CALLS IT THE NO FRILLS MODEL, MAKES SENSE FOR A</p>	<p style="text-align: right;">Page 2133</p> <p>1 HE ALSO IGNORED THIS DOCUMENT. THIS IS A DOCUMENT 2 WHICH IS ONE OF THE FIRST TWO BUSINESS CASES FOR TOMORROWNOW. 3 IT SAYS, WE HAVEN'T RECEIVED MUCH FORWARD-LOOKING FINANCIAL 4 INFORMATION, BUT TOMORROWNOW'S THOUGHTS ON THE RATIONALE ARE 5 FAIRLY PRESENTED. 6 THIS IS WHAT MEYER SHOULD HAVE CONSIDERED. 7 AND THE NEXT DOCUMENT HE SHOULD HAVE CONSIDERED WAS 8 WHERE HE TOOK TOMORROWNOW'S NUMBERS AND SAID, WE NEED TO ADJUST 9 THOSE DOWN TO REALITY, REVISE REALITY. 10 (SLIDE DISPLAYED ON SCREEN.) 11 AND THIS, I ENCOURAGE YOU TO LOOK AT. IT'S A9329. 12 AND THIS IS THE DOCUMENT THAT IS ATTACHED TO THE E-MAIL WE JUST 13 SAW. AND THESE ARE TOMORROWNOW'S NUMBERS. 14 AND IF YOU DO THE MATH, WHICH WE HAVE DONE UP AT THE 15 TOP, THE PART AT THE TOP LISTING THE CUSTOMER IS NOT IN THE 16 DOCUMENT. THAT'S SIMPLY DIVIDING THE EXPECTED REVENUES BY 17 50,000, AND 50,000 -- I WILL COME TO THAT -- \$50,000 IS THE 18 AVERAGE BUSINESS DEAL SIZE. AND IF YOU DO THAT MATH AND YOU 19 CONVERT FROM EUROS TO DOLLARS, FOR 2008 THE -- THIS PROJECTION 20 OF CUSTOMERS WOULD GIVE TOMORROWNOW 297 CUSTOMERS. 21 (SLIDE DISPLAYED ON SCREEN.) 22 THIS IS THE NEXT DOCUMENT, THE BUSINESS CASE A DAY 23 LATER. IT IS BASED ON AVERAGE DEAL SIZES OF \$50,000. 24 (SLIDE DISPLAYED ON SCREEN.) 25 WHAT IT SHOWS, AND NOW THEY HAVE REVISED IT</p>

Page 2134	Page 2136
<p>1 SLIGHTLY. SO THESE ARE NO LONGER TOMORROWNOW'S NUMBERS, THEY 2 ARE TOMORROWNOW'S NUMBERS REVISED FOR REALITY, AND THAT GOES TO 3 308.</p> <p>4 AND WHEN YOU STUDY THIS DOCUMENT, YOU CAN COMPARE 5 THE LAST DOCUMENT AND THIS DOCUMENT WITH THE NET INCOME LINE, 6 AND YOU WILL SEE THAT WHEN IT WAS REVISED TO REALITY FROM 7 TOMORROWNOW'S NUMBERS TO SAP'S NUMBERS, THESE NET INCOME 8 NUMBERS GO DOWN. THAT'S BECAUSE THE COSTS WERE GOING UP.</p> <p>9 AGAIN, MEYER IGNORED THAT IN HIS RUSH TO FIND A 10 NUMBER LIKE 3,000, HE LOOKS AT THE ZIEMEN DOCUMENT WHICH IS 11 APPLES AND ORANGES, AND HE NOT ONLY MAKES A MISTAKE OF USING 12 3,000 FOR SAP'S EXPECTATIONS, BUT HE USES THE SAME NUMBER FOR 13 ORACLE'S EXPECTATIONS.</p> <p>14 THEIR LUMP SUM APPROACH IS ALSO TOO UNREASONABLE. 15 AND THIS IS WHERE WE GET INTO THE REALITY CHECK, THE BOOK OF 16 WISDOM.</p> <p>17 THE COURT WILL INSTRUCT YOU THAT YOU CAN USE WHAT 18 ACTUALLY HAPPENED IF IT PROVIDES AN INSIGHT INTO WHAT THE 19 PARTIES WOULD HAVE BEEN THINKING AT THE TIME. WHAT THEY WOULD 20 HAVE BEEN THINKING AT THE TIME.</p> <p>21 AND THINK ABOUT IT THIS WAY. WHEN MR. ELLISON COMES 22 IN AND SAYS, YOU KNOW, WE COULD HAVE LOST 2,000 TO 3,000 23 CUSTOMERS, THE QUESTION FOR HIM UNDER THE REALITY CHECK IS, 24 YOU'VE GOT A VERY SUCCESSFUL COMPANY. YOU HAVE GOT REALLY 25 SMART FORECASTERS DOWN THERE. ARE WE REALLY TO BELIEVE YOU</p>	<p>1 HE TESTIFIED THREE YEARS AGO WHEN HE WAS ON THE OTHER SIDE. 2 AND IN THIS OTHER CASE, HE TESTIFIED WHEN HE'S STILL DOING THE 3 FAIR MARKET VALUE HYPOTHETICAL NEGOTIATION, THIS IS WHAT HE 4 TESTIFIED.</p> <p>5 "YOU WANT TO BE AWARE OF WHAT HAPPENS IN THE 6 FUTURE TO MAKE SURE YOU GET THE PROPER RESULT AT 7 THE TIME OF THE HYPOTHETICAL." 8 COMMON SENSE. IT PROVIDES AN INSIGHT. 9 "SO WE ARE SORT OF USING SOME MONDAY MORNING 10 QUARTERBACKING AND HINDSIGHT TO HELP US, BUT 11 WE'RE ABLE TO DO THAT IF WE DO IT IN A WAY 12 THAT'S REASONABLE." 13 SO IN THAT CASE WHERE IT HELPED HIM, HE DID WHAT WAS 14 RIGHT, HE USED A REALITY CHECK. IN THIS CASE WHERE HE KNOWS IT 15 WOULDN'T HELP HIM, HE DIDN'T USE A REALITY CHECK.</p> <p>16 IN THE BOEING CASE, I ASKED HIM THIS. REMEMBER, IN 17 THE BOEING CASE, INSTEAD OF COMING IN AND SAYING YOU CAN ONLY 18 DO THIS ON A LUMP SUM BECAUSE ONE COMPANY -- THE GOVERNMENT HAD 19 ALREADY PAID FOR THE PATENT AND SO IT WOULD HAVE A LOT OF 20 UNCERTAINTY IF IT DIDN'T KNOW HOW MUCH IT WAS GOING TO GET AND 21 IT HAD ALREADY INVESTED ALL THIS MONEY, SO HE JUST WOULD HAVE 22 TO HAVE A LUMP SUM. HE DIDN'T SAY THAT.</p> <p>23 IN BOEING HE SAID: "A RUNNING ROYALTY IS THE ONLY 24 THING THAT MAKES SENSE." 25 AND HIS RUNNING ROYALTY WAS 3.75 PERCENT OF SALES</p>
Page 2135	Page 2137
<p>1 WHEN YOU SAY YOU THINK YOU WOULD HAVE THOUGHT THAT YOU COULD 2 HAVE LOST 3,000 CUSTOMERS WHEN WE KNOW YOU ONLY LOST 358? HOW 3 COULD YOU BE SO WRONG? THAT'S THE REALITY CHECK.</p> <p>4 THEY HAVE NEVER EXPLAINED WHAT THEY WERE THINKING OR 5 IF THEY WOULD HAVE BEEN THINKING THEY WOULD LOSE 3,000 6 CUSTOMERS. HOW COULD THEY BE SO WRONG? AND THE FACT THAT 7 3,000 IS SO DIFFERENT FROM 358 SUGGESTS THAT MAYBE YOU 8 SHOULDN'T GIVE TOO MUCH CREDIT, TOO MUCH CREDENCE TO THEM WHEN 9 THEY COME IN AND SAY WE THOUGHT WE WOULD HAVE -- COULD HAVE 10 LOST 20 TO 30 PERCENT. YOU USE REALITY TO PROVIDE INSIGHT INTO 11 WHAT THEY REALLY WOULD HAVE BEEN THINKING AT THE TIME.</p> <p>12 SO, MR. MEYER SAYS: 13 THERE'S NO REASON TO HAVE TO DO A REALITY CHECK. 14 I DON'T HAVE TO DO A REALITY CHECK GOING PASSED 15 THE DATE OF THE HYPOTHETICAL. 16 AND HE'S SAYING THAT BECAUSE IF YOU DO A REALITY 17 CHECK, THERE IS NO WAY YOU CAN SELL 3,000 CUSTOMERS WHEN ONLY 18 358 ACTUALLY BOUGHT.</p> <p>19 DURING THIS TRIAL HE TESTIFIED UP AT THE TOP, I 20 ASKED HIM: 21 "SO NO MONDAY MORNING QUARTERBACKING, NO 22 HINDSIGHT TO HELP US OUT; THAT'S YOUR POSITION?" 23 HE SAYS: "THAT'S MY POSITION ABOUT THE FAIR 24 MARKET VALUE OF THE LICENSE." 25 WELL, I ASKED HIM THAT QUESTION BECAUSE I KNEW WHAT</p>	<p>1 AND THE COURT FOUND HE WAS THREE TIMES TOO HIGH. 2 THIS IS WHAT HAPPENED.</p> <p>3 "DO YOU REMEMBER IN THE BOEING CASE, THE COURT SAID 4 THAT BECAUSE YOUR BASELINE WAS LITTLE MORE THAN CONJECTURE, IT 5 MATTERS LITTLE HOW YOU APPLIED THE OTHER GEORGIA-PACIFIC 6 FACTORS BECAUSE PLUS OR MINUS A GUESS IS, AFTER ALL, STILL A 7 GUESS?"</p> <p>8 AND HE SAID -- "DO YOU REMEMBER THAT?" 9 "I RECALL READING THE JUDGE'S DECISION." 10 DO YOU REMEMBER READING THAT PART? 11 "I JUST SAID THAT." 12 BUT ON THE ROYALTY RATE THE COURT FOUND YOUR 13 OPINION WAS TOO SPECULATIVE TO STAND. 14 WELL HE, HE DID SAY THAT HE DIDN'T LIKE THE 15 ROYALTY RATE AND HE USED LANGUAGE THAT YOU HAVE. 16 AND HE SAID IT BORE LITTLE RELATIONSHIP TO WHAT 17 A WILLING BUYER AND A WILLING SELLER WOULD USE 18 IN THE REAL WORLD. I DON'T HAVE IT IN FRONT OF 19 ME, BUT IF THAT'S WHAT YOU HAVE IN THE OPINION, 20 HE SAID A FEW THINGS LIKE THAT. 21 AND, WELL, HE REJECTED YOUR ROYALTY RATE AS 22 THREE TIMES TOO HIGH? 23 I'VE ALREADY SAID THAT. 24 AND HE FOUND YOUR APPROACH ON THIS ROYALTY RATE 25 WAS CAPRICIOUS, CORRECT?</p>

<p style="text-align: right;">Page 2138</p> <p>1 WE CAN LOOK AT HIS LANGUAGE, BUT HE WAS PRETTY</p> <p>2 AGGRESSIVE IN HIS LANGUAGE, THAT'S CORRECT.</p> <p>3 WHERE THERE HE WAS ARBITRARY, HE SPECULATED AND HE</p> <p>4 CAME AND PUT THE ROYALTY RATE THAT WAS THREE TIMES TOO HIGH.</p> <p>5 WHAT HE DID IN THAT CASE MAKES WHAT HE DID HERE LOOK LIKE</p> <p>6 CHILD'S PLAY.</p> <p>7 HE IS WAY, WAY TOO HIGH. IF ONLY HE HAD DONE A</p> <p>8 REALITY CHECK</p> <p>9 WHAT DOES MR. MEYER (SIC) SAY? MR. MEYER (SIC)</p> <p>10 SAYS:</p> <p>11 "I THINK IT'S IMPERATIVE IN THESE CASES THAT YOU</p> <p>12 SEE WHETHER THE ANSWERS YOU'RE COMING UP WITH</p> <p>13 MAKE SENSE WHEN YOU KNOW WHAT YOU KNOW</p> <p>14 DOWNSTREAM. THAT'S VERY MUCH THE CASE HERE.</p> <p>15 AND I THINK THAT MY LICENSE MAKES SENSE WHEN YOU</p> <p>16 CONSIDER WHAT THE ACTUAL USE WAS AND HOW</p> <p>17 SUCCESSFUL OR UNSUCCESSFUL THESE PROGRAMS</p> <p>18 ACTUALLY WERE."</p> <p>19 THAT'S THE BEAUTY OF A RUNNING ROYAL. BEAUTY OF A</p> <p>20 RUNNING ROYALTY IS YOU SET THE RATE, THE VALUE AT THE TIME, AND</p> <p>21 THEN YOU SEE HOW IT PLAYS OUT.</p> <p>22 NOW, ORACLE SAYS THAT THE WAY WE KNOW THIS VALUE ON</p> <p>23 THIS LUMP SUM IS SUPPOSED TO BE REALLY HIGH IS BECAUSE SAP TOOK</p> <p>24 THIS REALLY BIG RISK.</p> <p>25 WHAT IS WRONG WITH THAT ARGUMENT? IT IS A CIRCULAR</p>	<p style="text-align: right;">Page 2140</p> <p>1 WHEN THEY ARE TRYING TO TALK ABOUT SAP'S</p> <p>2 EXPECTATIONS AND THEY'RE TRYING TO TURN ZIEMEN'S ASSUMPTIONS</p> <p>3 INTO EXPECTATIONS SO FIRM THAT WE WOULD WRITE A BILLION DOLLAR</p> <p>4 CHECK ON IT? THE ONE THAT GOT ME GOING WHEN THEY WERE QUIZZING</p> <p>5 MEYER AND ALSO JUST A COUPLE OF HOURS AGO, WAS THIS ONE, CHART</p> <p>6 169.</p> <p>7 (SLIDE DISPLAYED ON SCREEN.)</p> <p>8 THE ZIEMEN DOCUMENT, EVERYBODY KNOWS BY NOW IS</p> <p>9 DECEMBER 23, 2004. AND THAT'S THE DOCUMENT WITH THE 3,000</p> <p>10 ASSUMED CUSTOMERS. EVERYBODY ALSO KNOWS THAT THE BUSINESS CASE</p> <p>11 IS JANUARY 7, AND THAT'S THE ONE THAT HAS 300 CUSTOMERS.</p> <p>12 SO THEY SHOW, JUST NOW, WHEN HE WAS GIVING YOU HIS</p> <p>13 TALK, HE SAID, AND MR. AGASSI SAID, THEY COULD DO EVEN BETTER</p> <p>14 THAN ZIEMEN'S NUMBERS. BUT I WILL SHOW THIS TO YOU AGAIN.</p> <p>15 THE QUESTION TO AGASSI IS:</p> <p>16 "DID YOU HAVE ANY REASON TO QUESTION THE</p> <p>17 PROJECTIONS EITHER IN THE ONE PRESENTED IN THE</p> <p>18 JANUARY 7, 2000 (SIC) BUSINESS PLAN OR," AND</p> <p>19 THEN THEY STUCK IN 50 PERCENT CUSTOMER GOAL,</p> <p>20 THAT IS NOT IN THE TESTIMONY, "OR SUBSEQUENTLY?"</p> <p>21 "I THOUGHT WE COULD, WE COULD DO BETTER."</p> <p>22 HE'S SAYING WE COULD DO BETTER THAN THE JANUARY 7,</p> <p>23 2005 PLAN FOR 300 CUSTOMERS, WHICH WAS BEFORE IT. HE'S NOT</p> <p>24 SAYING WE COULD DO BETTER THAN THE 3,000 THAT WAS IN ZIEMEN'S</p> <p>25 DOCUMENT.</p>
<p style="text-align: right;">Page 2139</p> <p>1 ARGUMENT. THEY ARE SAYING AND I HAVE GOT THEIR CHART HERE.</p> <p>2 HERE IS MY FAVORITE CHART. THIS IS 72.</p> <p>3 (SLIDE DISPLAYED ON SCREEN.)</p> <p>4 THEY SAY SAP CHOSE TO TAKE THE RISK BECAUSE IT KNEW</p> <p>5 THAT IT WOULD COST BILLIONS OF DOLLARS TO BUY A LICENSE. SO WE</p> <p>6 TOOK THIS ENORMOUS RISK BECAUSE IT WAS GOING TO COST US</p> <p>7 BILLIONS OF DOLLARS TO BUY A LICENSE.</p> <p>8 WHERE DOES THAT COME FROM? HOW ABOUT YOU PUT IN</p> <p>9 THERE 40 MILLION, WHICH IS CLARKE'S NUMBER. THIS IS CIRCULAR.</p> <p>10 THEY SAY IT'S AN ENORMOUS RISK BECAUSE THEY SAY IT'S A HIGH</p> <p>11 NUMBER. IT'S SELF-FULFILLING. THEY JUST STICK BILLIONS OF</p> <p>12 DOLLARS IN THERE AS IF THAT MAKES IT LOOK LIKE WE TOOK THIS</p> <p>13 ENORMOUS RISK.</p> <p>14 I AM NOT PROUD OF THIS AND SAP SHOULDN'T BE PROUD OF</p> <p>15 THIS. YOU SAW THAT EARLY DOCUMENT WHERE THEY SAID WE ARE GOING</p> <p>16 TO USE TOMORROWNOW AS A LIABILITY SHIELD. THEY'LL STAY</p> <p>17 INCORPORATED IN TEXAS AND THEY WILL HAVE THE LIABILITY. BAD</p> <p>18 IDEA. WE ARE NOT STANDING BEHIND THAT. SAP IS HERE TO PAY THE</p> <p>19 DAMAGES AWARDED AGAINST TOMORROWNOW, BUT THAT TELLS YOU</p> <p>20 SOMETHING ABOUT WHAT THEY THOUGHT THE RISK WAS AT THE TIME.</p> <p>21 AGAIN, BAD IDEA. THAT WAS NOT A GOOD WAY TO DO IT,</p> <p>22 BUT IT SORT OF PROVIDES A LITTLE OFFSET TO THEIR ARGUMENT THAT,</p> <p>23 WELL, THERE WAS THIS ENORMOUS RISK BECAUSE THERE WAS GOING TO</p> <p>24 BE THIS HUGE JUDGMENT.</p> <p>25 IF YOU WILL FORGIVE ME, I WANT TO GO BACK ONE STEP.</p>	<p style="text-align: right;">Page 2141</p> <p>1 OKAY. I AM COMING NOW TO THE RUNNING ROYALTY. IF</p> <p>2 THE HYPOTHETICAL LICENSE APPROACH WERE GOING TO WORK AT ALL, IT</p> <p>3 WOULD ONLY WORK ON A RUNNING ROYALTY BASIS. WHY IS THAT?</p> <p>4 BECAUSE THAT'S THE ONLY ONE THAT SHARES THE RISK. IT DOESN'T</p> <p>5 GIVE ORACLE EVERYTHING THEY WANT. IT DOESN'T GIVE TOMORROWNOW</p> <p>6 EVERYTHING IT WANTS, BUT IT SHARES THE RISK.</p> <p>7 UNLIKE A LUMP SUM WHICH PUTS THE RISK ON ONE PARTY</p> <p>8 IF THEY ARE TOO HIGH OR TOO LOW, THIS ONE YOU SET THE RATE AND</p> <p>9 THEN YOU SEE HOW IT PLAYS OUT.</p> <p>10 NOW, THEY SAY THEY DON'T LIKE THE RUNNING ROYALTY</p> <p>11 BECAUSE THEY WOULD LOSE MONEY. THEY WOULDN'T MAKE AS MUCH</p> <p>12 MONEY ON THE RUNNING ROYALTY AS IF THEY HAD KEPT THE CUSTOMER.</p> <p>13 BUT WHAT THE MISTAKE THEY MADE IS THEY ARE</p> <p>14 ASSUMING -- THEY MADE TWO MISTAKES. ONE IS THEY MISUNDERSTAND</p> <p>15 WHAT MR. CLARKE TESTIFIED VERY CLEARLY. HE IS GIVING THEM</p> <p>16 50 PERCENT OF ALL OF TOMORROWNOW'S REVENUES. NOT THE PROFIT</p> <p>17 BECAUSE THEY DIDN'T MAKE PROFIT. HE IS BEING GENEROUS IN</p> <p>18 GIVING THEM 50 PERCENT OF ALL OF TOMORROWNOW'S REVENUES. HE IS</p> <p>19 NOT JUST GIVING HIM -- GIVING THEM THE 50 PERCENT ON CUSTOMERS</p> <p>20 THAT WOULDN'T HAVE LEFT ORACLE ANYWAY.</p> <p>21 SO, WE HAVE ALL AGREED THAT OUT OF THE 358</p> <p>22 TOMORROWNOW CUSTOMERS, THERE ARE SOME CUSTOMERS IN THERE THAT</p> <p>23 WOULD HAVE LEFT ORACLE ANYWAY. SO THEY WERE GOING TO LOSE THE</p> <p>24 PROFIT ON THEM ANYWAY.</p> <p>25 MR. MEYER AND MR. CLARKE DISAGREE ON HOW MANY OF</p>

<p style="text-align: right;">Page 2162</p> <p>1 CATEGORIES THAT HE TALKED ABOUT ON THE STAND.</p> <p>2 (SLIDE DISPLAYED ON SCREEN.)</p> <p>3 WE WALKED THROUGH THESE ON THE STAND. THESE ARE THE</p> <p>4 COMPANIES AND THE VARIOUS CATEGORIES.</p> <p>5 SPECIFIC FUNCTIONALITY IS ONE I WANT TO PAUSE ON.</p> <p>6 THIS IS WHERE ORACLE OR PEOPLESOFT PROMISED TO DEVELOP SOME</p> <p>7 SOFTWARE SPECIFIC FOR AN INDUSTRY AND THEN ORACLE CHANGED</p> <p>8 PEOPLESOFT'S MIND OR J.D. EDWARDS' MIND AND DIDN'T ACTUALLY DO</p> <p>9 IT. THAT'S WHY THE CUSTOMER LEFT.</p> <p>10 THEY CAN'T BLAME US FOR THAT. THEY CAN'T SAY WE</p> <p>11 NEED TO PAY THEM FOR CUSTOMERS WHO LEFT THEM BECAUSE THEY</p> <p>12 DIDN'T DEVELOP THE SOFTWARE.</p> <p>13 OF ALL THE CUSTOMERS THAT MR. CLARKE EXCLUDED, HE</p> <p>14 WAS QUESTIONED ONLY ON FOUR. AGAIN, MEYER NEVER CAME BACK AND</p> <p>15 DISAGREED WITH ANY OF THIS. AS FAR AS MEYER GOES, THIS IS</p> <p>16 UNREFUTED.</p> <p>17 IF YOU CONSIDER CROSS-EXAMINATION REFUTING AN EXPERT</p> <p>18 STUDY, THERE WERE ONLY FOUR. ABITIBI CLARKE EXCLUDE BECAUSE</p> <p>19 SAP PROVIDED SPECIFIC PULP AND PAPER FUNCTION THAT J.D. EDWARDS</p> <p>20 PROMISED AND ORACLE DIDN'T DELIVER.</p> <p>21 HE EXCLUDED THE NEXT ONE BECAUSE THEY WERE</p> <p>22 STANDARDIZING THEIR SOFTWARE.</p> <p>23 HE EXCLUDED NATIONAL FOODS BECAUSE THEY WANTED A</p> <p>24 SPECIFIC CHOICE OF SOFTWARE.</p> <p>25 AND ON SARA LEE, WHICH YOU HEARD A LOT ABOUT ON</p>	<p style="text-align: right;">Page 2164</p> <p>1 "50 PERCENT."</p> <p>2 "WHAT TIME PERIOD DID HE USE?"</p> <p>3 "THE SAME AS ME, THE END OF 2008."</p> <p>4 THAT IS UNDISPUTED. THEY DIDN'T CALL MR. MEYER</p> <p>5 BACK.</p> <p>6 AND SO WHEN THEY GET UP HERE AND SAY IT SHOULD BE</p> <p>7 SOME NUMBER OTHER THAN 50 PERCENT, THEY HAVE A PROBLEM BECAUSE</p> <p>8 THEIR OWN EXPERT USED 50 PERCENT AND HE USED THE SAME TIME</p> <p>9 PERIOD.</p> <p>10 NOW, THEY ALSO SAID THAT MR. MEYER SAID WELL, HIS</p> <p>11 INFRINGERS' PROFIT NUMBER WOULDN'T DO IT. IT WOULDN'T BE</p> <p>12 ENOUGH. BUT HERE'S WHAT HE SAID. THIS IS BASED ON USING 63</p> <p>13 CUSTOMERS, SO HE'S GOT 288 MILLION.</p> <p>14 YOU REMEMBER HE WOULDN'T AGREE WITH THIS WHEN HE WAS</p> <p>15 ON THE STAND, AND THEN I IMPEACHED HIM BY READING FROM HIS</p> <p>16 DEPOSITION. IMPEACHING MEANING SHOWING THAT HE TOLD SOMETHING</p> <p>17 DIFFERENT BEFORE. HERE IS FROM HIS DEPOSITION.</p> <p>18 "THE 288 MILLION OF INFRINGERS' PROFITS THAT YOU</p> <p>19 CALCULATED, IS IT YOUR POSITION THAT BUT FOR THE</p> <p>20 ACTIVITIES OF TOMORROWNOW, SAP WOULD NOT HAVE</p> <p>21 RECEIVED ANY OF THOSE PROFITS?"</p> <p>22 AND HIS ANSWER: "IT IS MY POSITION THAT THE</p> <p>23 288 MILLION IS A CALCULATION OF BENEFITS THAT</p> <p>24 SAP RECEIVED FROM THE ALLEGED INFRINGEMENT. AND</p> <p>25 FROM MY PERSPECTIVE, I HAVE LOOKED AT THOSE</p>
<p style="text-align: right;">Page 2163</p> <p>1 CROSS-EXAMINATION, THERE'S NO POINT BECAUSE EVEN MR. MEYER</p> <p>2 AGREED THAT SARA LEE SHOULD BE EXCLUDED BECAUSE THEY LEFT</p> <p>3 ORACLE FOR REASONS UNRELATED TO TOMORROWNOW.</p> <p>4 (SLIDE DISPLAYED ON SCREEN.)</p> <p>5 SO, THIS IS THE WAY THAT MR. CLARKE CALCULATED THIS.</p> <p>6 IT WAS THE SAP REVENUES AFTER THE TOMORROWNOW START DATE LESS</p> <p>7 ONGOING REVENUE. ONGOING REVENUE WAS THE REVENUE THAT HAD BEEN</p> <p>8 PRE-COMMITTED BEFORE TOMORROWNOW. SO THERE'S NO WAY YOU CAN</p> <p>9 CHARGE US FOR THAT. AND MR. MEYER AGREES WITH THAT. SO THEY</p> <p>10 AGREE ON THAT STARTING NUMBER.</p> <p>11 AND THEN THE BIG DEDUCTION IS FOR ALL OF THOSE</p> <p>12 CUSTOMERS WHO WOULD HAVE LEFT ANYWAY.</p> <p>13 THE SUBTOTAL. AND THEN ON THE PROFITS, THE</p> <p>14 7.6 MILLION OUT OF THE 13 MILLION, THAT'S 50 PERCENT. AND</p> <p>15 THAT'S A NUMBER THAT MR. MEYER AGREED WITH. HE'S -- MR. MEYER</p> <p>16 ALSO AGREED WITH THE TIME PERIOD.</p> <p>17 AND HERE'S TO SHOW THAT SAP AND ORACLE AGREE THAT</p> <p>18 THE PROFIT MARGIN THAT SHOULD BE USED FOR THIS CALCULATION</p> <p>19 SHOULD BE 50 PERCENT.</p> <p>20 MS. CATZ: EVEN MR. MEYER AGREES THAT WOULDN'T</p> <p>21 BE ORACLE'S DAMAGE CLAIM; HE'D ONLY GIVE YOU</p> <p>22 50 PERCENT OF THAT, CORRECT?</p> <p>23 YEAH, I WASN'T DOING THE DAMAGES CALCULATION.</p> <p>24 MR. CLARKE: "WHAT FIGURE DID MR. MEYER USE IN</p> <p>25 HIS SIMILAR CALCULATION?"</p>	<p style="text-align: right;">Page 2165</p> <p>1 CUSTOMERS AND DETERMINED THAT THE 288 MILLION IS</p> <p>2 A REASONABLE CALCULATION OF THAT VALUE," MEANING</p> <p>3 BENEFITS THAT SAP RECEIVED FROM THE ALLEGED</p> <p>4 INFRINGEMENT.</p> <p>5 "I STAND BY THAT TESTIMONY. I STAND BY THAT.</p> <p>6 THAT'S EXACTLY WHAT I SAID."</p> <p>7 NOT QUITE, BECAUSE IN THE OPENING STATEMENT I</p> <p>8 REFERRED TO THREE CUSTOMERS WHERE IT WAS JUST OBVIOUS THEY LEFT</p> <p>9 SAP -- THEY LEFT ORACLE FOR SAP FOR REASONS UNRELATED. BASF,</p> <p>10 THEIR PARENT TOLD THEM TO, AMGEN, THEY LEFT, AND THERE WAS ONE</p> <p>11 OTHER. HE TOOK THOSE OUT AND HE AGREED THAT HIS NUMBER 288</p> <p>12 DROPPED DOWN TO 236.</p> <p>13 (SLIDE DISPLAYED ON SCREEN.)</p> <p>14 SO THIS IS THE COMPARISON OF THE CALCULATION BETWEEN</p> <p>15 THE TWO EXPERTS.</p> <p>16 ON LOST PROFITS, MEYER USES 253 CUSTOMERS; CLARKE</p> <p>17 USES 206. AND FOR TOMORROWNOW TIME PERIOD, MEYER'S NUMBER IS</p> <p>18 36. IF HE RUNS THAT OUT TO 2015, IT'S A BIGGER NUMBER. BUT</p> <p>19 THE 36 COMPARES TO CLARKE'S 19.3.</p> <p>20 ON INFRINGERS' PROFITS, PROFITS SAP MADE ON SOFTWARE</p> <p>21 SALES. MEYER USES 63 CUSTOMERS AND COMES TO 236; CLARKE USES</p> <p>22 FOUR AND COMES TO 8.7. AND THIS IS A BIG DIFFERENCE. FOUR TO</p> <p>23 63. BUT BEAR IN MIND, WE ARE TALKING ABOUT WHY CUSTOMERS WOULD</p> <p>24 SWITCH FROM ORACLE TO SAP FOR SOFTWARE, AND WOULD IT HAVE</p> <p>25 ANYTHING TO DO WITH TOMORROWNOW.</p>

<p style="text-align: right;">Page 2166</p> <p>1 AND AS WE HAVE SEEN IN ALL THESE NUMBERS, THERE'S NO</p> <p>2 REASON TO THINK THAT ANY CUSTOMER SWITCHED FROM ORACLE TO SAP</p> <p>3 FOR SOFTWARE BECAUSE OF THE LITTLE SAVINGS AT TOMORROWNOW. SO</p> <p>4 MEYER'S TOTAL WOULD BE 272 FOR THE SAME TIME PERIOD; CLARK'S</p> <p>5 TOTAL IS 28 MILLION.</p> <p>6 THEY HAVE TALKED ABOUT THE GOAL OF DISRUPTING</p> <p>7 ORACLE. THEY HAVE PUT ON NO EVIDENCE THAT THERE WAS ANY HARM</p> <p>8 TO THEM FROM DISRUPTION.</p> <p>9 THEY TALKED ABOUT, WELL, THEY HAVE GOT \$4 BILLION IN</p> <p>10 R&D THAT THEY SPEND EVERY YEAR. THEY HAVE NOT SAID ANYTHING</p> <p>11 ABOUT HOW LOSING FOUR CUSTOMERS OR \$19 MILLION HAD ANY EFFECT</p> <p>12 WHATSOEVER ON THEIR \$4 BILLION RESEARCH AND DEVELOPMENT BUDGET.</p> <p>13 AGAIN, IT'S HIT AND RUN. THEY SAY IT, BUT THEY DON'T TRY AND</p> <p>14 PROVE IT.</p> <p>15 (COUNSEL AT EASEL.)</p> <p>16 ANDREW NELSON. LET ME JUST TAKE ONE MINUTE ON</p> <p>17 ANDREW NELSON AND HIS \$1 AND \$18 IN CASE THAT COMES BACK ON</p> <p>18 REBUTTAL.</p> <p>19 THEY HAVE A CHANCE TO TALK TO YOU AGAIN. I DON'T</p> <p>20 GET TO GET UP AND GIVE AN ANSWER. I AM PRETTY SURE I WOULD</p> <p>21 HAVE AN ANSWER. AND I ASK YOU TO THINK WHAT THAT ANSWER WOULD</p> <p>22 BE AND EVALUATE THAT.</p> <p>23 ALL ANDREW NELSON DID, I WILL JUST HAVE TO HOLD IT,</p> <p>24 ALL ANDREW NELSON DID WAS TO SAY THAT IF ORACLE CHARGES \$2 FOR</p> <p>25 SUPPORT, AND TOMORROWNOW CHARGES \$1 FOR SUPPORT, AND IF YOU RUN</p>	<p style="text-align: right;">Page 2168</p> <p>1 STILL END UP WITH AN ASSUMPTION.</p> <p>2 MY CROSS-EXAMINATION OF MEYER FOCUSED ON THE</p> <p>3 IMPORTANT ISSUES; THE USE OF THE BOOK OF WISDOM, HIS USE OF</p> <p>4 RUNNING ROYALTIES IN OTHER CASES, AND SO FORTH.</p> <p>5 THE CROSS-EXAMINATION OF CLARKE DIDN'T. THERE WAS A</p> <p>6 LOT OF TALK ABOUT CEDARCRESTONE AND WHETHER THEY WERE IN</p> <p>7 BUSINESS IN 2005. EVEN IF CEDARCRESTONE WASN'T IN BUSINESS IN</p> <p>8 2005, ON THAT CHART IT SHOWED PLENTY OF OTHERS WHO WERE.</p> <p>9 WHAT DID IT MATTER ABOUT CEDARCRESTONE? AS IT</p> <p>10 TURNED OUT, THE DOCUMENT SHOWED CEDARCRESTONE WAS IN BUSINESS</p> <p>11 FOR UP TO FIVE YEARS BEFORE 2008. YOU REMEMBER THE</p> <p>12 CROSS-EXAMINATION ON THAT.</p> <p>13 YOU WILL ALSO REMEMBER WHEN HE WAS QUESTIONED ABOUT</p> <p>14 SUN DOCUMENTS AND WHERE HE GOT THE INFORMATION. AND THE</p> <p>15 QUESTION WAS, WELL, IT WOULD BE WRONG, WOULDN'T IT, IT WOULD BE</p> <p>16 WRONG, WOULDN'T IT, IF YOU DIDN'T HAVE THAT IN YOUR BINDER?</p> <p>17 I AM SITTING THERE THINKING WELL NEXT THING HE'S</p> <p>18 GOING TO DO IS PULL OUT THE BINDER. HE DIDN'T. THAT WAS JUST</p> <p>19 INNUENDO. IT WAS AN INSINUATION THAT THERE'S SOMETHING WRONG</p> <p>20 WITH THE WITNESS' TESTIMONY. AND IT'S NITPICKING ON CUSTOMERS</p> <p>21 LIKE SARA LEE THAT BOTH SIDES HAVE EXCLUDED.</p> <p>22 THE CONCLUSION ON THE DAMAGE SUMMARY ARE THESE</p> <p>23 NUMBERS.</p> <p>24 IF WE CAN SWITCH TO THE ELMO.</p> <p>25 (DOCUMENT DISPLAYED ON ELMO.)</p>
<p style="text-align: right;">Page 2167</p> <p>1 THAT OUT NINE YEARS, THAT TURNS OUT TO BE \$18.</p> <p>2 AND SO WHAT HE SAYS, YOU CAN EVALUATE WHETHER THIS</p> <p>3 MATH MAKES ANY SENSE OR WHETHER SAP WOULD EVER RELY ON THIS.</p> <p>4 WHAT HE SAYS, IF WE GET A CUSTOMER AND GET \$1, THAT'S WORTH \$18</p> <p>5 TO ORACLE.</p> <p>6 NOT QUITE BECAUSE YOU REALLY HAVE TO DO \$1 EVERY</p> <p>7 YEAR, SO IT COMES OUT TWO TO ONE. FOR EVERY DOLLAR THAT WE</p> <p>8 GET, IT COST ORACLE IN SUPPORT \$2. SO THAT CALCULATION THAT</p> <p>9 THEY USE ONE OUT OF 18 JUST DOESN'T HAVE ANYTHING TO DO WITH</p> <p>10 THIS, AND IT'S CERTAINLY NO WAY TO CALCULATE DAMAGES.</p> <p>11 OKAY. I AM ALMOST DONE. WHY VALUE CLARKE'S</p> <p>12 APPROACH OVER MEYER'S? CLARKE STUDIED THE CUSTOMERS ONE BY</p> <p>13 ONE. MEYER DIDN'T.</p> <p>14 DON'T TRUST SOMEBODY WHO DOESN'T BELIEVE IN REALITY</p> <p>15 CHECKS.</p> <p>16 DON'T TRUST SOMEBODY WHO DOESN'T LET YOU LOOK UNDER</p> <p>17 THE HOOD.</p> <p>18 DON'T TRUST SOMEBODY WHO USES A FOUR-YEAR GAP AND</p> <p>19 THEN DENIES IT.</p> <p>20 DON'T TRUST SOMEBODY WHEN HE'S PUT IN A REALLY TOUGH</p> <p>21 POSITION IN HIS CLIENT TO COME UP WITH A BIGGER NUMBER THAN</p> <p>22 THERE'S ANY BASIS IN REALITY FOR.</p> <p>23 DON'T TRUST SOMEBODY LIKE IN THE BOEING CASE WHERE</p> <p>24 THE COURT CRITICIZED HIM FOR STARTING WITH A GUESS, STARTING</p> <p>25 WITH AN ASSUMPTION AND THEN ADDING PLUS OR MINUS TO IT. YOU</p>	<p style="text-align: right;">Page 2169</p> <p>1 THIS IS GOING TO BE THE VERDICT FORM THAT THE COURT</p> <p>2 GIVES YOU.</p> <p>3 AND THE FIRST QUESTION WILL BE ACTUAL DAMAGES FOR</p> <p>4 COPYRIGHT INFRINGEMENT. AND IT SAYS:</p> <p>5 WHAT IS THE DOLLAR AMOUNT THAT ORACLE IS ENTITLED TO</p> <p>6 FROM DEFENDANTS TO COMPENSATE ORACLE FOR ITS ACTUAL DAMAGES</p> <p>7 UNDER THE COPYRIGHT INFRINGEMENT CLAIM IN THE FORM OF" AND</p> <p>8 HERE'S WHERE YOU HAVE YOUR CHOICE. EITHER A FAIR MARKET VALUE</p> <p>9 LICENSE FOR COPYRIGHT INFRINGEMENT OR LOST PROFITS?</p> <p>10 AND SO ONE WAY TO FILL THIS OUT, AND I DON'T MEAN TO</p> <p>11 BE PRESUMPTUOUS, I'M JUST SAYING WHERE OUR NUMBERS WOULD COME</p> <p>12 OUT. IT'S UP TO YOU TO DECIDE.</p> <p>13 ONE WAY TO FILL THIS OUT WOULD BE TO PUT IN CLARKE'S</p> <p>14 NUMBER FOR LOSS PROFITS, 19.3 MILLION.</p> <p>15 AND THEN IT SAYS: "IF YOU ASSIGNED ACTUAL DAMAGES</p> <p>16 IN THE FORM OF FAIR MARKET VALUE, PLEASE PROCEED TO THE END."</p> <p>17 SO THAT WOULD BE IT.</p> <p>18 "IF YOU ASSIGNED ACTUAL DAMAGES IN THE FORM OF LOST</p> <p>19 PROFITS," WHICH I HAVE, "PLEASE PROCEED TO THE NEXT." AND THE</p> <p>20 NEXT IS: INFRINGERS' PROFITS. THESE ARE THE SOFTWARE SALES.</p> <p>21 "WHAT IS THE DOLLAR AMOUNT THAT ORACLE IS ENTITLED</p> <p>22 TO FROM DEFENDANTS AS INFRINGERS' PROFITS FOR THE COPYRIGHT</p> <p>23 INFRINGEMENT?"</p> <p>24 AND HERE CLARKE'S NUMBER IS 8.7 MILLION. AND THAT</p> <p>25 INCLUDES, LET ME WRITE THIS WITH A SMALLER PEN, THAT INCLUDES</p>

<p style="text-align: right;">Page 2214</p> <p>1 CONTENTS AS NUMBERS 2 THROUGH 6 IN YOUR NOTEBOOK.</p> <p>2 IN THESE STIPULATIONS, DEFENDANTS HAVE ADMITTED THAT</p> <p>3 TOMORROWNOW IS DIRECTLY LIABLE TO ORACLE FOR ALL OF ORACLE'S</p> <p>4 CLAIMS FOR DIRECT COPYRIGHT INFRINGEMENT OF ALL 120 ORACLE,</p> <p>5 PEOPLESOFT, J.D. EDWARDS AND SIEBEL COPYRIGHTS THAT ARE LISTED</p> <p>6 IN ATTACHMENT A TO TRIAL STIPULATION NUMBER 3.</p> <p>7 TRIAL STIPULATION NUMBER 3 ALSO CONTAINS COUNTS OF</p> <p>8 THE MINIMUM NUMBERS OF INFRINGING COPIES AND DOWNLOADS MADE BY</p> <p>9 TOMORROWNOW. AND THE DEFENDANTS HAVE ALSO ADMITTED THAT SAP AG</p> <p>10 AND SAP AMERICA ARE CONTRIBUTORILY AND VICARIOUSLY LIABLE FOR</p> <p>11 ALL OF TOMORROWNOW'S COPYRIGHT INFRINGEMENT.</p> <p>12 YOU ARE, THEREFORE, TO TREAT ALL OF ORACLE'S</p> <p>13 COPYRIGHT INFRINGEMENT CLAIMS AS HAVING BEEN PROVED.</p> <p>14 NOW, SAP AG AND SAP AMERICA AGREE THEY ARE LIABLE</p> <p>15 FOR ALL OF TOMORROWNOW'S INFRINGEMENT BASED UPON PRINCIPLES OF</p> <p>16 VICARIOUS LIABILITY. AND BY AGREEING TO VICARIOUS LIABILITY,</p> <p>17 SAP AG AND SAP AMERICA AGREE THAT THEY BOTH RECEIVED A DIRECT</p> <p>18 FINANCIAL BENEFIT FROM THE INFRINGING ACTIVITY OF TOMORROWNOW</p> <p>19 AND THEY BOTH HAD THE RIGHT AND ABILITY TO SUPERVISE OR CONTROL</p> <p>20 THE INFRINGING ACTIVITY OF TOMORROWNOW.</p> <p>21 SAP AG AND SAP AMERICA ALSO AGREE THAT THEY ARE</p> <p>22 LIABLE FOR ALL OF TOMORROWNOW'S INFRINGEMENT BASED UPON</p> <p>23 PRINCIPLES OF CONTRIBUTORY INFRINGEMENT AND BY AGREEING TO</p> <p>24 CONTRIBUTORY INFRINGEMENT, SAP AG AND SAP AMERICA AGREED THAT</p> <p>25 THEY KNEW OR HAD REASON TO KNOW OF THE INFRINGING ACTIVITY OF</p>	<p style="text-align: right;">Page 2216</p> <p>1 WORK CAUSED BY THE INFRINGEMENT.</p> <p>2 THE REDUCTION OF THE FAIR MARKET VALUE OF THE</p> <p>3 COPYRIGHTED WORK IS THE AMOUNT A WILLING BUYER WOULD HAVE BEEN</p> <p>4 REASONABLY REQUIRED TO PAY A WILLING SELLER AT THE TIME OF THE</p> <p>5 INFRINGEMENT FOR THE ACTUAL USE MADE BY DEFENDANTS OF ORACLE'S</p> <p>6 WORKS. THAT AMOUNT ALSO COULD BE REPRESENTED BY THE LOST</p> <p>7 LICENSE FEES THAT ORACLE WOULD HAVE RECEIVED FOR DEFENDANTS'</p> <p>8 UNAUTHORIZED USE OF ORACLE'S WORKS.</p> <p>9 IN DETERMINING THE FAIR MARKET VALUE OF THE RIGHTS</p> <p>10 INFRINGED, YOU MUST CONSIDER THE ENTIRE SCOPE OF INFRINGEMENT</p> <p>11 WHICH IS REFLECTED IN THE FIVE STIPULATIONS IN YOUR JURY</p> <p>12 NOTEBOOK.</p> <p>13 NOW, WHILE THERE IS NO PRECISE FORMULA FOR</p> <p>14 DETERMINING ACTUAL DAMAGES, YOUR AWARD MUST BE BASED ON</p> <p>15 EVIDENCE, NOT ON SPECULATION, GUESSWORK OR CONJECTURE.</p> <p>16 DETERMINING THE FAIR MARKET VALUE OF THE RIGHTS INFRINGED MAY</p> <p>17 INVOLVE SOME UNCERTAINTY AND ORACLE IS NOT REQUIRED TO</p> <p>18 ESTABLISH ITS ACTUAL DAMAGES WITH PRECISION.</p> <p>19 NOW, IF YOU DECIDE THAT THE BEST MEASURE OF ORACLE'S</p> <p>20 ACTUAL DAMAGES IS A FAIR MARKET VALUE LICENSE, YOU SHOULD</p> <p>21 CONSIDER ALL OF THE INFORMATION KNOWN TO AND ALL OF THE</p> <p>22 EXPECTATIONS OF THE PARTIES ON THE DATES OF THE HYPOTHETICAL</p> <p>23 NEGOTIATIONS, WHICH ARE THE DATES ON WHICH INFRINGEMENT BEGAN.</p> <p>24 YOU MUST DETERMINE WHAT WOULD HAVE BEEN THE RESULT</p> <p>25 OF THIS NEGOTIATION IN ORDER TO ESTABLISH THE FAIR MARKET</p>
<p style="text-align: right;">Page 2215</p> <p>1 TOMORROWNOW AND THEY INTENTIONALLY AND MATERIALLY CONTRIBUTED</p> <p>2 TO TOMORROWNOW'S INFRINGING ACTIVITY.</p> <p>3 NOW YOU MUST DETERMINE, YOU MUST DETERMINE ORACLE'S</p> <p>4 DAMAGES RESULTING FROM THE COPYRIGHT INFRINGEMENT AGREED TO BY</p> <p>5 THE DEFENDANTS. ORACLE IS ENTITLED TO RECOVER THE ACTUAL</p> <p>6 DAMAGES SUFFERED AS A RESULT OF THE INFRINGEMENT.</p> <p>7 AS THE MEASURE OF ITS ACTUAL DAMAGES, ORACLE, AS THE</p> <p>8 PLAINTIFF, HAS THE RIGHT TO SEEK TO RECOVER EITHER THE FAIR</p> <p>9 MARKET VALUE OF A LICENSE FOR THE RIGHTS INFRINGED OR ITS LOST</p> <p>10 PROFITS.</p> <p>11 IF YOU AWARD ORACLE ACTUAL DAMAGES BASED ON ITS LOST</p> <p>12 PROFITS, THEN ORACLE IS ALSO ENTITLED TO RECOVER ANY PROFITS</p> <p>13 THAT EACH DEFENDANT MADE THAT ARE ATTRIBUTABLE TO THE</p> <p>14 INFRINGEMENT.</p> <p>15 IF YOU AWARD ORACLE ACTUAL DAMAGES BASED ON THE FAIR</p> <p>16 MARKET VALUE OF A LICENSE FOR THE RIGHTS INFRINGED, THAT AWARD</p> <p>17 TAKES INTO ACCOUNT THE DEFENDANTS' PROFITS ATTRIBUTABLE TO</p> <p>18 THEIR INFRINGEMENT AND ORACLE IS NOT ENTITLED TO ANY ADDITIONAL</p> <p>19 AWARD.</p> <p>20 ORACLE MUST PROVE DAMAGES BY A PREPONDERANCE OF THE</p> <p>21 EVIDENCE.</p> <p>22 NOW, ORACLE IS ENTITLED TO RECOVER THE ACTUAL</p> <p>23 DAMAGES SUFFERED AS A RESULT OF THE INFRINGEMENT. ACTUAL</p> <p>24 DAMAGES MEANS THE AMOUNT OF MONEY ADEQUATE TO COMPENSATE ORACLE</p> <p>25 FOR THE REDUCTION OF THE FAIR MARKET VALUE OF THE COPYRIGHTED</p>	<p style="text-align: right;">Page 2217</p> <p>1 VALUE.</p> <p>2 THE FAIR VALUE MARKET VALUE IS AN OBJECTIVE MEASURE</p> <p>3 OF ORACLE'S DAMAGES THAT IS MEANT TO APPROXIMATE THE FAIR</p> <p>4 MARKET VALUE OF A LICENSE FOR ALL OF THE COPYRIGHTS DEFENDANTS'</p> <p>5 INFRINGED CALCULATED AT THE TIME THE INFRINGEMENT COMMENCED,</p> <p>6 WHICH THE PARTIES AGREE IS JANUARY 19TH, 2005 FOR THE</p> <p>7 PEOPLESOFT, J.D. EDWARDS AND THE DATABASE COPYRIGHTS, AND</p> <p>8 SEPTEMBER 29TH, 2006 FOR THE SIEBEL COPYRIGHTS.</p> <p>9 THE VALUE OF A HYPOTHETICAL LICENSE IS NOT</p> <p>10 NECESSARILY THE AMOUNT THE DEFENDANTS IN THIS CASE WOULD HAVE</p> <p>11 AGREED TO PAY OR THAT ORACLE WOULD HAVE ACTUALLY AGREED TO</p> <p>12 ACCEPT. YOU MAY CONSIDER EVIDENCE OF EVENTS AND FACTS THAT</p> <p>13 HAPPENED AFTER THE DATE OF THE HYPOTHETICAL NEGOTIATION ONLY TO</p> <p>14 THE EXTENT THAT IT PROVIDES INSIGHT INTO THE EXPECTATIONS OF</p> <p>15 THE PARTIES AT THE TIME THE INFRINGEMENT FIRST BEGAN OR INSIGHT</p> <p>16 INTO THE AMOUNT A WILLING BUYER WOULD HAVE BEEN REASONABLY</p> <p>17 REQUIRED TO PAY A WILLING SELLER AT THE TIME OF INFRINGEMENT.</p> <p>18 AND YOU MAY NOT LIMIT OR INCREASE THE FAIR MARKET VALUE OF THE</p> <p>19 RIGHTS INFRINGED BASED ON THE ACTUAL PROFITS DEFENDANTS MADE.</p> <p>20 IF YOU DECIDE THAT THE BEST MEASURE OF ORACLE'S</p> <p>21 DAMAGES IS LOST PROFITS, YOU MUST DETERMINE WHAT PROFITS ORACLE</p> <p>22 PROVES IT WOULD HAVE MADE WITHOUT THE INFRINGEMENT.</p> <p>23 LOST PROFITS ARE THE REVENUE ORACLE WOULD HAVE MADE</p> <p>24 WITHOUT THE INFRINGEMENT LESS ANY ADDITIONAL EXPENSES IT WOULD</p> <p>25 HAVE INCURRED IN MAKING THE SALES.</p>

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 22, 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 23, 2010