

Exhibit E

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

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DIRECT EXAMINATION

1

2

BY MR. MITTELSTAEDT:

3

Q. MR. CLARKE, GOOD MORNING. WHAT IS YOUR ROLE IN THIS CASE?

4

A. IT WAS TO CALCULATE THE DAMAGES THAT ORACLE HAD SUFFERED AS A RESULT OF COPYRIGHT INFRINGEMENT AND ALSO TO LOOK AT MR. MEYER'S ANALYSIS OF THAT SAME ISSUE AND COMMENT ON IT AS I SAW FIT.

8

Q. BEFORE WE GET INTO THAT, LET'S GET SOME BACKGROUND ON YOU. COULD YOU TELL THE JURY WHEN AND WHERE YOU WERE BORN?

10

A. I WAS BORN IN A SMALL TOWN CALLED WIGAN NEAR MANCHESTER IN ENGLAND. THE -- DID YOU JUST SAY WHEN, TOO?

12

Q. YES.

13

A. 1950.

14

Q. AND WOULD YOU TELL US ABOUT YOUR EDUCATION BRIEFLY, PLEASE.

15

A. I STARTED HIGH SCHOOL IN THAT -- IN THAT LITTLE TOWN IN 1961. WE START WHEN WE'RE 11 YEARS OLD IN ENGLAND IN HIGH SCHOOL. I GRADUATED FROM THERE IN '69 AND WENT TO MANCHESTER UNIVERSITY, AND AT THE SAME TIME I WAS AT MANCHESTER, I ALSO JOINED THE ROYAL AIR FORCE. SO STRAIGHT OUT OF HIGH SCHOOL, I JOINED THE ROYAL AIR FORCE, SO I WENT THE COLLEGE WHILE I WAS IN THE ROYAL AIR FORCE AS A PILOT.

22

Q. AND AFTER COLLEGE, WHAT DID YOU DO?

23

A. I THEN WENT TO THE EQUIVALENT OF THE U.S. AIR FORCE ACADEMY. IT'S CALLED THE ROYAL AIR FORCE COLLEGE CRANWELL LEARNED TO BE AN OFFICER IN THE ROYAL AIR FORCE.

25

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

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.

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.

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.

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

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

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

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?

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

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

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 --

5 (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.

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

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.

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

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

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.

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.

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.

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

1 **BY MR. MITTELSTAEDT:**

2 **Q.** WE ARE ALMOST DONE. WOULD YOU EXPLAIN TO US WHY YOU
3 EXCLUDED THIS CUSTOMER?

4 **A.** I WILL.

5 ABITIBI IS A PAPER, PULP AND PAPER COMPANY. THERE
6 WAS A PLAN FOR J.D. EDWARDS TO CREATE THAT FUNCTIONALITY, THE
7 SOFTWARE SPECIFIC TO PULP AND PAPER OPERATIONS. IT WAS
8 PROMISED, AS YOU CAN SEE, J.D. EDWARDS COMMITTED, BUT THEY
9 NEVER DID IT.

10 AND SO ABITIBI WAS CONCERNED THAT THEY WERE RUNNING
11 LONGER AND LONGER ON THIS NONSPECIFIC SOFTWARE, DIDN'T DEAL
12 WITH PULP AND PAPER OPERATIONS, AND THAT HE WAS LOOKING TO PULL
13 ALL OF THAT OUT AND GO WITH SAP. AGAIN, COULD NOT BE RELATED
14 TO TOMORROWNOW.

15 **Q.** OKAY.

16 SO BASED ON ALL THIS WORK, ALL THE REVIEW OF THE
17 CUSTOMER INFORMATION, AND PLACING THE CUSTOMERS INTO VARIOUS
18 BUCKETS, EITHER EXCLUSION OR INCLUSION, YOU REACHED SOME
19 CONCLUSIONS ABOUT THE AMOUNT OF COMPENSATION SAP OWED TO -- SAP
20 AND TOMORROWNOW OWED TO ORACLE, RIGHT?

21 **A.** CORRECT.

22 **Q.** AND LET'S LOOK FINALLY AT TWO SLIDES, SLIDE 53 TO START
23 WITH.

24 (SLIDE DISPLAYED ON SCREEN.)

25 AS YOU DID FOR THE LOST SUPPORT PROFITS, IF YOU

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