

EXHIBIT A

Part 2

914

MEYER - DIRECT / MR. PICKETT

1 CUSTOMERS, THAT'S EVEN -- THAT'S A BIGGER IMPACT THAN ORACLE.
 2 THE LAST THING YOU WANT TO DO IS LICENSE YOUR COMPETITOR, AND
 3 THEN THE MORE SALES THEY MAKE, THEY PAY A ROYALTY BUT THEY ARE
 4 TAKING THE CUSTOMER AWAY. SO YOU ARE ACTUALLY DOING WORSE EVEN
 5 THOUGH YOU ARE GETTING A ROYALTY. BECAUSE A ROYALTY, A RUNNING
 6 ROYALTY IS A LOT LOWER THAN YOUR PROFITS WHEN IT'S ACTUALLY
 7 YOUR CUSTOMER. SO YOU WILL DO THE AGREEMENT AND YOU GET ROOTED
 8 AGAINST YOUR COMPETITOR. SO A DIRECT COMPETITOR, IT DOESN'T
 9 MAKE SENSE TO DO THESE KINDS OF RUNNING ROYALTY ARRANGEMENTS.
 10 AND THEN THIS ONE IS VERY INTERESTING. MS. CATZ
 11 MENTIONED THIS THIS MORNING. YOU PROBABLY HEARD IN THIS CASE
 12 THAT TOMORROWNOW WAS PROVIDING SERVICE AT BASICALLY HALF THE
 13 PRICE OF ORACLE FOR MAINTENANCE. SO SAY 10 PERCENT VERSUS
 14 22 PERCENT.
 15 SO, IF TOMORROWNOW HAS A LICENSE AND CAN USE THE
 16 MATERIALS, THEY CAN GO TO THE SAME CUSTOMER AS ORACLE AND SAY,
 17 WE WILL GIVE YOU THAT SAME SERVICE -- ACTUALLY SAID THEY HAVE
 18 COMPARABLE OR BETTER SERVICE FOR HALF PRICE. SO WHAT HAPPENS
 19 IS THAT -- TWO THINGS HAPPEN. YOU ARE GOING TO GET A ROYALTY,
 20 BUT THEY ARE ALSO GOING TO WIN THE CUSTOMER BECAUSE THEY ARE AT
 21 HALF PRICE WITH BASICALLY THE SAME MATERIALS, SOFTWARE, UPDATES
 22 AND BUG FIXES.
 23 SO YOU ARE GOING TO HAVE EVEN LESS SUCCESS IF YOU
 24 ARE COMPETING HEAD TO HEAD BUT YOUR COMPETITOR'S AT HALF PRICE
 25 BECAUSE IT DIDN'T PAY FOR THE DEVELOPMENT UP FRONT, IT'S JUST
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1 DIRECTORS AND SAY, BY THE WAY, WE GAVE SAP A LICENSE TO OUR
 2 VERY VALUABLE SOFTWARE SUPPORT BUT WE CAN'T TELL YOU WHAT THEY
 3 ARE GOING TO PAY US FOR IT, THEY ARE GOING TO COMPETE, BUT THEY
 4 ARE ALL QUESTION MARKS. WE MAY GET PAID A LITTLE OR A LOT, WE
 5 DON'T KNOW. YOU CAN'T HAVE THAT UNCERTAINTY WHEN YOU JUST PAID
 6 \$11 BILLION FOR PEOPLESOFT AND SIX FOR SIEBEL.
 7 AND SO, WHAT YOU HAVE TO HAVE WITH -- IN THESE
 8 CIRCUMSTANCES BECAUSE OF THOSE BIG INVESTMENTS, YOU NEED
 9 CERTAINTY. AND YOU NEED TO BE CERTAIN IN THE NEGOTIATION.
 10 OTHERWISE, YOU ARE GOING TO HAVE THIS UNKNOWN IN THE FUTURE AND
 11 IT WOULDN'T MAKE SENSE.
 12 Q. MR. MEYER, WE HAVE HEARD SOME EVIDENCE ABOUT, WELL, SAP
 13 TOOK IT, AND MAYBE DIDN'T DO AS WELL AS THEY EXPECTED, HOW DOES
 14 THAT IMPACT YOUR OPINION, WHETHER THEIR EXPECTATIONS WERE MET
 15 AFTER THE FACT?
 16 A. FROM MY PERSPECTIVE, IT DOESN'T IMPACT THE VALUE OF THE
 17 LICENSE AT ALL, THE FAIR MARKET VALUE OF THE LICENSE.
 18 I LOOK AT WHAT'S KNOWN AT THE TIME, THE PARTIES'
 19 EXPECTATIONS, WHAT WAS IMPORTANT TO THEM, WHAT THEY PLAN TO DO.
 20 AND IF IT TURNS OUT THAT FOR WHATEVER REASON SAP, IN THIS CASE,
 21 DECIDES TO CHANGE PLANS, GO PURSUE SOMETHING ELSE THAT'S BETTER
 22 FOR ITS SHAREHOLDERS, CHANGE ITS PRODUCT LINES, IT DOESN'T
 23 IMPACT THE NEGOTIATION.
 24 AND THEN A BIG ISSUE IS BY MARCH OF 2007, THERE'S A
 25 LAWSUIT. AND SO THERE, SAP AND TOMORROWNOW REALLY HAVE TO
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1 PAYING THE ROYALTY. SO ONCE, AGAIN, A REASON WHY NO RUNNING
 2 ROYALTY WOULD BE APPROPRIATE.
 3 Q. MR. MEYER, LET'S GO TO A SLIDE THAT SAP'S LAWYER USED IN
 4 HIS OPENING STATEMENT.
 5 (SLIDE DISPLAYED ON SCREEN.)
 6 THIS IS A SLIDE WE SAW TUESDAY, LAST TUESDAY, IN
 7 SAP'S STATEMENT.
 8 WHAT IS YOUR OPINION OF THIS PRESENTATION?
 9 A. WELL, FROM MY PERSPECTIVE, THIS CHART ACTUALLY PROVES MY
 10 POINT. IT IS EXACTLY WHY IT HAS TO BE UP FRONT.
 11 WHAT YOU HAVE ON THE BOTTOM HAND SIDE IS YOU HAVE A
 12 PAID UPFRONT LICENSE. OKAY. SO, YOU PAID UP FRONT AND THEN
 13 EACH PARTY CAN GO OFF AND COMPETE LEGALLY IN THE MARKETPLACE
 14 AND COMPETE APPROPRIATELY AND TAKE THE CUSTOMERS THAT THEY CAN
 15 WIN.
 16 AND WHEN ORACLE HAD JUST SPENT FOR PEOPLESOFT
 17 \$11 BILLION, IT'S IMPORTANT TO HAVE IT PAID UP FRONT BECAUSE
 18 THE RUNNING ROYALTY, WHAT YOU SEE -- SO ON THE UPFRONT PAYMENT,
 19 THERE'S CERTAINTY. ORACLE CAN GO TO ITS BOARD OF DIRECTORS AND
 20 SAY, WE WANT TO DO THIS LICENSE WITH SAP. THEY ARE GOING TO
 21 PAY AN UPFRONT AMOUNT. WE HAVE A PRICE, WE CAN GO PUT IT IN
 22 THE BANK, USE IT FOR DEVELOPMENT, SO WE CAN JUSTIFY GIVING THEM
 23 A ROYALTY. THEY PAID IT UP FRONT AND THEY'RE GETTING A PIECE
 24 OF OUR INVESTMENT IN PEOPLESOFT, \$11 BILLION BACK.
 25 IF THEY DO A RUNNING ROYALTY, GO TO THE BOARD OF
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1 CHANGE PLANS. AND I HAVE LOOKED AT SOME OF THAT INFORMATION AT
 2 THAT TIME, AND THEY DID CHANGE PLANS.
 3 SO THE POINT IS, YOU WANT TO LOOK AT WHAT'S PURE AT
 4 THE TIME OF THE HYPOTHETICAL AND NOT DEAL WITH THESE DOWNSTREAM
 5 CHANGES THAT ARE INDEPENDENT OF WHAT ORACLE GAVE IN THIS CASE
 6 OR WHAT SAP TOOK FROM ORACLE, WHICH WAS THE SOFTWARE.
 7 Q. STAYING ON SAP'S OPENING STATEMENT, THERE WAS A COMMENT BY
 8 THEIR ATTORNEY THAT THE EVIDENCE MIGHT SHOW THAT THERE MIGHT
 9 NOT BE AN ACTUAL AGREEMENT IN THE REAL WORLD, NOT THIS -- LET
 10 ME GO BACK.
 11 WE KNOW WE HAVE TO USE THE NEGOTIATION BECAUSE SAP
 12 DIDN'T APPROACH ORACLE FOR A LICENSE, RIGHT?
 13 A. THAT'S CORRECT.
 14 Q. NOW, WHAT IF WE WENT BACK AND THERE'S EVIDENCE SAP WILL
 15 SAY, WELL, THERE MIGHT NOT BE AN ACTUAL LICENSE IF WE HAD DONE
 16 THAT. HOW DOES THAT EFFECT YOUR OPINION?
 17 A. I HAVE BEEN DOING THESE ASSIGNMENTS FOR OVER TWO DECADES,
 18 AND IT'S TOTALLY NOT RELEVANT TO OUR ANALYSIS. WE GET TO
 19 ASSUME THAT THE PARTIES WOULD DO AN AGREEMENT. THEY WOULD DO A
 20 WILLING BUYER AND SELLER NEGOTIATION.
 21 AND FOR SOMEONE TO SAY THAT, WELL, THEY WOULD NEVER
 22 HAVE COME TO THAT AGREEMENT, I HAVE BEEN IN LOTS OF ASSIGNMENTS
 23 LIKE THAT AND I HAVE HAD TO WORK ON ASSIGNMENTS BETWEEN BIG
 24 COMPETITORS THAT RESPECT EACH OTHER, BUT DON'T LIKE EACH OTHER,
 25 AND I HAVE TO ASSUME THAT THEY WOULD SIT DOWN AND DO THE
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1 AGREEMENT SO THEY CAN PAY THE MONEY, AND THEN MOVE ON AND
 2 COMPETE LEGALLY.
 3 SO, THAT'S NOT RELEVANT TO THE NEGOTIATION AT ALL.
 4 WE ASSUME WILLING LICENSOR, WILLING LICENSEE. THE LICENSOR IS
 5 ORACLE AND THE LICENSEE IS SAP.
 6 Q. THAT'S KNOWN AS AN OBJECTIVE APPROACH?
 7 A. THAT'S CORRECT.
 8 Q. LET'S TURN TO THE FIRST OF THE LICENSES THAT SAP SHOULD
 9 HAVE NEGOTIATED. THE FIRST IS THE PEOPLESOFT.
 10 BASED ON THE -- BEFORE WE GET TO THAT SLIDE, BASED
 11 ON YOUR REVIEW, YOUR ANALYSIS, AND BASED ON THE FACTORS YOU
 12 HAVE BEEN ALLOWED TO CONSIDER IN THIS CASE, WHAT IS, IN YOUR
 13 OPINION, WAS THE VALUE OF THE PROPERTY THAT SAP TOOK FOR
 14 PEOPLESOFT AND, THEREFORE, THE VALUE OF THE LICENSE?
 15 A. WELL, FOR PEOPLESOFT, MY OPINION IS THAT THE LICENSE WOULD
 16 BE \$1.5 BILLION OR MORE. IT WOULD NOT BE LESS THAN
 17 \$1.5 BILLION FOR THE PEOPLESOFT SOFTWARE AND RELATED MATERIALS,
 18 AND THERE'S A LONG LIST OF THOSE.
 19 Q. ONE AT LEAST 1.5 BILLION?
 20 A. AT LEAST 1.5 BILLION.
 21 Q. YOU DID A LOT OF WORK TO COME UP WITH THAT, CALCULATE THAT
 22 NUMBER, DID YOU NOT?
 23 A. YES, I HAVE.
 24 Q. LET'S START SOME OF THAT WORK.
 25 FIRST OF ALL, WHAT WOULD A LICENSE FOR THE
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1 LIKE THEY JUST GOT A LICENSE NOT TO BE SUED, THEY ACTUALLY GOT
 2 REAL PROPERTY. THAT REAL PROPERTY WAS DOWNLOADED AND OBTAINED
 3 AND COPIED, AND IT WAS VERY VALUABLE PROPERTY WHEN IT WAS
 4 DOWNLOADED. LOTS OF TIME WAS SPENT. AS I MENTIONED ON THE
 5 BOTTOM THERE WITH MY DEPICTION, ORACLE SOFTWARE ENGINEERS AND
 6 DEVELOPERS DEVELOPING THOSE SOFTWARE MATERIALS.
 7 AND MR. ELLISON THIS MORNING TESTIFIED TO THE SIZE
 8 OF SOME OF THOSE EXPENDITURES ON IN-HOUSE DEVELOPMENT, BUT WHEN
 9 YOU THINK ABOUT THE PEOPLESOFT TRANSACTION OF \$11 BILLION, WHAT
 10 YOU ARE PAYING FOR IS ALL THOSE SOFTWARE MATERIALS THAT WERE
 11 DEVELOPED BY PEOPLESOFT THAT IS NOW PART OF YOUR COMPANY.
 12 SO THAT'S ALL -- YOU ACQUIRED ALL THAT. IT'S LIKE
 13 SPENDING YOUR OWN DEVELOPMENT MONEY, YOU HAPPENED TO DO IT IN A
 14 TRANSACTION.
 15 Q. SO, THE LICENSE WOULD COVER A RIGHT TO EVERYTHING THAT
 16 THEY TOOK WITHOUT A LICENSE?
 17 A. THAT'S RIGHT. ALL THE THINGS THAT THEY ACTUALLY TOOK THAT
 18 ARE NOW IN THE STIPULATIONS IS ALL NOW IN OUR SCOPE FOR OUR
 19 LICENSED NEGOTIATION.
 20 Q. THEY WOULD HAVE HAD A RIGHT TO USE IT UNDER THIS LICENSE
 21 RATHER THAN JUST TAKE IT?
 22 A. RIGHT. THEY WOULD HAVE A RIGHT NOW WITH THE LICENSE TO
 23 USE THIS IN THEIR BUSINESS STARTING IN RELEASE WITH PEOPLESOFT
 24 IN JANUARY 2005.
 25 Q. ALL RIGHT.
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1 PEOPLESOFT SOFTWARE BETWEEN SAP AND ORACLE, WHAT WOULD THAT
 2 LICENSE HAVE COVERED?
 3 A. WELL, I HAVE A CHART ON THIS, A SLIDE ON THIS.
 4 (SLIDE DISPLAYED ON SCREEN.)
 5 BUT REALLY IT WOULD COVER ALL THE PROPERTY THAT'S
 6 BEEN TAKEN AND ALL THE PROPERTY THAT'S IN THE STIPULATIONS OF
 7 LIABILITY.
 8 AND SO I HAVE LAID IT OUT FOR THE JURY HERE, WHAT I
 9 CALL THE SCOPE. BACK ON THE NEGOTIATION FACTORS CHARTS A WHILE
 10 BACK, SLIDES A WHILE BACK, ONE OF THE FACTORS WAS THE SCOPE.
 11 WHAT'S IN THIS LICENSE. SO WE KNOW THERE IS FOR
 12 PEOPLESOFT A HUNDRED AND FIVE COPYRIGHT REGISTRATIONS. THAT
 13 COVERS AT LEAST HUNDREDS OF THOUSANDS OF SOFTWARE FILES, AT
 14 LEAST THOUSANDS OF COPIES OF ENTIRE APPLICATIONS, AND AT LEAST
 15 HUNDREDS OF THOUSANDS OF DOWNLOADS. SO THAT'S ALL THE
 16 REGISTRATION THAT'S THE PROPERTY OF ORACLE THAT IS UNDER
 17 LICENSE NOW IN THIS NEGOTIATION.
 18 ON THE RIGHT-HAND SIDE, I TRIED TO MAKE IT MORE REAL
 19 LIFE TO WHAT I CALL THE PROPERTY OR THE COPYRIGHTED WORKS. SO
 20 THEY ARE GETTING A LIBRARY OF THINGS, SORT OF A TOOL BOX OF
 21 ITEMS. YOU ARE GETTING SOFTWARE OBJECTS, SOFTWARE UPDATES.
 22 MR. ELLISON MENTIONED THE, I THINK HE MENTIONED THE BUG FIXES,
 23 THE PATCHES, SOFTWARE APPLICATIONS, INSTRUCTIONAL MATERIALS AND
 24 CUSTOM SOLUTIONS.
 25 WHAT WAS IMPORTANT TO ME IN THIS CASE WAS IT WASN'T
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1 NOW, WHEN WOULD THIS LICENSE NEGOTIATION, WHEN WOULD
 2 IT HAVE OCCURRED? WHAT IS THE BEGINNING DATE OF THE LICENSE?
 3 A. THE NEGOTIATION OCCURS ON JANUARY 19TH, 2005. AND I PUT
 4 UP A CHART HERE TO SORT OF PLACE IN TIME WHY THAT IS AN
 5 IMPORTANT SORT OF MEETING OF A COUPLE DATES.
 6 (SLIDE DISPLAYED ON SCREEN.)
 7 BASICALLY, ON JANUARY 18, 2005, THERE IS A BIG
 8 ANNOUNCEMENT BY ORACLE WHERE THEY ARE DESCRIBING TO ALL THEIR
 9 CUSTOMERS AND THE FINANCIAL ANALYSTS AND THE PUBLIC HOW THEY
 10 ARE GOING TO COMBINE PEOPLESOFT AND J.D. EDWARDS WITH THEIR
 11 BUSINESS, AND THAT'S THE \$11.1 BILLION ACQUISITION.
 12 SO, YOU'VE HEARD A LOT ABOUT THAT TODAY FROM
 13 MS. CATZ AND MR. ELLISON, AND I BELIEVE MR. PHILLIPS LAST WEEK.
 14 SO THAT'S A LOT THAT HAPPENED.
 15 THEN JUST ONE DAY LATER, ONE DAY LATER, SAP HAS A
 16 SIMILAR CONFERENCE. THEY HAVE A CONFERENCE CALL, AND THEY TALK
 17 TO THEIR CUSTOMERS, THEY TALK TO THE FINANCIAL ANALYSTS AND
 18 THEY TALK TO THE PUBLIC, AND THEY ANNOUNCE A COMPETING BUSINESS
 19 CALLED SAFE PASSAGE. AND AS PART OF THAT ANNOUNCEMENT, THEY
 20 ANNOUNCE THE ACQUISITION OF TOMORROWNOW TO BE THEIR SERVICE
 21 PROVIDER TO PROVIDE SERVICE ON PEOPLESOFT AND J.D. SOFTWARE
 22 PRODUCTS.
 23 AND SO FROM MY PERSPECTIVE, AT THAT POINT, ON
 24 JANUARY 19TH, 2005, TO LAUNCH THAT NEW BUSINESS OFFERING FROM
 25 SAP, THEY WOULD NEED A LICENSE. SO THEY WOULD NEGOTIATE RIGHT
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1 **THERE AND TAKE THE LICENSE SO THAT WHAT THEY DID WAS NOT**
 2 **INFRINGING.**
 3 Q. SO, THE LICENSE WOULD BE NEGOTIATED AND START DAY ONE
 4 JANUARY 19, 2005?
 5 A. YES.
 6 Q. BECAUSE THAT'S WHEN THE INFRINGEMENT STARTED?
 7 A. THAT'S CORRECT.
 8 Q. AND THAT'S WHEN THEY WOULD HAVE NEEDED A LICENSE?
 9 A. THAT'S CORRECT.
 10 Q. ALL RIGHT. HOW LONG WOULD THIS LICENSE LAST?
 11 A. THE LICENSE WILL LAST UNTIL OCTOBER 2008. AND IT WOULD BE
 12 THAT PERIOD BECAUSE THAT'S THE PERIOD WHEN TOMORROWNOW CEASED
 13 OPERATIONS AND SHUT DOWN THEIR BUSINESS. SO, THE LICENSE GOES
 14 FROM JANUARY 19TH, 2005 OUT TO OCTOBER 2008 WHEN THE BUSINESS
 15 OF TOMORROWNOW WAS NO LONGER IN BUSINESS.
 16 Q. YOU MENTIONED EARLIER A NEED, SAP'S NEED FOR THESE
 17 COPYRIGHTED SOFTWARE AND SUPPORT MATERIALS. WHY ARE THOSE
 18 COPYRIGHTED SOFTWARE AND SUPPORT MATERIALS VALUABLE?
 19 A. WELL, THEY ARE REALLY VALUABLE BECAUSE THEY LEAD TO A VERY
 20 SUCCESSFUL BUSINESS.
 21 SO, IF YOU HAVE THE SOFTWARE AND THE SUPPORT
 22 MATERIALS FROM ORACLE ON PEOPLESFT, YOU CAN THEN HAVE
 23 MAINTENANCE PROVIDED ON PEOPLESFT AND J.D. PRODUCTS.
 24 AND SO THE SOFTWARE LEADS TO THE REVENUE YOU HEARD
 25 ABOUT THIS MORNING. AND SO MS. CATZ MENTIONED THERE WAS
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1 MR. SOMEBODY -- MR. BRANDT, THE ONE WHO SHOWED UP. OKAY.
 2 WHAT IS THAT EXECUTIVE BOARD?
 3 A. WELL, IT'S BASICALLY THE GROUP THAT MANAGES. IT'S THE
 4 MANAGEMENT TEAM OF SAP.
 5 SO, MR. APOTHEKER IS ON THAT GROUP, AND HE WAS HEAD
 6 OF SALES. MR. AGASSI WAS PART OF THAT GROUP AND HE WAS HEAD OF
 7 TECHNOLOGY PRODUCTS. MR. KAGERMANN, WHO YOU SAW LAST WEEK, WAS
 8 HEAD OF FINANCE. MR. OSWALD WAS HEAD OF SUPPORT SERVICES,
 9 WHICH WOULD FIT INTO WHAT WE ARE TALKING ABOUT HERE, PEOPLESFT
 10 SUPPORT.
 11 Q. YOU MISSPOKE. YOU SAID KAGERMANN WAS FINANCE. IT WAS --
 12 A. MR. BRANDT WAS. MR. KAGERMANN, I AM NOT CERTAIN --
 13 Q. CEO?
 14 A. HE WAS CEO AND THEN LATER ON I THINK MR. APOTHEKER BECAME
 15 CO-CEO. THEY ARE THE GROUP THAT BASICALLY RUNS THE COMPANY AS
 16 MANAGEMENT DAY-TO-DAY. AND THAT WOULD BE AKIN TO WHAT WE CALL
 17 OUR EXECUTIVE OFFICES IN A U.S. COMPANY.
 18 AND THEN THERE'S A SEPARATE OUTSIDE BOARD THEY HAVE.
 19 I THINK THEY CALL IT A SUPERVISORY BOARD. WE CALL THAT HERE IN
 20 U.S. COMPANIES THE BOARD OF DIRECTORS, WHICH IS MOSTLY OUTSIDE
 21 DIRECTORS, BUT THESE ARE THE INSIDE PEOPLE THAT RUN THE COMPANY
 22 AND MAKE DECISIONS AND APPROVE BUSINESS DECISIONS EVERY DAY.
 23 Q. SO WHEN DOCUMENTS ARE PRESENTED TO THAT BOARD AND THAT
 24 BOARD TESTIFIES THAT SAP NEEDED THIS PEOPLESFT SOFTWARE, WHAT
 25 DO YOU CONCLUDE?
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1 **\$1.2 BILLION OF ANNUAL MAINTENANCE REVENUE ON PEOPLESFT**
 2 **PRODUCTS. AND THAT IS EVERY YEAR. THAT IS CALLED RECURRING**
 3 **REVENUE.**
 4 SO, THE SOFTWARE IN THIS CASE, YOU DON'T HAVE THAT
 5 SOFTWARE, YOU CAN'T PROVIDE WHAT'S CALLED VENDOR LEVEL SERVICE.
 6 THAT'S WHERE YOU GET ALL THE UPDATES, THE BUG FIXES, AND ALL
 7 THE THINGS MR. ELLISON MENTIONED. SO YOU NEED THE SOFTWARE TO
 8 HAVE AN OPPORTUNITY TO COMPETE FOR THAT \$1.2 BILLION, AND
 9 THAT'S AN ANNUAL REVENUE ITEM.
 10 Q. HOW DO YOU KNOW THAT THE DEFENDANTS NEEDED ACCESS TO THIS
 11 SOFTWARE?
 12 A. THERE'S VERY MANY DOCUMENTS THAT I HAVE GONE THROUGH, I
 13 BELIEVE THE JURY HAS SEEN MANY OF THESE DOCUMENTS. THEY BEGAN
 14 BEING CREATED IN DECEMBER OF 2004 BY SAP'S EXECUTIVE BOARD.
 15 SO, MR. APOTHEKER, MR. AGASSI, MR. KAGERMANN AND
 16 MR. BRANDT, MR. OSWALD, THEY ALL WERE INVOLVED STARTING IN
 17 DECEMBER 2004 IN A WIDE VARIETY OF DOCUMENTS THAT LEAD UP TO
 18 THE LAUNCH OF SAFE PASSAGE ON JANUARY 19TH, 2005.
 19 SO OVER SIX WEEKS THAT GROUP COMES TOGETHER WITH ALL
 20 OF THEIR COLLEAGUES AND PLAN A BUSINESS. AND IN THOSE BUSINESS
 21 DOCUMENTS, IT'S VERY CLEAR THAT THE CORNERSTONE OF THIS
 22 PEOPLESFT MAINTENANCE WOULD BE PROVIDED BY TOMORROWNOW.
 23 Q. YOU MENTIONED -- LET ME JUST GO THROUGH THAT. YOU
 24 MENTIONED THE EXECUTIVE BOARD OF SAP AG. YOU MENTIONED
 25 MR. APOTHEKER, MR. BRANDT, MR. OSWALD AND MR. AGASSI AND
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1 A. FROM MY REVIEW, THAT IS THE MANAGEMENT OF THIS COMPANY.
 2 THAT'S THE HIGHEST IT GOES IN TERMS OF WHAT IT DOES EVERY
 3 SINGLE DAY WITH ITS EMPLOYEES AND ITS CUSTOMERS.
 4 Q. SO, GIVEN, GIVEN SAP'S NEED FOR THIS PEOPLESFT SOFTWARE,
 5 WHAT WERE THEIR OPTIONS IN JANUARY 2005?
 6 A. WELL, THEY HAD BASICALLY, I GUESS, REALLY TWO, MAYBE
 7 THREE. THE FIRST TWO WOULD BE YOU TAKE A LICENSE. YOU GO TO
 8 ORACLE AND SAY, WE WANT TO OFFER THIS SERVICE ON PEOPLESFT.
 9 WILL YOU SIT DOWN AND NEGOTIATE A LICENSE? THEY CAN DO THAT.
 10 THEY CAN TRY TO BUILD IT LIKE IN THEIR OWN COMPANY.
 11 MR. ELLISON DESCRIBED THAT THIS MORNING. BASICALLY HE THOUGHT
 12 THEY WERE GOING TO SPEND A LOT OF MONEY TO BUILD THOSE
 13 MATERIALS AND THAT WOULD COST A LOT. BE VERY EXPENSIVE TO
 14 BUILD IT IN-HOUSE. I BELIEVE THERE'S TESTIMONY IN THIS CASE
 15 WHERE SAP TOMORROWNOW DETERMINED THEY COULD NOT BUILD IT, AND I
 16 THINK THEIR EXPERTS HAVE TAKEN THAT POSITION.
 17 AND THEN THE THIRD OPTION IS YOU TAKE IT. OBVIOUSLY
 18 THAT IS NOT A LEGAL OPPOSITE.
 19 Q. BASICALLY THEIR CHOICE WAS TO BUY THROUGH A LICENSE OR
 20 ILLEGALLY TAKE?
 21 A. THAT'S HOW I SEE IT.
 22 Q. LET'S GO TO SOME TESTIMONY OF MR. BRANDT, THE ONLY BOARD
 23 MEMBER WHO HAS APPEARED HERE LAST FRIDAY. AND THROUGH THE
 24 MAGIC OF THESE WONDERFUL COURT REPORTERS, AND I'M HOPING YOU
 25 ARE GETTING ALL THIS DOWN, WE HAVE TRANSCRIPTS OF WHAT WAS SAID
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1 SO THERE'S NO DOUBT ABOUT IT.
 2 I WOULD LIKE TO, IF I COULD, PUT UP PAGE 699 OF THE
 3 TRANSCRIPT FROM FRIDAY'S TESTIMONY OF MR. BRANDT.
 4 (TRANSCRIPT DISPLAYED ON SCREEN.)
 5 AND I WANT TO START WITH A QUESTION HE WAS ASKED,
 6 MR. BOIES ASKED HIM.
 7 "QUESTION: IN JANUARY OF 2005," THIS IS TO THE
 8 BOARD MEMBER, MR. BRANDT, "IF YOU HAD KNOWN THAT
 9 THE RESULT OF WHAT YOU WERE GOING TO BE DOING
 10 WAS GOING TO BE TOMORROWNOW AND SAP BEING FOUND
 11 LIABLE FOR COPYRIGHT INFRINGEMENT, YOU WOULD
 12 HAVE WANTED TO AVOID THAT BY BUYING A LICENSE,
 13 CORRECT, SIR?
 14 ANSWER: YOU SAID THROUGH A LICENSE QUESTION?
 15 QUESTION: YES.
 16 "ANSWER: I UNDERSTOOD THE QUESTION. THE ANSWER
 17 IS NO BECAUSE IN THAT CASE WE EITHER WOULD HAVE
 18 CONSIDERED NOT TO BUY TOMORROWNOW OR WE WOULD
 19 HAVE INSISTED THAT TOMORROWNOW CHANGE THEIR
 20 OPERATING PROCEDURES IN ORDER NOT TO VIOLATE ANY
 21 COPYRIGHT INFRINGEMENT."
 22 DOES THIS CHANGE YOUR OPINION IN ANY WAY?
 23 A. NO, IT DOES NOT. I DON'T SEE THOSE AS BEING VIABLE
 24 OPTIONS FROM THE MANY RECORDS I REVIEWED IN THIS CASE.
 25 AND IN PARTICULAR, WHEN YOU SEE THE NUMBER OF
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1 VIOLATING THE COPYRIGHTS. AND THEY HAD NO WAY TO DO IT, SO
 2 THEY SHUT THE COMPANY DOWN.
 3 Q. IN YOUR OPINION, THEY NEEDED A LICENSE?
 4 A. THEY HAD TO TAKE A LICENSE.
 5 Q. ALL RIGHT.
 6 NOW, WAS THE TIMING OF THE DEFENDANTS' ACCESS TO THE
 7 PEOPLESFT SOFTWARE, WAS THAT IMPORTANT IN ANY WAY?
 8 A. YES, IT WAS VERY IMPORTANT. I THINK IT'S ONE OF THE MOST
 9 IMPORTANT ISSUES IN THIS CASE ON DAMAGES IS THE TIMING ISSUE.
 10 Q. WHY IS THAT?
 11 A. BECAUSE THERE IS SO -- THE TRANSACTION OF PEOPLESFT,
 12 WHICH YOU WILL SEE IN A MOMENT, BY ORACLE WAS BEGINNING TO
 13 CHANGE THE MARKET SHARES IN THE ENTERPRISE SOFTWARE MARKET SO
 14 SIGNIFICANTLY THAT SAP WANTED TO RESPOND AND WANTED TO TAKE
 15 ADVANTAGE OF PEOPLESFT BEING ACQUIRED BY ORACLE WHEN THESE
 16 CUSTOMERS HAD TO BE SORT OF TRANSITIONED INTO ORACLE. AND THEY
 17 WANTED DO SOMETHING RIGHT AT THAT POINT IN TIME, IN JANUARY OF
 18 2005, TO IMPACT ORACLE AND TAKE THOSE CUSTOMERS.
 19 Q. LET'S LOOK AT PLAINTIFFS' EXHIBIT 141, WHICH IS ON THE
 20 NEXT SLIDE. RELEVANT PORTION OF IT. WHAT DOES THIS DOCUMENT
 21 SHOW YOU?
 22 (EXHIBIT DISPLAYED ON SCREEN.)
 23 A. THIS IS A DOCUMENT THAT BASICALLY GOES RIGHT TO THE POINT
 24 I MENTIONED A MOMENT AGO. I THINK THE TITLE IS ALWAYS
 25 IMPORTANT ON THESE DOCUMENTS. IT IS CALLED "SAFE PASSAGE:
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1 RECORDS THAT RELATE TO HOW IMPORTANT IT WAS, IMPORTANT IT WAS
 2 ON JANUARY 19TH, 2005, THE DAY AFTER ORACLE ANNOUNCES
 3 PEOPLESFT TO MARKET, SAP NEEDED TO HAVE A SOLUTION. AND THAT
 4 WAS WHAT THIS WAS ALL ABOUT, THE TIMING.
 5 SO YOU BASICALLY HAD TO HAVE A PRODUCT RELEASE THEN.
 6 SO THEY NEEDED A LICENSE. AND THEY CAN'T GO BACK AND NOT BUY
 7 THE COMPANY.
 8 IN FACT, ALL THE RECORDS I HAVE SEEN IS THEY REALLY
 9 WANTED THIS COMPANY. THEY RESEARCHED THE COMPANY OF
 10 TOMORROWNOW BECAUSE THEY WANTED TO GET INTO THIS MARKET IN
 11 JANUARY OF 2005.
 12 AND THEN I THINK THE RECORD REFLECTS THAT,
 13 BASICALLY, THERE WAS NO CHANGE IN OPERATING PROCEDURES AT
 14 TOMORROWNOW. WHEN THEY WENT TO -- WHEN THE LAWSUIT WAS FILED,
 15 THEY TRIED TO CHANGE OPERATING PROCEDURES AND TOMORROWNOW WAS
 16 SHUT DOWN BECAUSE THEY COULDN'T OPERATE WITHOUT INFRINGING.
 17 Q. CAN SAP GO BACK IN TIME, GO BACK TO 2005 AND PRETEND IT
 18 DIDN'T BUY TOMORROWNOW?
 19 A. I HAVE BEEN IN MANY ASSIGNMENTS LIKE THIS WHERE THERE'S
 20 INFRINGEMENT, AND I HAVE NEVER SEEN THAT ALLOWED. IT'S JUST
 21 NOT AN OPTION.
 22 Q. COULD SAP GO BACK IN TIME FIVE YEARS AND SAY, OH, WELL, WE
 23 WOULDN'T HAVE VIOLATED, WE WOULDN'T HAVE INFRINGED?
 24 A. I JUST MENTIONED THAT. WHEN THE LAWSUIT WAS FILED,
 25 TOMORROWNOW DID LOOK TO SEE WHETHER THEY COULD OPERATE WITHOUT
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1 WINNING CUSTOMERS AND MARKETS FROM ORACLE, PEOPLESFT,
 2 J.D. EDWARDS JANUARY 16TH, 2005."
 3 I THINK THE KEY LANGUAGE HAS BEEN HIGHLIGHTED THERE.
 4 IT SAYS "KEY TACTICS." THIS IS NOW SAP'S MANAGEMENT.
 5 "ANNOUNCE A DRAMATIC MARKET CHANGING PEOPLESFT AND
 6 J.D. EDWARDS SUPPORT AND UPGRADE OFFERING IN JANUARY JUST AS
 7 ORACLE ANNOUNCES THEIR NEW STRATEGY."
 8 SO IT'S ALL ABOUT TIMING.
 9 Q. AND WHAT CONCLUSIONS DO YOU DRAW THAT -- WITH RESPECT TO
 10 THE DATE AND THE FACT THAT THE BOARD AND OTHER TOP MANAGEMENT
 11 WAS GETTING THIS STATEMENT OF STRATEGY?
 12 A. THERE WAS NO QUESTION IN MY MIND THAT THE EXECUTIVE BOARD
 13 OF SAP WAS FULLY ORCHESTRATING THIS NEW BUSINESS, AND THERE'S
 14 MANY INDICATIONS THAT THEY PLAN TO ANNOUNCE IT THE DAY AFTER
 15 ORACLE'S ANNOUNCEMENT.
 16 Q. IS THIS THE ONLY DOCUMENT YOU SAW -- SAP DOCUMENT THAT YOU
 17 SAW THAT STRESSES THE IMPORTANCE OF BEING ABLE TO COMPETE
 18 AGAINST ORACLE WITH PEOPLESFT SOFTWARE IMMEDIATELY?
 19 A. NO. THERE'S MANY MORE LIKE THIS.
 20 Q. HOW IS THE TIMING OF SAP'S NEED FOR ACCESS TO PEOPLESFT
 21 SOFTWARE, HOW IS THE TIMING RELEVANT TO THE LICENSE
 22 NEGOTIATION?
 23 A. THE TIMING IS VERY IMPORTANT BECAUSE YOU HAVE A THEN B.
 24 YOU HAVE ORACLE SPENDING \$11 BILLION ON PEOPLESFT AND THEN THE
 25 NEXT DAY YOU HAVE SAP GOING TO THE MARKET AND COMPETING HEAD TO
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1 HEAD AND TELLING CUSTOMERS THAT WE HAVE COMPARABLE OR BETTER
2 SERVICE AT HALF THE PRICE.

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

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

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

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

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

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

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

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

3 Q. LET ME ASK ONE MORE SERIES OF QUESTIONS ABOUT ONE MORE
4 BACKGROUND TOPIC FOR THIS NEGOTIATION THAT YOU'VE ANALYZED.

5 WHAT WAS THE IMPACT OF ORACLE'S ACQUISITION OF
6 PEOPLESOFT ON MARKET SHARE IN THE APPLICATIONS MARKET?

7 A. IT WAS DRAMATIC. I HAVE A SLIDE ON THIS. BUT THE SLIDE
8 TELLS THE WHOLE STORY.

9 (SLIDE DISPLAYED ON SCREEN.)

10 BASICALLY, WHAT YOU HAVE HERE ON THE LEFT-HAND SIDE,
11 YOU HAVE THE 2004 WORLDWIDE MARKET SHARES. THIS IS FOR
12 ENTERPRISE SOFTWARE, SOFTWARE THAT RUNS THE COMPANY'S SYSTEMS.

13 AND ON THE LEFT-HAND SIDE, THE BLUE BAR, IS SAP AT
14 57 PERCENT MARKET SHARE. ORACLE, IN THE RED, IS AT 12 PERCENT
15 AND THEN CLOSE TO ORACLE IS PEOPLESOFT AT 11 PERCENT.

16 AND PEOPLESOFT HAD REALLY GOOD HUMAN RESOURCE
17 SOFTWARE. SO THEY HAD SOME GREAT PRODUCTS. THEY ARE AT
18 11 PERCENT. THEN ORACLE GOES OUT AND THEY PAY \$11 BILLION TO
19 BASICALLY ACQUIRE 11 PERCENT OF THE MARKET. THAT'S PRETTY
20 IMPORTANT BECAUSE THEY BASICALLY PAID A BILLION DOLLARS FOR
21 EVERY PERCENTAGE OF MARKET SHARE.

22 SO THEY PAY \$11 BILLION, AND THEN THEY GET TO BRING
23 THAT 11 PERCENT MARKET SHARE AND THEIR PLANS INTO THE COMPANY
24 BECAUSE THEY BASICALLY ARE GOING TO COMBINE PEOPLESOFT WITH
25 THEIR RED BAR OF 12 PERCENT.

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

3 MR. PICKETT: WELL --

4 THE COURT: DO YOU WANT TO RESPOND?

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

10 THE COURT: I AM GOING TO ALLOW IT.

11 BY MR. PICKETT:

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

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

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

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1 SO ON THE RIGHT-HAND SIDE, WE HAVE SAP AFTER THE
2 TRANSACTION OF ORACLE BUYING PEOPLESOFT AND ORACLE THEN IS AT
3 23 PERCENT. THEY BASICALLY HAVE DOUBLED THEIR MARKET SHARE IN
4 THIS ERP MARKET FOR THE \$11 BILLION THEY PAID.

5 FROM MY PERSPECTIVE, THIS IS EXACTLY WHERE SAP'S
6 PLANNING DOCUMENTS INDICATE THAT THEY ARE VERY NERVOUS, SAP,
7 ABOUT THE INCREASED COMPETITION FROM A COMBINED ORACLE AND
8 PEOPLESOFT.

9 AND THE VALUE OF THE TRANSACTION IS ALSO VERY
10 IMPORTANT THERE THAT IT COST BASICALLY A BILLION DOLLARS PER
11 MARKET SHARE TO BUY THAT VALUABLE SOFTWARE AND MATERIALS AND TO
12 GET THOSE MAINTENANCE CUSTOMERS.

13 Q. SO, FROM THE ORACLE STANDPOINT, IT'S GOT A DOUBLE MARKET
14 SHARE BUT IT HAD TO PAY FOR IT?

15 A. WELL, THAT'S RIGHT. AND THAT DOUBLE MARKET SHARE FOR
16 23 PERCENT, THAT ASSUMES THAT SAP'S NOT GOING TO USE THEIR
17 SOFTWARE. AND ORACLE WAS HOPING TO THEN GO FROM THERE AND
18 EXECUTE ON THAT NEW TRANSACTION.

19 Q. NOW PEOPLESOFT, DID YOU SEE ANY EVIDENCE -- I AM SORRY.

20 SAP, DID YOU SEE ANY EVIDENCE OF HOW SAP REACTED TO
21 THE FACT THAT ORACLE NOW HAD TAKEN THE NUMBER TWO AND NUMBER
22 THREE, COMBINED THEM, AND NOW MOVED UP. WHAT WAS SAP'S
23 REACTION?

24 A. WELL, THEY FIRST BEGAN PLANNING IN DECEMBER 2004, AND
25 THERE'S SOME DOCUMENTS ON THAT. THEN BASICALLY BY JANUARY,

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1 THEY HAD IDENTIFIED THIS WAS A MAJOR CHANGE IN THE SOFTWARE
2 MARKET. AND THEY HAVE LOTS OF DOCUMENTS TALKING ABOUT HOW
3 DRAMATIC THAT WAS GOING TO BE, THIS CONSOLIDATION OF PEOPLESOFT
4 AND JDE WITH ORACLE.

5 BECAUSE ORACLE ALREADY WAS THE LEADER IN THE
6 DATABASE SOFTWARE. AND NOW THESE ENTERPRISE SOFTWARE PRODUCTS
7 RUN ON TOP OF THAT, AND THAT'S WHERE SAP HAS ALWAYS BEEN THE
8 MARKET LEADER. NOW, ORACLE WITH PEOPLESOFT WAS MOVING INTO
9 THAT IN A VERY BIG SENSE.

10 Q. LET'S GO TO ONE OF THOSE DOCUMENTS ABOUT SAP'S REACTION.
11 THIS IS PLAINTIFFS' EXHIBIT 171.

12 (EXHIBIT DISPLAYED ON SCREEN.)

13 WHAT IS THE SIGNIFICANCE OF THIS SAP DOCUMENT?

14 A. THIS ONE IS REALLY IMPORTANT. I HAVE HIGHLIGHTED A COUPLE
15 OF THINGS THERE.

16 FIRST OFF, THIS DOCUMENT BASICALLY IT WENT TO THE
17 BOARD MEMBERS. THESE ARE THE EXECUTIVE BOARD MEMBERS. IT
18 SAYS, "DEAR BOARD MEMBERS." SO THIS INCLUDES MR. KAGERMANN,
19 MR. AGASSI, MR. APOTHEKER, MR. OSWALD AND MR. BRANDT.
20 AND SO THIS WAS COMMUNICATIONS TO THEM. AND
21 HIGHLIGHTED AT THE TOP THERE, IT SAYS "SITUATION ANALYSIS. IT
22 SAYS, "MARKET CONSOLIDATION HAS CHANGED THE COMPETITIVE
23 LANDSCAPE." THIS IS NOW BASICALLY EARLY FEBRUARY, IN THE
24 JANUARY TIME FRAME. "ORACLE HAS POSITIONED ITSELF TO
25 AGGRESSIVELY CHALLENGE SAP FOR LEADERSHIP IN BUSINESS SOFTWARE

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

3 A. IT'S A VERY BIG ISSUE BECAUSE OF BEING DIRECT COMPETITORS.

4 WHENEVER THERE IS A LICENSE BETWEEN COMPETITORS, THE
5 PARTY THAT TAKES THE LICENSE IS NOW GOING TO COMPETE HEAD TO
6 HEAD. AND IF THEY ARE SUCCESSFUL, THEY ARE TAKING A CUSTOMER
7 AWAY FROM THE GROUP THAT LICENSED IT OUT, THE LICENSOR.

8 SO WHEN IT IS HEAD TO HEAD, IT'S NEVER WIN-WIN.

9 SOMEONE IS GOING TO LOSE SOMETHING BECAUSE YOU MAY GET PAID A
10 ROYALTY AMOUNT, BUT YOU ARE GOING TO LOSE A CUSTOMER. AND
11 CUSTOMERS IN THE SOFTWARE BUSINESS WHERE THERE'S LICENSE AND
12 ONGOING MAINTENANCE, IT'S HUGE TO BE INSTALLED IN THAT COMPANY
13 LONG-TERM RELATIONSHIPS MS. CATZ MENTIONED THIS MORNING, THEY
14 CAN BE THERE FOR DECADES.

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

19 Q. THANK YOU, MR. MEYER.

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

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

2 SO THAT'S THEIR TOP ANALYSIS. IT GOES ON AND SAYS,
3 "INTERNAL PRESSURE AT SAP IS HIGH TO TAKE ON ORACLE IN RESPONSE
4 TO PUBLIC PROVOCATION FROM ORACLE."

5 SO, ONCE AGAIN, THIS IS RECOGNITION AT THE EXECUTIVE
6 BOARD AT SAP THAT THE MARKET IS CHANGING AND ORACLE IS BECOMING
7 A MUCH BIGGER COMPETITOR.

8 Q. WHEN SAP SAYS "ORACLE IS POSITIONING ITSELF TO
9 AGGRESSIVELY CHALLENGE SAP," WAS THAT SOMETHING NEW FOR SAP?

10 A. NO. IN THE SENSE OF TWO REASONS. ONE, ENTERPRISE, SAP
11 WAS ALWAYS THE DOMINANT. THEY WERE AROUND 60 PERCENT OF THE
12 MARKET. EVERYBODY ELSE WAS ABOUT TEN PERCENT. SO, IN THAT
13 MARKET, IT WAS A BIG CHANGE FOR SAP.

14 IF YOU GO FROM EVERYBODY BEING AROUND 10 PERCENT NOW
15 SOMEONE IS CLOSE TO 25, IT'S A BIG COMPETITOR, BUT IT'S ALSO A
16 NEW COMPETITOR BECAUSE IT'S ORACLE AND PEOPLESOFT. ORACLE HAS
17 A BIG PLATFORM WITH ITS OTHER PRODUCTS. AND SO THIS WAS REALLY
18 SAP RECOGNIZING THAT AND SAYING WE NEED TO RESPOND.

19 Q. BY TAKING ON ORACLE?

20 A. THAT'S CORRECT.

21 Q. ALL RIGHT.

22 LET'S GO TO -- LET ME ASK ONE LAST QUESTION BEFORE
23 WE GET TO THE SPECIFIC NEGOTIATION.

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

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

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

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

10 (SLIDE DISPLAYED ON SCREEN.)

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

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

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

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

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

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1 TAKING CUSTOMERS AWAY FROM ORACLE.
 2 AND ALSO I MENTIONED THIS CONCEPT A MOMENT AGO ABOUT
 3 THE FACT THAT IF SAP INCREASES REVENUE, THEN ORACLE'S REVENUES
 4 ARE IMPACTED.
 5 THEN LASTLY I DO A LOT OF FINANCIAL CALCULATIONS.
 6 THIS IS CALLED SAP'S EXPECTED FINANCIAL GAINS.
 7 SO THE FIRST ITEM THERE, I THINK YOU HAVE HEARD THIS
 8 ALREADY IN THE TRIAL, THAT SAP EXPECTED TO HAVE REVENUES OF
 9 \$897 MILLION IN THE FIRST THREE YEARS OF THIS PROGRAM THAT WAS
 10 GOING TO USE ORACLE'S SOFTWARE.
 11 THERE'S MANY SOURCES OF PROJECTIONS THAT INCLUDE THE
 12 EXECUTIVE BOARD MEMBERS. AND THE WORD YOU SEE A LOT IS
 13 CONVERTED OR CONVERSION. AND THAT'S MOVING A CUSTOMER FROM
 14 PEOPLESOFT OVER TO FIRST TOMORROWNOW, AND THEN HOPEFULLY FROM
 15 SAP'S PERSPECTIVE, TO THE SAP APPLICATION. AND THAT
 16 INFORMATION SAYS BETWEEN 2,000 AND 6,000 CUSTOMERS.
 17 AND THEN I HAVE RUN SOME CALCULATIONS. I WILL WALK
 18 YOU THROUGH, IF NOT TODAY, TOMORROW, WHICH TO SAY BASICALLY
 19 FROM MY ANALYSIS OF SAP'S EXPECTED GAINS, THEY ARE GOING TO
 20 MAKE BETWEEN \$881 MILLION UP TO \$2.7 BILLION IF THEY TAKE THIS
 21 LICENSE. THAT'S WHERE THEY GET VALUE FROM -- THEY GET VALUE IN
 22 THE WAY OF SOFTWARE, IT ALLOWS THEM TO GO OUT AND COMPETE FOR
 23 CUSTOMERS, AND THEY WILL PAY THESE AMOUNTS TO BE ABLE TO HAVE
 24 THAT OPPORTUNITY.
 25 Q. THAT'S THE TOTAL VALUE, NOT JUST THE FIRST THREE YEARS?
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1 AT IS DECEMBER 15TH OF 2004. AND THE LAST ONE IS, I THINK,
 2 JANUARY 25TH, 26TH, 2005.
 3 AND THEN THERE IS A DOCUMENT, AND THEN THERE'S
 4 BASICALLY THE THREE NEGOTIATION FACTORS. AND I HAVE PUT AN "X"
 5 IN THERE IF THAT DOCUMENT REFERENCED SOMETHING IN IT THAT
 6 RELATED TO A GOAL OF SAP'S, NUMBER ONE, AND IMPACT ON ORACLE
 7 WAS ONE OF THE OBJECTIVES, AND THEN LASTLY, THREE, WHAT SAP
 8 EXPECTED ITS FINANCIAL GAINS WOULD BE IF IT LAUNCHED SAFE
 9 PASSAGE WITH THE INFRINGING SOFTWARE.
 10 THEN I WANTED TO SEE ALSO, WHEN I GOT DONE WITH THE
 11 ANALYSIS OF THESE EIGHT DOCUMENTS AND OTHERS, WHO WAS INVOLVED.
 12 AND SO I PUT IN BOLD ON THE RIGHT-HAND SIDE IF THE EXECUTIVE
 13 BOARD WAS INVOLVED EITHER IN RECEIVING THE DOCUMENT OR IN
 14 DRAFTING THE DOCUMENT. AND THEN I HAVE ALSO NOTED THE NAMES.
 15 YOU WILL SEE THE BOARD OVERALL. AND THEN MR. AGASSI AND OSWALD
 16 AND APOTHEKER AND KAGERMANN, ET CETERA. YOU WILL SEE THAT.
 17 ONCE AGAIN, THIS HELPS ME COME IN HERE AND TESTIFY,
 18 HAVE A FOUNDATION OF WHAT I BELIEVE SAP WAS ACTUALLY PLANNING
 19 TO DO AND THAT THEY WERE A VERY SOPHISTICATED COMPANY LAUNCHING
 20 THIS COMPETITIVE BUSINESS AGAINST ORACLE AT THE SAME POINT IN
 21 TIME ORACLE HAD SPENT \$11 BILLION.
 22 Q. ARE THESE EIGHT DOCUMENTS FROM SAP, ARE THEY THE ONLY SAP
 23 DOCUMENTS, ONLY EVIDENCE THAT YOU SAW THAT RELATES TO EACH OF
 24 THESE FACTORS?
 25 A. NO. THERE'S MANY MORE.
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1 A. YES. ON THE BOTTOM LINE, THAT WOULD BE THE TOTAL VALUE AT
 2 THE TIME OF THE NEGOTIATION. SAP WOULD BE BETWEEN 880 MILLION
 3 AND \$2.7 BILLION THAT THEY WOULD PAY.
 4 Q. THOSE CALCULATIONS ARE BASED ON INTERNAL SAP DOCUMENTS
 5 PRESENTED TO THE BOARD AND OTHER TOP MANAGEMENT?
 6 A. BOTH PRESENTED, BUT ALSO BOARD MEMBERS WERE INVOLVED IN
 7 THAT PROCESS.
 8 Q. ALL RIGHT.
 9 WE WILL GET INTO THE DETAILS OF EACH OF THESE THREE
 10 FACTORS. WHY DON'T WE SEE IF WE CAN GET NUMBER ONE DONE BEFORE
 11 WE TAKE A BREAK.
 12 SO, I WANT TO TALK ABOUT, FIRST OF ALL, WHAT
 13 EVIDENCE DID YOU SEE THAT SUMMARIZED YOUR FINDINGS WITH RESPECT
 14 TO THESE THREE NEGOTIATION FACTORS?
 15 A. WELL, THERE IS LOTS OF DIFFERENT SOURCES OF INFORMATION.
 16 I WAS IN THE COURTROOM THIS MORNING AND I HEARD A LOT OF
 17 QUESTIONING ABOUT PLANS AND PROJECTIONS. AND I WAS VERY
 18 FOCUSED IN MY ANALYSIS TO GO BACK INTO SAP'S RECORDS AND LOOK
 19 AT ALL THE DOCUMENTS THAT INVOLVE THEIR BOARD EXECUTIVES THAT
 20 LED UP TO THE LAUNCHING OF SAFE PASSAGE.
 21 SO I HAVE SUMMARIZED HERE, I THINK, EIGHT OF THOSE
 22 DOCUMENTS, BUT THERE WERE MANY MORE. THIS ONE IS IMPORTANT
 23 BECAUSE I TRIED TO JUST GIVE YOU SORT OF A SCHEDULE OR ROAD MAP
 24 OF WHAT THEY TELL US AT A HIGH LEVEL.
 25 YOU WILL SEE THE DATE. AND THE FIRST DATE WE LOOK
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1 Q. BUT THESE ARE THE KEY?
 2 A. THESE ARE KEY DOCUMENTS, THAT'S CORRECT.
 3 Q. MR. MEYER, IN YOUR EXPERIENCE, YOUR LONG EXPERIENCE IN
 4 ANALYZING FINANCIAL DAMAGES, VALUING INTELLECTUAL PROPERTY AND
 5 THE LICENSE APPROACH, IS IT TYPICAL FOR YOU TO HAVE THIS TYPE
 6 OF EVIDENCE TO RELY ON IN FORMULATING YOUR OPINION?
 7 A. NO, IT'S NOT. THIS IS VERY DIFFERENT FOR TWO MAIN
 8 REASONS. ONE -- ACTUALLY THREE. IT'S A VERY SHORT PERIOD OF
 9 TIME. IT'S A VERY FOCUSED SIX-WEEK PERIOD OF TIME AND WHAT YOU
 10 HAVE IS MANY SOURCES OF GOALS AND IMPACTING ORACLE AND
 11 PROJECTIONS. YOU HAVE SOMETHING VERY UNIQUE IN THIS SITUATION.
 12 I'VE BEEN IN HUNDREDS OF ASSIGNMENTS. YOU HAVE THE
 13 SENIOR MANAGEMENT, DAY-TO-DAY MANAGEMENT DIRECTLY AUTHORIZING
 14 THE PROGRAM, DIRECTING THE RESEARCH TO FIND TOMORROWNOW,
 15 ACQUIRING TOMORROWNOW, AND THEN LAUNCHING THE BUSINESS PLAN,
 16 GOING TO THE MARKETING PEOPLE AND THEN GOING TO THE GENERAL
 17 PUBLIC AND THE CUSTOMERS AND THE ANALYSTS SAYING, HERE'S THIS
 18 NEW OFFERING WE HAVE, AND WE CAN COMPETE HEAD TO HEAD WITH
 19 ORACLE'S PEOPLESOFT FOR MAINTENANCE.
 20 IT IS VERY UNIQUE TO HAVE SENIOR INDIVIDUALS
 21 INVOLVED LIKE THIS. AND SO IT'S A SHORT PERIOD OF TIME, BUT IT
 22 IS VERY DENSE AND LOTS OF INFORMATION FROM IMPORTANT PEOPLE
 23 ABOUT EXPECTATIONS AND PROJECTIONS.
 24 Q. LET'S GO TO THE FIRST NEGOTIATION FACTOR. "SAP'S GOALS
 25 FOR THE NEW SAFE PASSAGE TOMORROWNOW PROJECT." WHAT IS THE
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1 EVIDENCE OF SAP'S GOALS?
 2 A. WELL, THERE IS NO QUESTION THAT -- I HAVE LAID OUT FOUR
 3 DOCUMENTS HERE. IT'S THE SAME STRUCTURE AS THE PRIOR CHART.
 4 BASICALLY, THE DOCUMENT AND THEN ONCE AGAIN THE CONSIDERABLE
 5 INVOLVEMENT OF THE EXECUTIVE BOARD. MR. AGASSI'S NAME IS
 6 THERE, MR. OSWALD, MR. APOTHEKER, MR. KAGERMANN, AND SOME
 7 OTHERS.

8 BUT THAT WAS IMPORTANT, BUT THE GOALS THAT ARE
 9 HERE -- THESE ARE ACTUAL QUOTES FROM THE DOCUMENTS. I THINK
 10 THAT THEY CLEARLY INDICATE THAT, THAT THE SOFTWARE THAT WAS
 11 TAKEN THAT'S USED BY TOMORROWNOW TO BECOME THE FIRST STEP OF
 12 THE BUSINESS, WHICH IS THE MAINTENANCE OF PEOPLESFT, THAT'S
 13 SUCH A KEY STEP AND IT'S CRITICAL.

14 AND SO WE WILL SEE SOME OF THESE DOCUMENTS LATER ON,
 15 BUT I AM JUST GOING TO READ THE FIRST AND THE LAST ON THE
 16 RIGHT-HAND SIDE BECAUSE IT SAYS TO ME THAT THIS IS THE
 17 CORNERSTONE.

18 IT SAYS -- THE FIRST ONE, WHICH IS DECEMBER 15TH,
 19 2004, THIS IS WHERE THE EXECUTIVE BOARD MINUTES SAY WE WANT TO
 20 GO OUT AND FIND A WAY TO OFFER SERVICE ON PEOPLESFT. SO THEY
 21 ARE SORT OF COMMISSIONING THE COMPANY TO GO DO THIS.

22 THEY SAY, "THE EXECUTIVE BOARD AGREES TO MAKE A
 23 SPECIAL OFFER TO PEOPLESFT SAP CUSTOMERS TO TAKE OVER
 24 RESPONSIBILITY FOR THE MAINTENANCE OF THEIR PEOPLESFT HUMAN
 25 RESOURCE INSTALLATIONS."

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1 Q. SO LET ME SEE IF I UNDERSTAND THIS. THEY ARE NOT JUST
 2 GOING AFTER THE MAINTENANCE REVENUES, THEY WANT THESE CUSTOMERS
 3 TO SWITCH OVER TO MY SAP SOFTWARE APPLICATIONS, RIGHT?

4 A. RIGHT. THE GOAL WAS TO BUY LICENSE, ULTIMATELY AN
 5 APPLICATION SOFTWARE LICENSE FOR MY SAP. AND THE WAY TO DO IT,
 6 THE VEHICLE TO DO IT WAS TO FIRST PROVIDE MAINTENANCE ON
 7 PEOPLESFT AND THEN CONVERT THAT CUSTOMER TO THE PRODUCT OF
 8 SAP, WHICH IS MY SAP, AND TAKE A LICENSE ON THAT. AND THEN
 9 THEY WOULD EARN LICENSE THERE AND MORE MAINTENANCE.

10 Q. MORE MAINTENANCE ON THE MY SAP?

11 A. THAT'S CORRECT.

12 Q. FOR HOW LONG?

13 A. IT COULD GO ON FOR DECADES.

14 Q. ALL RIGHT.

15 THE COURT: WE ARE --

16 MR. PICKETT: WHY DON'T WE STOP HERE. SOUNDS LIKE A
 17 GOOD PLACE TO STOP.

18 THE COURT: LADIES AND GENTLEMEN OF THE JURY, THANK
 19 YOU FOR YOUR TIME AND ATTENTION TODAY. YOU ARE EXCUSED UNTIL
 20 TOMORROW MORNING AT 8:30. PLEASE KEEP IN MIND THE INSTRUCTIONS
 21 THAT I HAVE GIVEN YOU FROM TIME TO TIME, NOT TO COMMUNICATE
 22 ABOUT THE CASE EVEN AMONGST YOURSELVES, NOT TO DO ANY
 23 INDEPENDENT RESEARCH ABOUT THE CASE, AND TO AVOID ANY MEDIA
 24 COVERAGE ABOUT THE CASE.

25 THANK YOU.

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1 THEN IT SAYS, "AND FOR POTENTIALLY UPGRADING TO MY
 2 SAP BS." THIS IS THE FIRST TIME I SEE THAT THEY SAY WE WANT TO
 3 GO OUT AND BE ABLE TO OFFER THIS MAINTENANCE.

4 AND THIS IS AROUND THE SAME TIME WHEN THEY ARE
 5 THINKING ABOUT HOW TO RESPOND TO ORACLE CLOSING ON ITS DEAL
 6 WITH PEOPLESFT. THAT DEAL IS GOING TO CLOSE IN JANUARY OF
 7 2005, AND THE EXECUTIVE BOARD IS COMMISSIONING THIS NEW
 8 BUSINESS OFFERING.

9 AND THEN AT THE BOTTOM, IT IS REALLY IMPORTANT. IT
 10 SAYS, BOTTOM RIGHT-HAND SIDE. WE ARE TALKING ABOUT, ONCE
 11 AGAIN, THE OFFERING OF MAINTENANCE ON PEOPLESFT BECAUSE THAT'S
 12 CRITICAL TO SAFE PASSAGE AND GETTING THE REVENUE. IT SAYS,
 13 "SAFE PASSAGE FEATURES THREE FUNDAMENTAL ELEMENTS." THEN THE
 14 FIRST ELEMENT THERE, NUMBER ONE, "MAINTENANCE OF PEOPLESFT AND
 15 J.D. EDWARDS APPLICATIONS."

16 IT ALL STARTS WITH NUMBER ONE, WHICH IS
 17 TOMORROWNOW'S USING THE SOFTWARE THAT'S IN THIS CASE THAT HAS
 18 BEEN INFRINGED.

19 Q. SO YOU START WITH MAINTENANCE, AND THEN THE GOAL IS TO
 20 UPGRADE A CUSTOMER TO MY SAP. WHAT IS MY SAP?

21 A. THAT'S THE ENTERPRISE APPLICATIONS. SO THAT'S SAP'S
 22 VERSION. THERE IS A FINANCIAL, HUMAN RESOURCE, AND ACCOUNTING.
 23 THESE ARE APPLICATIONS THAT RUN THE BUSINESS' SOFTWARE. AND
 24 THAT'S SAP'S COMPETING PRODUCT WITH PEOPLESFT AND J.D. EDWARDS
 25 AND ORACLE'S OWN INTERNAL APPLICATION SOFTWARE.

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

1 (PROCEEDINGS HELD OUTSIDE THE PRESENCE OF THE JURY.)

2 THE COURT: ALL RIGHT, MR. MEYER. THANK YOU. YOU
 3 CAN STEP DOWN AS WELL.

4 THE WITNESS: THANK YOU.

5 THE COURT: ANYTHING, COUNSEL, BEFORE WE ADJOURN?

6 MR. LANIER: I DON'T THINK SO ON OUR END.

7 THE COURT: ALL RIGHT. WE WILL SEE YOU IN THE
 8 MORNING.

9 THE CLERK: JUDGE?

10 THE COURT: YES.

11 MR. HOWARD: WE DO HAVE SOME EVIDENCE TO MOVE IN.
 12 WE CAN DO THAT NOW OR WE CAN DO IT IN THE MORNING. WHATEVER
 13 YOU PREFER.

14 THE COURT: EVIDENCE THAT'S ALREADY BEEN STIPULATED
 15 TO?

16 MR. HOWARD: YES. IT'S FROM THE OPENING.

17 THE COURT: NICHOLE CAN TAKE IT DOWN.

18 MR. HOWARD: VERY WELL. THANK YOU, YOUR HONOR.

19 MR. LANIER: THANK YOU, YOUR HONOR.

20 (PROCEEDINGS CONCLUDED AT 1:32 P.M.)

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

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CERTIFICATE OF REPORTER

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

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

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

DIANE E. SKILLMAN, CSR, RPR, FCRR

TUESDAY, NOVEMBER 9, 2010

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Raynee H. Mercado

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TUESDAY, NOVEMBER 9, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

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

Certified Copy

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY:

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

967

1 THAT WE CAN LOOK AT THE JURY AND SAY, WE DID NOT HAVE THE
 2 WILLINGNESS TO INFRINGE THAT THEY ARE ARGUING JUSTIFIES AN
 3 EXTRAORDINARY VALUATION HERE, AND HERE ARE THE FACTS THAT PROVE
 4 THAT, WITHOUT CHALLENGING THE STIPULATION ON CONTRIBUTORY
 5 INFRINGEMENT.
 6 THE COURT: UM-HMM.
 7 MR. LANIER: BECAUSE CONTRIBUTORY INFRINGEMENT AND
 8 WILLINGNESS TO INFRINGE CAN BE THE SAME THING, BUT THEY CAN BE
 9 DIFFERENT. AND IT'S THAT DIFFERENCE THAT WE'RE TRYING TO ARGUE.
 10 THE COURT: OKAY.
 11 MR. HOWARD: YOUR HONOR --
 12 THE COURT: THE DISTINCTION IS SO SUBTLE.
 13 MR. HOWARD: AND IT'S FUNDAMENTALLY -- YOU KNOW, THE
 14 ARGUMENT -- IT FUNDAMENTALLY UNDERMINES THE STIPULATION TO
 15 LIABILITY. AND -- AND PARTICULARLY NOW WHEN WE HAVE BEEN -- YOU
 16 KNOW, TRIAL TIME HAS BEEN REDUCED ON THE BASIS THAT -- THAT THAT
 17 STIPULATION IS IN PLACE AND ON THE BASIS THAT WE WOULD NOT BE
 18 NEEDING TO PROVE THE ELEMENTS OF CONTRIBUTORY INFRINGEMENT.
 19 THAT -- THAT IMPOSES PREJUDICE ON THE PLAINTIFFS IF
 20 NOW THEY SAY, WELL, WE'RE GOING TO PICK AND CHOOSE THE FACTS.
 21 AND REMEMBER, IN STIPULATION NO. 1, TOMORROWNOW STIPULATED TO
 22 ALL LIABILITY, ALL -- ALL COPYRIGHT LIABILITY ON ALL CLAIMS.
 23 AND -- AND SO NOW THAT -- IT WOULD BE UNFAIR TO ALLOW THEM TO,
 24 ON THE ONE HAND, STIPULATE TO CONTRIBUTORY INFRINGEMENT, WHICH
 25 HAS KNOWLEDGE AS AN ELEMENT AND WHICH HAS MATERIAL CONTRIBUTION
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

969

1 CAN -- WHAT IS YOUR -- WHAT IS YOUR POSITION WITH
 2 RESPECT TO THE SENTENCE THAT I SUGGESTED WE SUBSTITUTE FOR THE
 3 LAST SENTENCE THAT THE PLAINTIFF HAS PROPOSED?
 4 MR. LANIER: AS -- AS I THINK I RECALL IT, YOUR
 5 HONOR, WE CAN LIVE WITH THAT SO LONG AS WE CAN ARGUE TO THE JURY
 6 THAT WE ARE NOT -- THAT WE TOOK STEPS TO AVOID INFRINGEMENT AND,
 7 THEREFORE, AT LEAST ARGUES AGAINST OR MITIGATES AGAINST THEIR
 8 CLAIM OF VALUATION.
 9 I WOULD THINK THAT YOU COULD ALSO ADD IN THE PHRASE
 10 "UNLESS IT'S OFFERED WITH RESPECT TO DAMAGES IS INCONSISTENT
 11 WITH THE STIPULATION," 'CAUSE THAT'S THE ONLY PURPOSE.
 12 WE ARE CONTENT WITH EVERYTHING IN THE FIRST THREE
 13 PARAGRAPHS. THEY HAD ADDED A WORD INTO THEIR VERSION, SO WE'D
 14 NEED TO ADDRESS THAT BRIEFLY, BUT THE FIRST THREE PARAGRAPHS
 15 WE'RE HAPPY TO SAY THAT TO THE EXTENT WE'RE OFFERING IT ABOUT
 16 CONTRIBUTORY INFRINGEMENT, IT'S INCONSISTENT WITH THE
 17 STIPULATION. WE'D AGREE. WE DIDN'T WANT TO BE OFFERING THIS
 18 TESTIMONY.
 19 WE ACTUALLY ARE ONLY OFFERING IT TO SHOW THAT
 20 DEFENDANTS DID NOT HAVE WHAT THEY CLAIM TO BE THE WILLINGNESS TO
 21 INFRINGE. AND, AGAIN, WILLINGNESS TO INFRINGE AND CONTRIBUTORY
 22 INFRINGEMENT ARE NOT THE SAME THING.
 23 THE COURT: I'D LIKE TO GET STARTED. I DON'T WANT TO
 24 KEEP THE JURY WAITING. I'LL GIVE THIS SOME FURTHER THOUGHT. WE
 25 CAN REVISIT IT AGAIN. I'M NOT GOING TO GIVE THE INSTRUCTION
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

968

1 AS AN ELEMENT, AND THEN SAY, OH, WELL, BUT WE DIDN'T REALLY MEAN
 2 THAT WITH RESPECT TO THE UNDERLYING DIRECT LIABILITY
 3 STIPULATION, BECAUSE THEN WE WOULD HAVE TO TRY THE CONTRIBUTORY
 4 INFRINGEMENT CASE, BOTH BECAUSE WE HAVE A CONTRIBUTORY
 5 INFRINGEMENT CLAIM AND ALSO BECAUSE THAT SAME EVIDENCE
 6 IRREGARDLESS (SIC) OF WHETHER IT RELATES TO CONTRIBUTORY
 7 INFRINGEMENT, AS YOUR HONOR HAS RULED, IS SPECIFICALLY RELATED
 8 TO DAMAGES.
 9 THE COURT: YEAH.
 10 MR. LANIER: AND, YOUR HONOR, THAT'S NOT WHAT WE
 11 WOULD ARGUE, AND I WILL -- I WILL TRY TO SAY IT IN ONE SENTENCE
 12 SO OUR POSITION IS CRYSTAL CLEAR. WE -- TWO SENTENCES.
 13 WE ADMIT TO CONTRIBUTORY INFRINGEMENT. BUT WE TOOK
 14 STEPS TO AVOID IT, WHICH MAY NOT HAVE BEEN ENOUGH TO AVOID
 15 CONTRIBUTORY INFRINGEMENT, BUT DO SHOW THAT WE TRIED NOT TO
 16 INFRINGE, AT LEAST IN SOME LIMITED RESPECTS. THAT'S ALL WE WANT
 17 TO ARGUE. AND THAT'S WHAT WE HAVE TO ARGUE GIVEN THEIR DAMAGES
 18 THEORY. AND, AGAIN, A DAMAGES THEORY THAT IS FAIRLY NEW TO THIS
 19 CASE AND IS EQUALLY WELL PREJUDICING TO US.
 20 THE COURT: WELL, ESSENTIALLY WHAT YOU'RE ARGUING IS
 21 THAT THE SAP BOARD MEMBERS ATTEMPTED TO MITIGATE IN SOME WAY.
 22 AND IT DOES SEEM TO ME THAT THERE'S A JUST A FINE LINE HERE, AND
 23 I'M NOT SURE THAT THIS HELPS WITH THE PROBLEM THAT I PERCEIVE
 24 THE JURY MAY END UP HAVING, TRYING TO RECONCILE ALL THIS
 25 INFORMATION.
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

970

1 FIRST THING IN ANY EVENT.
 2 MR. HOWARD: OKAY. I DO WANT TO ADDRESS THE WORD
 3 THAT HE TALKED ABOUT, BUT WE CAN DO THAT LATER.
 4 ALL RIGHT. THANK YOU, YOUR HONOR.
 5 MR. LANIER: THANK YOU, YOUR HONOR.
 6 THE COURT: ALL RIGHT. LET'S BRING THE JURY IN.
 7 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE
 8 OF THE JURY:)
 9 THE COURT: ALL RIGHT. GOOD MORNING, LADIES AND
 10 GENTLEMEN.
 11 COUNSEL, ARE WE GOING TO RESUME WITH MR. MEYER THIS
 12 MORNING?
 13 MR. PICKETT: WE ARE, YOUR HONOR. GOOD MORNING.
 14 MR. MEYER, COULD YOU PLEASE RETAKE THE STAND.
 15 (PAUSE IN THE PROCEEDINGS.)
 16 THE COURT: ALL RIGHT. MR. MEYER, YOU'RE STILL UNDER
 17 OATH THIS MORNING.
 18 THE WITNESS: THANK YOU.
 19 DIRECT EXAMINATION (RESUMED)
 20 MR. PICKETT: SO WITH YOUR HONOR'S PERMISSION, I'LL
 21 BRIEFLY RESET THE STAGE.
 22 MR. MEYER IS TESTIFYING ON THE FAIR VALUE OF PROPERTY
 23 TAKEN BY SAP AND, IN PARTICULAR, TESTIFYING ABOUT THE RESULTS OF
 24 A NEGOTIATION FOR A PEOPLESFT LICENSE THAT SHOULD HAVE TAKEN
 25 PLACE IN JANUARY 2005.
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

971

MEYER - DIRECT (RESUMED)/ PICKETT

1 AND IF I COULD GET SLIDE 16, WHICH THE JURY HAS
 2 PREVIOUSLY SEEN.
 3 (EXHIBIT PUBLISHED TO JURY.)
 4 BY MR. PICKETT:

5 Q. COULD YOU BRIEFLY REMIND THE JURY, MR. MEYER, JUST TO SET
 6 THE STAGE, WHAT THIS REPRESENTS?
 7 **A. OKAY. WE WERE TALKING ABOUT THE VARIOUS FACTORS THAT WOULD
 8 BE CONSIDERED BY SAP. AND I BELIEVE WE'D WORKED THROUGH FACTOR
 9 1 THERE, THE GOALS OF USING THE SOFTWARE IN THE -- WITH
 10 TOMORROWNOW AND IN THE SAFE PASSAGE PROGRAM AND THE BENEFITS
 11 THERE.
 12 WE BEGAN TO MOVE, I BELIEVE, INTO FACTORS 2 AND 3,
 13 TALKING ABOUT THE IMPACTS AND, ULTIMATELY, THE FINANCIAL GAINS
 14 THAT WERE EXPECTED.**
 15 Q. AND WE'RE TALKING ABOUT WHAT WOULD BE IN SAP AG'S MIND,
 16 THEIR EXPECTATIONS GOING INTO THE NEGOTIATION?
 17 **A. THAT IS CORRECT.**

18 Q. ALL RIGHT. ALL RIGHT. I DON'T THINK WE QUITE FINISHED
 19 NEGOTIATION FACTOR 1.
 20 SLIDE 18, PLEASE.
 21 (EXHIBIT PUBLISHED TO JURY.)
 22 BY MR. PICKETT:
 23 Q. THAT, YOU'VE GONE THROUGH, THE FOUR FACTORS YESTERDAY AT THE
 24 END OF THE DAY.
 25 **A. THAT'S CORRECT.**
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

973

MEYER - DIRECT (RESUMED)/ PICKETT

1 BY MR. PICKETT:
 2 Q. LET'S GO ON, THEN, TO FACTOR NO. 2, WHAT WOULD BE IN THE
 3 MIND OF SAP. WE'RE MOVING FROM THEIR GOALS TO EXPECTED IMPACT
 4 ON ORACLE.
 5 CAN YOU REMIND THE JURY WHAT THAT FACTOR INVOLVES?
 6 **A. YES, THIS WAS IN THE -- FROM THE PERSPECTIVE OF THE SAP
 7 NEGOTIATORS, HOW USING THE SOFTWARE WOULD THEN IMPACT ORACLE.
 8 AND AS YOU RECALL FROM THE DISCUSSION YESTERDAY, THAT WAS AN
 9 ISSUE, TO LAUNCH RIGHT AFTER THE ORACLE COMBINATION WITH
 10 PEOPLESOFT. AND SO WE'RE GOING TO SEE SOME OF THESE DOCUMENTS,
 11 I THINK, IN A MOMENT.
 12 I THINK THAT -- THAT THE FIRST ITEM THERE IN THE FAR
 13 RIGHT-HAND SIDE, WE'LL SEE THAT THIS WAS PRESENTED TO OR
 14 RECEIVED BY MR. AGASSI, MR. OSWALD, AND MR. MACKAY. AND WITH
 15 THIS PROGRAM, IT SAYS, "MAY FORCE ORACLE TO CHANGE ITS BEHAVIOR
 16 OR PLANS AROUND PRICING OR POSITIONING."
 17 AND THEN THE NEXT ONE, IT'S PRETTY IMPORTANT,
 18 "AFFECTING ORACLE'S ABILITY TO MAINTAIN THIS REVENUE STREAM
 19 COULD IMPACT THE ROI ASSUMPTIONS" -- THAT MEANS RETURN ON
 20 INVESTMENT -- "OF THE ORACLE/PEOPLESOFT DEAL." SO THAT MEANS
 21 THAT IT WOULD IMPACT THE ABILITY FOR ORACLE TO MAKE RETURN ON
 22 THE \$11 BILLION INVESTMENT.
 23 Q. SO IF -- THAT -- THE IDEA IS THAT IF SAP WAS SUCCESSFUL IN
 24 CONVERTING CUSTOMERS, IT WOULD DIVERT FUNDS THAT WOULD PAY FOR
 25 THE PEOPLESOFT \$11 BILLION ACQUISITION?
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530**

972

MEYER - DIRECT (RESUMED)/ PICKETT

1 Q. AND THEN THERE ARE SOME MORE -- THERE'S SOME MORE EVIDENCE
 2 WITH RESPECT TO SAP'S GOALS.
 3 IF WE COULD GO TO SLIDE 19.
 4 (EXHIBIT PUBLISHED TO JURY.)
 5 BY MR. PICKETT:
 6 Q. WHAT DOES THIS SLIDE SHOW? THIS IS NEW NOW FROM WHERE WE
 7 WERE?
 8 **A. THAT'S CORRECT. THESE WERE THE THREE ADDITIONAL DOCUMENTS
 9 ON THE SECOND SLIDE OF FACTOR 1. AND THESE FURTHER ILLUSTRATE
 10 ONCE AGAIN THE IMPORTANCE OF THE SOFTWARE IN THE TOMORROWNOW
 11 OFFERING. I THINK ONE OF THE KEY ITEMS HERE WAS AT THE BOTTOM
 12 THERE, ITEM 7 ON THE BOTTOM RIGHT-HAND SIDE. IT SAYS,
 13 "TOMORROWNOW WILL SERVE AS A MAJOR CORNERSTONE OF OUR
 14 GO-TO-MARKET STRATEGY AS OUR KEY SERVICE-DELIVERY UNIT." SO
 15 THAT WAS VERY IMPORTANT. THAT WAS STEP ONE IN THE SAFE PASSAGE
 16 PROGRAM.
 17 Q. WHY WAS IT IMPORTANT THAT SAP, GOING INTO THIS NEGOTIATION
 18 FOR LICENSE, WOULD HAVE THOUGHT TOMORROWNOW WOULD SERVE AS A
 19 MAJOR CORNERSTONE OF THIS PROGRAM?
 20 **A. IT WAS THEIR BELIEF THAT IT WOULD GIVE THEM A CHANCE TO
 21 CONVERT CUSTOMERS FROM THE PEOPLESOFT MAINTENANCE BEING PROVIDED
 22 BY ORACLE AND PEOPLESOFT TO TOMORROWNOW AND, ULTIMATELY, THE
 23 GOAL OF CONVERTING THAT CUSTOMER TO MYSAP, THE SAP APPLICATION.
 24 (EXHIBIT PUBLISHED TO JURY.)**
 25 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530**

974

MEYER - DIRECT (RESUMED)/ PICKETT

1 **A. THAT'S RIGHT. WHICH WOULD THEN IMPACT CASH FLOW TO ORACLE
 2 AND PEOPLESOFT, WHICH WOULD IMPACT DEVELOPMENT.**
 3 Q. AND SAP WOULD VIEW THAT HOW ENTERING THE NEGOTIATION TABLE?
 4 HOW WOULD THAT FACTOR IMPACT ITS THINKING?
 5 **A. THAT CREATES ADDITIONAL VALUE FOR SAP IN THE NEGOTIATION.
 6 IT'S A REASON WHY THEY WOULD PAY MORE FOR THE LICENSE.
 7 (EXHIBIT PUBLISHED TO JURY.)**
 8 BY MR. PICKETT:
 9 Q. ALL RIGHT. LET'S GO TO FACTOR NO. 3 IN SAP'S MIND ON THIS
 10 NEGOTIATION OF A LICENSE. AND THAT'S THE SAP'S EXPECTED
 11 FINANCIAL GAINS. THAT'S PRETTY OBVIOUS WHAT THAT IS.
 12 WHAT HAVE YOU SUMMARIZED HERE?
 13 **A. WHAT I'VE SUMMARIZED HERE ARE SOME OF THE KEY DOCUMENTS OR
 14 IMPORTANT DOCUMENTS IN THIS TIME FRAME OF DECEMBER 2004 AND
 15 JANUARY 2005. AND SIMILAR TO THE OTHER CHARTS, IT'S SET UP
 16 SHOWING WHO RECEIVED OR WAS PRESENTED THE DOCUMENTS AND -- AND
 17 YOU'LL SEE EXECUTIVE BOARD MEMBERS IN THAT COLUMN.
 18 AND I'VE NOTED IN RED SOME OF THOSE PROJECTION
 19 FIGURES ABOUT THE -- POTENTIAL CONVERSION OF CUSTOMERS FROM
 20 PEOPLESOFT OVER TO THE SAP APPLICATION. SO YOU SEE 3,000
 21 MAINTENANCE CUSTOMERS, YOU'LL SEE 1375 CUSTOMERS TO SAP BY 2007.
 22 SO THAT'S BY THE END OF 2007, A SHORT PERIOD OF TIME.
 23 AND THEN DOWN THE PAGE, YOU'LL SEE CONVERT THE
 24 MAJORITY -- I THINK IT'S IMPORTANT TO NOTE ON ITEM 2 THERE ABOUT
 25 THE TIMING ISSUE. THIS WAS PART OF A JANUARY 16TH, 2005, SORT
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530**

975

MEYER - DIRECT (RESUMED)/ PICKETT

1 OF LAUNCH AT SAP. IT SAYS, "AGGRESSIVELY CONVERT 450 OF GLOBAL
2 1000 OVER THE NEXT 30 DAYS."
3 SO THAT MEANS THE GOAL WAS FOR SAP IN THE NEXT 30
4 DAYS BETWEEN JANUARY 19TH, 2005, OUT FOR THE NEXT MONTH, TO GO
5 TO THE TOP 450 CUSTOMERS THEY HAD AND TO AGGRESSIVELY CONVERT
6 THEM TO SAP. I THINK IT'S VERY IMPORTANT ON TIMING AND
7 PROJECTIONS.
8 THEN YOU'LL SEE THE 4,000 JOINT SAP CUSTOMERS BEING A
9 TARGET, CONVERT 50 PERCENT. AND THEN AS YOU WORK DOWN THE PAGE,
10 2,000 TO 4,000 WAS -- WAS ALSO A PROJECTION. AND THEN
11 ULTIMATELY, THERE WAS TESTIMONY BY MR. AGASSI THAT HE FELT,
12 UNDER SOME CIRCUMSTANCE, THAT SAP COULD CONVERT 60 PERCENT OF
13 THE 10,000 CUSTOMERS. I ACTUALLY DID THE MATH THERE, THE 9,920,
14 WHICH CAME OUT OF A DOCUMENT MS. CATZ SHOWED YESTERDAY, TIMES
15 60 PERCENT. SO IT WOULD BE 5,952 CONVERTED CUSTOMERS.
16 Q. AND ALL OF THIS EVIDENCE ON THIS CHART 21 IS FROM WHOM?
17 A. THIS EVIDENCE IS -- EITHER BEEN PRESENTED TO OR PREPARED BY
18 OR APPROVED BY THE EXECUTIVE BOARD, THE INDIVIDUALS THAT MANAGE
19 SAP DAY TO DAY.
20 Q. SO WE KNOW EXACTLY WHAT THEY WERE THINKING AT THE TIME ABOUT
21 HOW MANY CUSTOMERS THEY COULD TAKE ON THE PEOPLESFT SIDE FROM
22 ORACLE IF THEY LAUNCHED THIS PROGRAM; IS THAT RIGHT?
23 A. THAT IS CORRECT.
24 Q. AND WHAT IMPACT DOES THAT HAVE ON THEIR THINKING GOING INTO
25 THE NEGOTIATION FOR THE LICENSE?
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

977

MEYER - DIRECT (RESUMED)/ PICKETT

1 A. THIS DOCUMENT FITS INTO THE CATEGORY OF GOALS. AND, ONCE
2 AGAIN, IT AFFIRMS THAT STEP ONE -- AND IT WAS CALLED THE
3 CORNERSTONE -- WAS TO PROVIDE CURRENT SAP CUSTOMERS PEOPLESFT
4 SUPPORT, AND THAT WOULD BE PROVIDED BY TOMORROWNOW USING THE
5 INFRINGING SOFTWARE.
6 SO IT JUST SHOWS THAT THE CORNERSTONE AND THE MOST
7 IMPORTANT PART OF THIS PROGRAM WAS STEP ONE, TOMORROWNOW WITH
8 THE SOFTWARE.
9 Q. AND ONE STEP -- STEP ONE WAS TOMORROWNOW, BUT WHAT DID IT
10 LEAD TO STEP TWO AND STEP THREE?
11 A. WELL, AND STEP TWO WAS ONCE THE CUSTOMER TOOK THE
12 SOFTWARE -- THE SUPPORT ON THE SOFTWARE, WAS -- IT SAYS, "DRIVE
13 INCREMENTAL REVENUE THROUGH COMPOSITE APPLICATIONS." THAT WAS
14 TO THEN SELL ANOTHER PRODUCT FROM SAP TO THAT CUSTOMER.
15 THEY HAD A PRODUCT CALLED NETWEAVER THAT WOULD HELP
16 THEM INTEGRATE THEIR PRODUCTS WITH OTHER PRODUCTS. AND THAT'S
17 AN INTEGRATION PRODUCT SO THAT WOULD BE ANOTHER LICENSE SALE FOR
18 SAP AND ADDITIONAL REVENUE AND PROFITS BOTH FROM LICENSE AND
19 THEN THE MAINTENANCE ON THAT PRODUCT.
20 AND THEN, ULTIMATELY, THE -- THE PAYOFF IS STEP
21 THREE, WHICH IS UPGRADE PEOPLESFT CUSTOMERS TO MYSAP ERP. AND
22 THAT'S THE TOTAL CONVERSION OF THAT PRIOR CUSTOMER ON PEOPLESFT
23 TO THE SAP APPLICATION. AND THEN SAP EARNS BOTH THE LICENSE AND
24 THE REVENUE AND PROFITS ON THAT.
25 Q. YOU CALL THAT LAST STEP THE PAYOFF. WHY?
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

976

MEYER - DIRECT (RESUMED)/ PICKETT

1 A. WELL, FROM MY PERSPECTIVE, IT'S VERY IMPORTANT. OBVIOUSLY,
2 THEY'VE LAID OUT A VARIETY OF GOALS. BUT A BIG GOAL WAS TO
3 CONVERT CUSTOMERS. AND THIS IS THEIR EXPECTATION, THEIR BEST
4 POSITION IN THE INFORMATION THEY USE TO MAKE THE DECISION TO GO
5 FORWARD TO -- TO LAUNCH THIS -- THIS PRODUCT. AND SO IT'S RIGHT
6 FROM THE BOARD MEMBERS, AND IT'S, FROM MY PERSPECTIVE, VERY
7 APPROPRIATE AND ACCURATE AND HIGH-QUALITY INFORMATION.
8 Q. ALL RIGHT. AND YOU CAN BASE THEIR EXPECTED GAIN BASED ON
9 THE NUMBER OF CUSTOMERS THAT THEY EXPECTED TO GAIN?
10 A. THAT'S RIGHT.
11 ONCE YOU UNDERSTAND THE NUMBER OF CUSTOMERS, YOU THEN
12 GO THROUGH FINANCIAL MODELS AND PUT A VALUE ON THAT. THE KEY
13 INFORMATION WOULD COME FROM THE BOARD MEMBERS AT SAP, THE
14 PROJECTED CUSTOMERS TO CONVERT.
15 Q. ALL RIGHT. NOW, SO WE'VE GONE THROUGH THE FACTORS AND
16 YOU'VE REFERENCED A WHOLE LOT OF EVIDENCE HERE. I WANT TO TAKE
17 YOU THROUGH JUST A FEW OF THE MANY DOCUMENTS THAT YOU'VE BASED
18 YOUR OPINION ON, MR. -- MR. MEYER. AND SOME OF THESE WILL BE
19 VERY FAMILIAR TO THE JURY.
20 LET'S FIRST LOOK AT PLAINTIFFS' EXHIBIT 6. SHOULD BE
21 THE NEXT SLIDE.
22 (EXHIBIT PUBLISHED TO JURY.)
23 MR. PICKETT: RIGHT. PLAINTIFFS' EXHIBIT 6.
24 Q. WHAT DOES THIS -- HOW THIS DOCUMENT RELATE TO YOUR OPINION,
25 MR. MEYER?
RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

978

MEYER - DIRECT (RESUMED)/ PICKETT

1 A. BECAUSE ULTIMATELY THEN YOU'VE TAKEN A CUSTOMER THAT WAS AN
2 ORACLE CUSTOMER AND TOTALLY CONVERTED IT TO SAP, AND SO THAT
3 BECOMES BOTH ONGOING PRODUCT SALES, WHICH IS LICENSE, AND THEN
4 THE -- THE IMPORTANT ANNUITY, WHICH IS THE MAINTENANCE WHICH
5 YOU -- CAN GO ON FOR DECADES. IT'S VERY IMPORTANT.
6 Q. ALL RIGHT. LET'S GO ON, THEN, TO EXHIBIT 12 WHICH IS THE
7 NEXT SLIDE.
8 (EXHIBIT PUBLISHED TO JURY.)
9 BY MR. PICKETT:
10 Q. THIS IS A DOCUMENT WE'VE SEEN A NUMBER OF TIMES. WHAT'S --
11 IS THIS A SIGNIFICANT DOCUMENT?
12 A. YES, IT IS. IT'S SIGNIFICANT ON A VARIETY OF FRONTS. WE'VE
13 TALKED ABOUT THE FACT THAT THIS WAS IN -- IT INVOLVED THE
14 EXECUTIVE BOARD MEMBERS OF SAP, AND -- AND IT ACTUALLY SHOWS BY
15 REVENUE CATEGORIES, TYPES OF REVENUES, MAINTENANCE, AND OTHER
16 ADDITIONAL REVENUES, A PROJECTION THAT GOES OUT THROUGH 2007.
17 SO FOR THREE YEARS. AND IT ACTUALLY SHOWS A PROJECTION OF
18 CUSTOMERS TO RECEIVE MAINTENANCE, CUSTOMERS TO BE CONVERTED, AND
19 THEN THE REVENUE VALUE THAT WAS PROJECTED BY SAP'S MANAGEMENT AT
20 THAT TIME.
21 Q. NOW, THE -- THERE'S THREE COLORS ON THE GRAPH. SORT OF A --
22 NOT GOOD WITH COLORS -- KIND OF A LAVENDER, MAYBE A LILAC AND A
23 PEACH.
24 WHAT DO THOSE COLORS REPRESENT?
25 A. THERE'S THREE DIFFERENT WHAT I'LL CALL REVENUE CATEGORIES,
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MEYER - DIRECT (RESUMED)/ PICKETT

1 AND THE FIRST ONE, WHICH IS THE LAVENDER IS -- I THINK THAT'S
 2 LAVENDER, BUT -- THAT'S THE MAINTENANCE REVENUE. AND SO THAT
 3 MEANS THAT AS TOMORROWNOW PROVIDES THE MAINTENANCE, THAT'S THE
 4 REVENUE THAT THEY WILL EARN OVER THAT THREE-YEAR PERIOD.
 5 IT THEN MOVES INTO SOMETHING THAT THEY REFER TO AS --
 6 AS CROSS-SELL, AND THAT'S AN ADDITIONAL REVENUE SOURCE. THAT'S
 7 THE NEXT COLOR THERE. AND THAT CROSS-SELL IS LIKE SELLING THE
 8 NETWEAVER PRODUCT, A LICENSE ON THAT, AND THEN REVENUE FOR
 9 MAINTENANCE ULTIMATELY ON THAT.
 10 AND THEN LASTLY, WHAT'S CALLED UPSWITCH AND, AND
 11 UPSWITCH SAP'S PHRASE, SO WHEN THEY ULTIMATELY CONVERT CUSTOMER
 12 TO MYSAP, THAT'S THE REVENUE FROM -- FROM THAT SOURCE. AND
 13 WHAT'S IMPORTANT HERE -- NOT ONLY DO YOU SEE DIFFERENT
 14 CATEGORIES OF REVENUE, WHICH IS IMPORTANT FOR SAP AND ITS
 15 FINANCIAL RETURNS, THERE'S ALSO TREMENDOUS GROWTH BETWEEN YEARS.
 16 SO BETWEEN THE FIRST YEAR AND THE SECOND YEAR, THE
 17 GROWTH THEY PROJECT IS 140 PERCENT. AND THEN I BELIEVE IT'S
 18 120 PERCENT AFTER THAT. SO EACH YEAR, THE REVENUES ARE ON AN
 19 UPWARD GROWTH CYCLE. SO IT ONLY GOES FOR THREE YEARS, BUT THE
 20 VALUE WILL CONTINUE ON INTO THE FUTURE, WHICH I'LL TALK ABOUT IN
 21 A MOMENT.
 22 BUT IT SHOWS GROWTH. IT SHOWS A VARIETY OF REVENUES.
 23 AND IT SHOWS THE ABILITY TO CONVERT THE CUSTOMERS TO MYSAP.
 24 AND, ULTIMATELY, IT SHOWS 3,000 CUSTOMERS THAT WOULD TAKE
 25 MAINTENANCE FROM TOMORROWNOW USING THE SOFTWARE, AND THE VALUE
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MEYER - DIRECT (RESUMED)/ PICKETT

1 3,000, THEY WILL THEN BE MYSAP CUSTOMERS POTENTIALLY FOR DECADES
 2 BECAUSE THEY NOW ARE PART OF THE SAP APPLICATION FAMILY.
 3 BY MR. PICKETT:
 4 Q. AND SO THERE WOULD BE BILLIONS OF REVENUES RESULTING.
 5 A. OH, ABSOLUTELY.
 6 Q. ALL RIGHT. NOW, WHO DO YOU UNDERSTAND HAD INPUT INTO THE
 7 CALCULATIONS THAT SAP WAS MAKING AT THE TIME?
 8 A. WELL, THIS DOCUMENT HERE WAS PREPARED BY MR. ZIEMEN, WHO WAS
 9 ACTUALLY IN THE SERVICE SOLUTIONS GROUP. SO HE ACTUALLY WAS
 10 IN -- IN A SUPPORT GROUP. HE WAS IN THAT -- IN THAT BUSINESS
 11 SEGMENT.
 12 BUT THIS DOCUMENT HERE WAS PROVIDED TO MR. AGASSI,
 13 MR. KAGERMANN, MR. APOTHEKER, AND MR. OSWALD. SO THEY ALL HAD
 14 FIRST-HAND KNOWLEDGE OF THE PROJECTIONS AND, AND THIS IS BACK IN
 15 DECEMBER 2004 WHEN THE BUSINESS WAS BEING PLANNED.
 16 Q. ALL RIGHT. AND LET'S LOOK AT THE NEXT EXHIBIT,
 17 EXHIBIT 4814.
 18 (EXHIBIT PUBLISHED TO JURY.)
 19 BY MR. PICKETT:
 20 Q. WHAT'S THE SIGNIFICANCE OF THIS DOCUMENT, MR. MEYER?
 21 A. THIS DOCUMENT -- THIS WOULD BE PRETTY QUICK HERE. BASICALLY
 22 WHAT THIS SAYS AND THIS WAS SENT BY A MR. WELZ, WHO WAS THE
 23 SENIOR VICE-PRESIDENT OF SERVICES AND SUPPORT AT SAP.
 24 THIS WAS ATTACHED, I BELIEVE, TO -- IT WAS SENT TO
 25 MR. OSWALD, BUT IN THE BODY OF EMAIL, THIS WAS WHAT WAS MR. WELZ
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MEYER - DIRECT (RESUMED)/ PICKETT

1 OVER THE THREE YEARS OF REVENUE IS ABOUT \$900 MILLION.
 2 SO IT'S AN IMPORTANT PROJECTION DOCUMENT DONE AT THE
 3 TIME AND ACCEPTED BY THE EXECUTIVE BOARD.
 4 Q. NOW, THE LICENSE THAT WOULD BE NEGOTIATED WOULD NOT END IN
 5 2007, WOULD IT?
 6 A. NO, IT WOULD NOT. THE LICENSE WOULD GO ON THROUGH OCTOBER
 7 OF 2008, AND SO THERE'D BE SOME MORE FINANCIAL BENEFITS THROUGH
 8 THE LICENSE PERIOD. AND THEN, AS I'VE MENTIONED EARLIER, THE
 9 BENEFITS GO WELL INTO THE FUTURE BECAUSE THE CONVERTED CUSTOMERS
 10 ARE THEN PART OF SAP.
 11 Q. AND IF THIS WERE IN THE MIND OF SAP GOING INTO THAT
 12 NEGOTIATION FOR THE LICENSE FOR THE PEOPLESFT SOFTWARE, WHAT
 13 IMPACT WOULD THAT HAVE ON THE NEGOTIATION, THE PRICE THAT THEY'D
 14 END UP WITH?
 15 MR. MITTELSTAEDT: YOUR HONOR, COULD I JUST STATE
 16 AGAIN OUR CONTINUATION OBJECTION TO THIS WHOLE LINE OF
 17 QUESTIONING, CALLING FOR SPECULATION.
 18 THE COURT: YES. OVERRULED.
 19 MR. MITTELSTAEDT: THANK YOU.
 20 THE WITNESS: IN MY OPINION, THIS WOULD INDICATE THAT
 21 SAP WOULD SEE SIGNIFICANT VALUE IN USING THE SOFTWARE AND
 22 ACQUIRING TOMORROWNOW AND THEN LAUNCHING THIS PROGRAM, BECAUSE
 23 THERE'S TREMENDOUS REVENUE OVER THREE YEARS. WE GO OUT ANOTHER
 24 TEN MONTHS IN THE LICENSE PERIOD, AND THEN ALL THOSE CONVERTED
 25 CUSTOMERS, WHETHER IT'S 1375, WHETHER IT'S 2,000, WHETHER IT'S
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MEYER - DIRECT (RESUMED)/ PICKETT

1 TO MR. OSWALD. HE SAID, "HI BERND AND GREG." IT SAYS, "THOMAS
 2 ZIEMEN IN MY TEAM HAS PUT TOGETHER FOR THE BOARD A PEOPLESFT
 3 ATTACK PROGRAM." AND THE DOCUMENT WE SAW A MOMENT AGO WITH THE
 4 PROJECTIONS, THAT WAS PART OF THIS PEOPLESFT ATTACK PROGRAM
 5 AND, AND THAT WAS THIS DOCUMENT. THIS DOCUMENT IS CALLED "A
 6 ROAD MAP FOR PEOPLESFT CUSTOMERS TO SAP."
 7 SO NOW, THE EMAIL IS ATTACHING THIS DOCUMENT, THE
 8 ROAD MAP, AND IT'S COMMUNICATING -- IT SAYS, "MR. ZIEMEN IN MY
 9 TEAM HAS PUT TOGETHER FOR THE BOARD A PEOPLESFT ATTACK PROGRAM.
 10 ENCLOSED PLEASE FIND THE LATEST VERSION." AND THEN IT SAYS,
 11 "HENNING, LEO, GERD AND SHAI HAVE GIVEN INPUT AND EXTENSIVE
 12 GUIDANCE ON THIS."
 13 AND HENNING'S MR. KAGERMANN ON THE EXECUTIVE BOARD.
 14 LEO IS MR. APOTHEKER, GERD'S MR. OSWALD, AND THEN SHAI IS
 15 MR. AGASSI. SO IT CLEARLY INDICATES TO ME THAT THE BOARD
 16 MEMBERS ARE INVOLVED IN THE PROCESS, THEY'RE CREATING THE
 17 PROJECTIONS. THEY'RE ACCEPTING THE PROJECTIONS, AND IT'S VERY
 18 STRONG INFORMATION ABOUT WHAT THE MANAGEMENT TEAM WAS PLANNING
 19 TO DO.
 20 Q. SO -- AND THAT IS THE DOCUMENT WITH THE 900 MILLION IN THE
 21 FIRST THREE YEARS?
 22 A. YES, IT IS.
 23 Q. THAT HAS THAT DATE IN IT.
 24 AND THAT WAS SENT TO THOSE FOUR BOARDS MEMBERS,
 25 RIGHT?
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **A. YES.**
 2 Q. WE KNOW THAT FROM THE PRIOR EXHIBIT.
 3 **A. WE KNOW THAT.**
 4 Q. NOW, THE FIFTH BOARD MEMBER IS THE ONLY ONE WHO'S TESTIFIED
 5 IN THIS COURTROOM, MR. BRANDT, RIGHT?
 6 **A. THAT'S CORRECT.**
 7 Q. YOU'LL RECALL HE TESTIFIED THAT HE DIDN'T BELIEVE THE
 8 900 MILLION. HE SAID "NOT AT ALL. I DON'T BELIEVE IT."
 9 NOW, HOW DO YOU CONTRAST WHAT THE FOUR BOARD MEMBERS
 10 WERE DOING AT THE TIME VERSUS WHAT MR. BRANDT SAID LAST FRIDAY?
 11 MR. MITTELSTAEDT: YOUR HONOR, I OBJECT. THAT'S
 12 ARGUMENTATIVE.
 13 THE COURT: OVERRULED.
 14 THE WITNESS: WELL, IT WAS DIFFICULT TO ACCEPT
 15 MR. BRANDT'S TESTIMONY BECAUSE OF THE SIGNIFICANT INVOLVEMENT OF
 16 ALL THE EXECUTIVE BOARD MEMBERS AND PARTICULARLY THE FACT THAT
 17 THEY WERE PERSONALLY INVOLVED AND THE FACT THAT MR. ZIEMEN WAS
 18 FROM THE SUPPORT SERVICES GROUP DOING THE PROJECTIONS AND
 19 WORKING THE NUMBERS UP FOR THE BOARD TO APPROVE, SO I WOULDN'T
 20 ACCEPT THAT TESTIMONY.
 21 BY MR. PICKETT:
 22 Q. AND IN THE OPENING STATEMENT, SAP'S LAWYERS SAID THAT THESE
 23 NUMBERS WERE MARKETING HYPE. IS THIS MARKETING HYPE?
 24 **A. NO, IT'S NOT. THESE NUMBERS ARE COMING FROM THE BUSINESS**
 25 **PEOPLE THAT RUN THE BUSINESS. THEY'RE COMING OUT OF A SUPPORT**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **AND THEN IT SAYS, SAP WILL SIPHON OFF THE CASH FLOW**
 2 **THAT ORACLE NEEDS TO BUILD OR ACQUIRE ITS NEXT-GENERATION**
 3 **APPLICATIONS. SO THAT WAS --**
 4 **AND THEN IT GOES ON AND SAYS, "SAP WILL ESTABLISH OR**
 5 **REINVIGORATE RELATIONSHIPS WITH POTENTIALLY THOUSANDS OF NEW AND**
 6 **EXISTING CUSTOMERS." AND I THINK THEY HAD DOCUMENTED THERE WERE**
 7 **4,000 JOINT CUSTOMERS THAT HAD SAP AND PEOPLESOF, AND THEY WERE**
 8 **GOING TO TARGET THAT GROUP.**
 9 Q. LET ME ASK YOU JUST ONE QUESTION IF I COULD INTERRUPT YOU
 10 PLEASE. UNDER "STRATEGY" WHERE IT STARTS, "BY OFFERING FULL
 11 MAINTENANCE AND SUPPORT OF PEOPLESOF AND JD EDWARDS SYSTEMS,"
 12 WHAT DID THAT HAVE TO DO WITH THE NEGOTIATIONS THAT SHOULD HAVE
 13 BEEN TAKING PLACE FOR A LICENSE?
 14 **A. WELL, THAT'S REALLY KEY. BECAUSE WHEN IT SAYS "FULL**
 15 **MAINTENANCE AND SUPPORT," THAT'S CALLED VENDOR-LEVEL SERVICE,**
 16 **AND TO HAVE VENDOR-LEVEL SERVICE ON THE ORACLE PRODUCTS, YOU**
 17 **NEED THE SOFTWARE AND THE MATERIALS THAT ARE COPYRIGHTED. SO**
 18 **THEY WOULD NEED THOSE MATERIALS AND COPYRIGHTED PROPERTIES TO**
 19 **OFFER THAT -- THAT MAINTENANCE, THAT FULL MAINTENANCE SERVICE**
 20 **WHICH WAS STEP ONE OF PROGRAM.**
 21 Q. ALL RIGHT. AND THEN FINALLY, "KEY TACTICS," WHAT'S THE
 22 SIGNIFICANCE OF SAP'S THINKING THERE?
 23 **A. WELL, THIS ONE IS VERY IMPORTANT, 'CAUSE ONE OF OUR THOUGHTS**
 24 **YESTERDAY WAS THE IMPORTANCE OF TIMING. AND THIS SHOWS HOW**
 25 **FOCUSED SAP'S MANAGEMENT WAS ON THE TIME TO DO THIS. IT WAS OF**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **GROUP. THEY'RE BEING APPROVED BY MR. AGASSI, HEAD OF PRODUCTS;**
 2 **MR. APOTHEKER, HEAD OF SALES. AND THIS IS REALLY A PROGRAM TO**
 3 **TAKE PRODUCT AND -- AND ALSO MR. OSWALD, HEAD OF SERVICE. SO**
 4 **THE HEAD OF SERVICE, THE HEAD OF PRODUCT, AND HEAD OF SALES ARE**
 5 **TAKING THIS NEW PRODUCT OFFERING TO THE MARKET.**
 6 **AND SO FROM MY PERSPECTIVE, IT'S THOROUGHLY**
 7 **INDICATIVE OF MANAGEMENT'S EXPECTATIONS AT THE TIME.**
 8 **(EXHIBIT PUBLISHED TO JURY.)**
 9 BY MR. PICKETT:
 10 Q. ALL RIGHT. LET'S LOOK AT THE NEXT EXHIBIT, EXHIBIT 141,
 11 PLEASE.
 12 WHAT DOES THIS TELL YOU ABOUT SAP'S THINKING AT THE
 13 TIME THEY SHOULD HAVE BEEN NEGOTIATING FOR A LICENSE?
 14 **A. THIS GOES TO FACTORS 2 AND 3. SO, ONE, THE IMPACT ON ORACLE**
 15 **FROM SAP'S PERSPECTIVE AND ALSO THE EXPECTATIONS POINT OUT UNDER**
 16 **GOAL -- I'LL POINT OUT OUR GOAL IS TO CONVERT THE MAJORITY OF**
 17 **THE PEOPLESOF AND JD EDWARDS CUSTOMERS BASE TO SAP AND CONTAIN**
 18 **ORACLE'S POTENTIAL GROWTH IN THE NEXT-GENERATION APPLICATION**
 19 **MARKET. SO THAT'S THE GOAL.**
 20 **AND THEN UNDER "STRATEGY," IT COMES BACK TO STEP ONE.**
 21 **BY OFFERING FULL MAINTENANCE AND SUPPORT, PEOPLESOF AND JD**
 22 **EDWARDS SYSTEMS, AND THEN IT GOES ON AND SAYS, WITH FAVORABLE**
 23 **UPGRADE LICENSING TERMS TO SAP, NETWEAVER, THAT'S STEP TWO WHICH**
 24 **IS THE INTEGRATION PRODUCTS. AND, ULTIMATELY, STEP THREE'S**
 25 **MYSAP ERP. THAT'S THE CONVERSION TO SAP, THEIR APPLICATIONS.**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **THE ESSENCE. IT SAYS, "REACH OUT TO THE JOINT" -- SO IT SAYS,**
 2 **"JOINT SAP-PEOPLESOF-JDE ACCOUNTS." IT SAYS, "WITHIN THE**
 3 **GLOBAL 1000 ESTABLISHED" -- I THINK IT'S 450, THEY HAD OF GLOBAL**
 4 **1000 WERE THEIR CUSTOMERS OVER THE NEXT 30 DAYS, WHICH IS**
 5 **FEBRUARY, AND AGGRESSIVELY CONVERT THEIR MAINTENANCE CONTRACTS**
 6 **TO SAP AND THEN FACILITATE ADOPTION -- IMMEDIATE ADOPTION OF**
 7 **NETWEAVER AND THE PLANNED ADOPTION OF MYSAP ERP AT PEOPLESOF**
 8 **AND JDE INSTALLATIONS WITHIN THOSE ENTERPRISES.**
 9 **AND SO IT SHOWS THAT THE NEXT 30 DAYS, THEY WANTED TO**
 10 **GO AFTER ALMOST 500 CUSTOMERS AND CONVERT THEM. SO IT SHOWS ME**
 11 **THAT THIS WAS VERY IMPORTANT TO MANAGEMENT AT THAT TIME, TO GET**
 12 **INTO THE MARKET, AND THEY NEEDED THE SOFTWARE.**
 13 Q. SO THEY'RE GOING AFTER THE GLOBAL 1000, STEP ONE, STEP TWO,
 14 STEP THREE?
 15 **A. THAT'S CORRECT.**
 16 Q. SO LET'S LOOK AT YET ANOTHER DOCUMENT. THIS ONE IS
 17 EXHIBIT 23.
 18 **(EXHIBIT PUBLISHED TO JURY.)**
 19 BY MR. PICKETT:
 20 Q. WHAT IS THE SIGNIFICANCE OF THIS EVIDENCE?
 21 **A. THIS -- THIS IS FROM COMMENTS THAT MR. AGASSI MADE. THERE**
 22 **WAS A CONFERENCE CALL ON JANUARY 19TH, 2005, WHERE SAP**
 23 **INTRODUCED THE TOMORROWNOW AND SAFE PASSAGE PROGRAM. AND THEY**
 24 **WERE TELLING THEIR CUSTOMERS AND THE PUBLIC AND ANALYSTS ABOUT**
 25 **WHAT THEY WERE GOING TO DO.**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 AND FROM THIS TRANSCRIPT, THERE'S SOME IMPORTANT
 2 COMMUNICATION MR. AGASSI MADE, WHO'S THE CHIEF TECHNOLOGY
 3 OFFICER AND EXECUTIVE BOARD MEMBER. AND I ALSO READ THROUGH
 4 THIS BECAUSE IT TALKS ABOUT REALLY WHAT I'LL CALL THE VALUE
 5 PROPOSITION, HOW IMPORTANT THIS WAS TO SAP.
 6 IT SAYS, "AND TOMORROWNOW IS THE VEHICLE THROUGH
 7 WHICH THEY GET THE MAINTENANCE SERVICES," SORT OF THAT FIRST
 8 SENTENCE AND A HALF.
 9 AND THEN IT DROPS DOWN, AND HE'S BEING ASKED A
 10 QUESTION ABOUT SORT OF THE GOAL OF THIS. THEY -- THEN SAY, "SO
 11 AS A RESULT OF THAT, BASICALLY," HE SAYS, "IF YOU WANT TO LOOK
 12 AT IT FROM SORT OF THE FINANCIALS PERSPECTIVE, THE RATIONALE IS
 13 MORE AROUND THE VALUE," AND THEN IT SAYS THAT "THESE CUSTOMERS
 14 REPRESENT AS A POTENTIAL SET OF CUSTOMERS FOR SAP APPLICATIONS."
 15 RIGHT THROUGH THERE, "APPLICATIONS."
 16 SO NOW HE'S SAYING WHAT'S THE VALUE OF THIS TO SAP IN
 17 OUR APPLICATION BUSINESS? AND IT SAYS -- AND IT'S -- "THE VALUE
 18 WAS ESTIMATED BY ORACLE," IT SAYS, "RIGHTFULLY OR WRONGFULLY, AS
 19 \$10 BILLION."
 20 AND THEN IT SAYS -- THIS IS MR. AGASSI NOW, THE
 21 EXECUTIVE BOARD MEMBER -- HE SAYS, "WHAT WE BELIEVE IS THAT THIS
 22 CUSTOMER BASE," THAT'S BASICALLY THE 10,000 CUSTOMERS OF
 23 PEOPLESFT, "IS NOT NECESSARILY CAPTIVE BY ORACLE." SO BECAUSE
 24 THEY HAVE THE SOFTWARE NOW, THEY DON'T -- THEY KNOW THEY CAN GO
 25 COMPETE FOR THESE CUSTOMERS. AND IT SAYS, "I THINK THE CUSTOMER
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MEYER - DIRECT (RESUMED)/ PICKETT

1 BY MR. PICKETT:
 2 Q. IT'S A DOCUMENT WE'VE SEEN. WHAT DOES THIS -- HOW DOES THIS
 3 DOCUMENT RELATE TO THE NEGOTIATION OF THE LICENSE THAT SHOULD
 4 HAVE TAKEN PLACE?
 5 A. THIS DOCUMENT WAS PRESENTED TO THE -- THE BOARD AT SAP ON
 6 JANUARY 20TH OF 2005. AND IT'S CONSISTENT WITH WHAT WE BEEN
 7 TALKING ABOUT THE LAST FEW MINUTES.
 8 I THINK WHAT'S IMPORTANT IN THAT FIRST -- THAT FIRST
 9 PHRASE, IT SAYS, THE GOAL -- IT SAYS, "CONVERT APPROXIMATELY
 10 50 PERCENT OF THE PEOPLESFT AND JD EDWARDS CUSTOMER
 11 INSTALLATIONS TO SAP." SO THAT'S THE CONVERSION.
 12 AND I THINK WHAT'S EVEN MORE IMPORTANT NOW, IT SAYS,
 13 "100 PERCENT OF SHARED CUSTOMERS," AND THAT MEANS WHERE A
 14 CUSTOMER ALREADY HAS SAP IN ITS I.T. SHOP AND ALSO HAS
 15 PEOPLESFT OR JD EDWARDS. SO BASICALLY A LOT OF TIMES,
 16 THERE'S -- IT'S A SHARED JOINT ACCOUNT. AND THIS ALLOWS SAP NOW
 17 TO TRY TO BRING THAT PEOPLESFT APPLICATION, SAY FOR HUMAN
 18 RESOURCE, INTO THEIR BUSINESS. SO THAT'S AN IMPORTANT GOAL OF
 19 THAT CONVERSION.
 20 AND IT GOES DOWN THE PAGE, TALKS ABOUT THREE OTHER
 21 OBJECTIVES, "DISRUPT ORACLE'S ABILITY TO PAY FOR THE ACQUISITION
 22 OUT OF CASH FLOW." THAT'S FACTOR TWO. IT SAYS, "SHRINK THEIR,"
 23 THAT'S ORACLE'S, "SHARE OF THE APPLICATION MARKET." THAT'S GOAL
 24 TWO.
 25 AND THEN IT SAYS, "DISCREDIT THEIR EFFORTS" -- THAT'S
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MEYER - DIRECT (RESUMED)/ PICKETT

1 BASE HAS TO MAKE THE CHOICE RIGHT NOW."
 2 SO THIS TELLS ME THAT IT'S THE EXPECTATION. IT'S THE
 3 GOAL. IT'S THE OBJECTIVE OF SAP'S MANAGEMENT TO GO AFTER ALL
 4 10,000 CUSTOMERS AND TO TRY TO ACHIEVE A BIG PIECE OF THAT
 5 \$10 BILLION VALUE.
 6 Q. AND ONLY FOR MAINTENANCE?
 7 A. NO, THIS WOULD BE FOR EVERYTHING. IT BASICALLY SAYS IN
 8 THERE "FOR SAP APPLICATIONS." SO MAINTENANCE IS ONLY SORT OF
 9 THE VEHICLE -- THE ENABLER TO GET TO THE APPLICATION SALE.
 10 Q. AND THIS IS A STATEMENT MADE BY MR. AGASSI WHEN?
 11 A. THIS WAS ON JANUARY 19TH, 2005. AND IT WAS A CONFERENCE
 12 CALL WITH -- IT WAS A PUBLIC CONFERENCE CONFERENCE CALL TO
 13 INVESTORS AND THE ANALYSTS AND THE CUSTOMERS.
 14 Q. AND WHAT'S THE DAY THE LICENSE SHOULD HAVE STARTED?
 15 A. BASICALLY THAT WOULD BE THE DAY. THEY WOULD NEED THE
 16 LICENSE TO ACTUALLY HAVE THIS PHONE CALL AND ANNOUNCE THIS
 17 PROGRAM IN A WAY THAT WOULD BE, YOU KNOW, LEGAL.
 18 Q. SO IS THERE ANY DOUBT ABOUT WHAT SAP WOULD BE THINKING IN
 19 NEGOTIATING THIS LICENSE HAD THEY DONE THAT?
 20 A. MY PERSPECTIVE, THEY WOULD TAKE THE LICENSE AND PAY THE
 21 APPROPRIATE VALUE TO -- TO BE ABLE TO GO AND PUT THIS PLAN INTO
 22 PLACE.
 23 Q. ALL RIGHT. LET'S LOOK AT EXHIBIT 24, NEXT.
 24 (EXHIBIT PUBLISHED TO JURY.)
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MEYER - DIRECT (RESUMED)/ PICKETT

1 ORACLE AGAIN -- "DISCREDIT ORACLE'S EFFORTS TO CREATE A
 2 NEXT-GENERATION APPLICATION PLATFORM." SO THESE GO TO GOALS TWO
 3 AND THREE AND WOULD MAKE THE LICENSE MUCH MORE VALUABLE TO SAP.
 4 Q. AND IN YOUR OPINION, WOULD SAP PAY FOR THE ACCESS TO
 5 SOFTWARE IN ORDER TO INITIATE AND ACHIEVE THESE GOALS?
 6 A. YES, TO HAVE THE ABILITY TO -- TO CONVERT 50 PERCENT OF THE
 7 10,000 CUSTOMERS OR TO HAVE A HUNDRED PERCENT OF THE SHARED
 8 CUSTOMERS, THE 4,000, YES, THEY WOULD DO THAT.
 9 Q. BE WORTH A LOT.
 10 A. THAT'S CORRECT.
 11 Q. ALL RIGHT. LET'S TAKE A LOOK AT ANOTHER DOCUMENT IN
 12 EVIDENCE, PLAINTIFFS' EXHIBIT 161.
 13 (EXHIBIT PUBLISHED TO JURY.)
 14 BY MR. PICKETT:
 15 Q. WHAT'S THE RELEVANCE OF THIS DOCUMENT, MR. MEYER?
 16 A. THIS DOCUMENT COMES BACK TO FACTOR 3, WHICH IS THE EXPECTED
 17 FINANCIAL BENEFITS OR GOALS. AND THIS IS JANUARY 25TH, 26TH.
 18 IT'S A MEETING WHERE THERE'S AN INTEGRATION BETWEEN TOMORROWNOW
 19 AND SAP. AND WHAT WAS IMPORTANT HERE WAS THERE WAS SOME
 20 COMMUNICATION IN THE INTEGRATION MEETING ABOUT THE POTENTIAL
 21 CUSTOMERS.
 22 AND IT SAYS WITH SCENARIO 1, IT SAYS, "2000 CUSTOMERS
 23 IN 2009." AND THEN WHAT YOU'LL SEE, WHICH IS IMPORTANT TO THE
 24 RIGHT-HAND SIDE, THAT SAYS, "FIVE TIMES ORIGINAL TOMORROWNOW
 25 PLANNING." SO THAT INDICATES TO ME THAT SAP NOW IS GOING TO
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MEYER - DIRECT (RESUMED)/ PICKETT

1 TAKE TOMORROWNOW FROM BEING A SMALL OPERATION AND THEN PUSH IT
 2 AS PART OF SAFE PASSAGE TO BEING MUCH BIGGER OPERATION. IT'S A
 3 FIVE TIMES MULTIPLE IN TERMS OF EXPECTATIONS.
 4 AND THEN IT SAYS, SCENARIO 2, THE EXPECTATIONS WOULD
 5 BE 4,000 CUSTOMERS IN 2009, AND, ONCE AGAIN, THE REFERENCE TO
 6 TOMORROWNOW AND A FIVE TIMES FACTOR.
 7 AND I BELIEVE THAT MR. ZIEMEN TESTIFIED IN DEPOSITION
 8 THAT THE 2,000 PROJECTION WAS MORE CONSERVATIVE, AND THE 4,000
 9 WAS WHAT HE CALLED MORE UPBEAT.
 10 Q. ALL RIGHT.
 11 LET'S LOOK AT SLIDE 4 OF THAT SAME DOCUMENT. IT'S
 12 THE NEXT PORTION. THIS IS PAGE 4 OF EXHIBIT 161.
 13 (EXHIBIT PUBLISHED TO JURY.)
 14 BY MR. PICKETT:
 15 Q. WHAT DOES THIS SHOW?
 16 A. THIS WAS ALSO PART OF THE INTEGRATION, AND THIS GOES BACK TO
 17 FACTOR 1, THE GOALS OF USING THE SOFTWARE. IT SAYS -- THIS IS
 18 THE MERGER. AND "THE MERGER" MEANS THIS IS THE MERGER WITH
 19 TOMORROWNOW, SO THIS IS THE COMBINATION OF SAP WITH TOMORROWNOW.
 20 THE MERGER PRESENTS A HUGE OPPORTUNITY FOR US, SO NOW
 21 THIS IS THE COMBINED SAP/TOMORROWNOW GROUP. AND THEN IT SAYS --
 22 AND THIS GETS BACK TO THE IMPORTANCE OF THE SOFTWARE AND
 23 TOMORROWNOW. IT SAYS, "TOMORROWNOW WILL SERVE AS A MAJOR
 24 CORNERSTONE OF OUR-GO-TO-MARKET STRATEGY AS OUR KEY
 25 SERVICE-DELIVERY UNIT." AND SO WE BEEN TALKING ABOUT HOW
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MEYER - DIRECT (RESUMED)/ PICKETT

1 Q. WHY DID YOU FOCUS ON JANUARY -- ON DECEMBER 2004 --
 2 DECEMBER 2004, JANUARY 2005?
 3 A. WELL, AS I MENTIONED TO THE JURY YESTERDAY, THAT WHEN YOU
 4 VALUE THE FAIR MARKET VALUE OF THE PROPERTY, THE -- PROPERTY IN
 5 THIS CASE, YOU FOCUS ON WHAT'S KNOWN AT THE TIME. AND WHAT WERE
 6 THE EXPECTATIONS OF THE PARTIES. AND I'M LAYING OUT FOR YOU THE
 7 EXPECTATIONS OF ONE PART OF THAT NEGOTIATING GROUP, AND THAT'S
 8 SAP.
 9 Q. ALL RIGHT. NOW, BASED ON ALL THE EVIDENCE YOU REVIEWED,
 10 MR. MEYER, DID YOU CALCULATE SAP'S EXPECTED FINANCIAL GAINS FROM
 11 THE LICENSE, HOW MUCH THEY WOULD EXPECT TO GAIN FROM THIS
 12 LICENSE?
 13 A. YES, I HAVE.
 14 Q. AND HOW DID YOU DO THAT?
 15 A. WELL, I DEVELOPED A FINANCIAL MODEL. AND FROM THAT, I WAS
 16 ABLE TO COME UP WITH CERTAIN FINANCIAL DATA THAT I'LL TALK TO
 17 YOU ABOUT AND SHOW YOU, AND THEN CAME UP WITH WHAT I'LL CALL
 18 THE -- SORT OF THE PRESENT VALUE OF -- OF THE GAINS THAT SAP
 19 WOULD -- WOULD COME INTO IF THEY WERE TO ACQUIRE THE SOFTWARE IN
 20 THIS NEGOTIATION. SO I HAVE A SLIDE THAT SHOWS THOSE REVENUE
 21 SOURCES.
 22 MR. PICKETT: LET'S SHOW THE NEXT --
 23 (EXHIBIT PUBLISHED TO JURY.)
 24 MR. PICKETT: THERE WE GO.
 25 Q. THIS IS EXHIBIT 12 AGAIN, BUT YOU'VE ADDED SOME ANALYSIS TO
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MEYER - DIRECT (RESUMED)/ PICKETT

1 IMPORTANT THAT WAS.
 2 Q. NOW, IN HIS OPENING STATEMENT, SAP'S ATTORNEY TOLD THE JURY
 3 THAT, QUOTE, TOMORROWNOW WAS A VERY, VERY SMALL PART, CLOSED
 4 QUOTE, OF SAP'S SAFE PASSAGE PROGRAM.
 5 IS THE EVIDENCE CONSISTENT WITH THAT STATEMENT?
 6 A. NO, IT'S NOT. AND CERTAINLY IT'S NOT CONSISTENT AT THE TIME
 7 OF THE PLANNING AND THE EXPECTATIONS AND THE ROLLOUT OF THIS
 8 PROGRAM. AND IT WAS -- IT WAS ABSOLUTELY REFERRED TO AS THE
 9 CORNERSTONE. IT WAS NOT A SMALL PART.
 10 AND THEY WERE GOING TO TAKE TOMORROWNOW WITH THE
 11 SOFTWARE AND RAMP IT UP AND MAKE IT A BIG PART OF THEIR 1-2-3
 12 PROGRAM TO CONVERT.
 13 Q. NOW, WE'VE GONE THROUGH SOME OF THE EVIDENCE OF RELATING TO
 14 THE FACTORS THAT THAT WOULD BE IN SAP'S MIND WHEN IT WOULD ENTER
 15 INTO A NEGOTIATION FOR A PEOPLESFT LICENSE.
 16 IS THERE OTHER EVIDENCE RELEVANT TO THOSE FACTORS?
 17 A. YES, THERE IS.
 18 Q. AND WITHOUT -- FOR THE SAKE OF TIME, WE'RE NOT GOING TO SHOW
 19 IT ALL, BUT HAVE YOU BASED YOUR OPINION ON NOT JUST THIS
 20 EVIDENCE BUT ALL OF THE EVIDENCE?
 21 A. YES. AND I WAS PARTICULARLY FOCUSED ON THE DECEMBER AND
 22 JANUARY 2004, 2005 TIME IN THOROUGHLY UNDERSTANDING THE
 23 EXPECTATIONS OF SAP MANAGEMENT OVER THE DEVELOPMENT AND LAUNCH
 24 AND PROJECTED GOALS AND OBJECTIVES AND CUSTOMERS OF USING THE
 25 SOFTWARE AND ACQUIRING TOMORROWNOW AND LAUNCHING SAFE PASSAGE.
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MEYER - DIRECT (RESUMED)/ PICKETT

1 IT. WHAT DOES THAT SHOW?
 2 A. RIGHT. SO WHEN YOU MENTIONED DID I DO A CALCULATION. YES,
 3 I DEVELOPED A MODEL. AND I WENT BACK TO THE -- THE DOCUMENTS
 4 FROM SAP. AND WHAT I FOCUSED ON WAS THE REVENUE THAT THEY WOULD
 5 GAIN FROM THREE MAJOR SOURCES. AND THE BLUE THERE, I'VE
 6 HIGHLIGHTED, THEY'D HAVE MAINTENANCE REVENUES THAT THEY WOULD
 7 EARN FROM SERVICING PEOPLESFT.
 8 SECONDLY, THEY WOULD HAVE SALES OF OTHER SAP
 9 PRODUCTS. I MENTIONED A MOMENT AGO. THAT WOULD BE THE
 10 CROSS-SELL ITEMS LIKE NETWEAVER AND, ULTIMATELY, IN THE GREEN
 11 THERE, THAT'S THE CONVERSION REVENUE THAT THEY WOULD EARN FROM
 12 SELLING THEIR PRODUCTS TO THE SAP APPLICATIONS.
 13 AND SO I WENT BACK TO THEIR PLANNING DOCUMENTS, AND I
 14 BUILT A FINANCIAL MODEL TO TAKE THOSE REVENUES, PROJECT OUT --
 15 TAKE THE CUSTOMERS AT THE AMOUNT OF -- THEY WOULD BE CHARGED PER
 16 YEAR FOR THE VARIOUS PRODUCTS, PROJECT IT OUT OVER TIME, LOOK AT
 17 THE COST THAT THEY WOULD HAVE TO SPEND TO -- TO MAKE THOSE
 18 REVENUES, CAME UP WITH PROFITS AND BROUGHT THAT BACK. IT'S
 19 CALLED DISCOUNTING TO JANUARY 2005.
 20 AND IT PROVIDES BASICALLY THE NET PRESENT VALUE
 21 PROFIT OR GAIN THAT SAP WOULD EARN IF THEY WERE TO USE THE
 22 SOFTWARE.
 23 Q. ALL RIGHT. LET'S GO TO THE NEXT SLIDE, THEN.
 24 (EXHIBIT PUBLISHED TO JURY.)
 25 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

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MEYER - DIRECT (RESUMED)/ PICKETT

1 BY MR. PICKETT:
 2 Q. WHAT IS -- THIS SEEMS -- THIS MAY HAVE MAY SET THE RECORD
 3 FOR MOST COMPLICATED SLIDE. WHAT DOES THIS ONE SHOW?
 4 **A. WELL, THIS ONE'S QUITE BUSY, BUT I WANTED TO INDICATE AND**
 5 **SHOW TO THE JURY THE VARIOUS INPUTS THAT GO INTO THE FINANCIAL**
 6 **MODEL AND UNDER FACTOR 3. BASICALLY I MENTIONED TO FIGURE OUT**
 7 **THE REVENUES THAT THEY WOULD EARN, DEDUCT THE COSTS IT WOULD**
 8 **TAKE TO EARN THOSE REVENUES, AND COME UP WITH PROFITS.**
 9 **AND SO IT'S ALMOST LIKE DOING A -- AN INCOME**
 10 **STATEMENT FOR PROJECTED BUSINESS, NOT DISSIMILAR TO WHAT**
 11 **MS. CATZ TESTIFIED TO YESTERDAY ABOUT WHEN YOU -- WHEN YOU VALUE**
 12 **AN ACQUISITION AND LOOK AT PROJECTED REVENUES AND COSTS AND**
 13 **PROFITS.**
 14 **SO THE INPUTS HERE WERE, FIRST, NUMBER OF CUSTOMERS**
 15 **BECAUSE IT ALL STARTS WITH CUSTOMERS. AND IN THIS CASE, I**
 16 **WORKED OFF OF 3,000 MAINTENANCE CUSTOMERS, AND -- AND I MODELED**
 17 **OUT TWO SEPARATE SCENARIOS THAT YOU'LL SEE IN A MOMENT.**
 18 **ONE WAS 3,000 WERE PROVIDED MAINTENANCE FOR THE**
 19 **PERIOD OF TIME WHEN TOMORROWNOW OPERATED THROUGH BASICALLY**
 20 **OCTOBER 2008. AND THEN AFTER THAT POINT IN TIME, 1375, 1,375**
 21 **CUSTOMERS CONVERTED TO SAP. AND THEN SECOND MODEL SHOWS 2,000**
 22 **CONVERTING.**
 23 **AND ONCE I HAD THOSE CUSTOMERS, THEN I JUST DO**
 24 **CALCULATIONS THAT SAY, OKAY, OVER TIME, YOU TAKE THE CUSTOMERS,**
 25 **YOU FIGURE OUT FROM NORMAL ATTRITION HOW MANY WILL LEAVE PER**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **YEAR. THAT WAS 3.5 PERCENT, AND THAT CAME FROM SOME EXPECTED**
 2 **ATTRITION RATES WE SAW YESTERDAY.**
 3 Q. LET ME GO BACK FOR A MOMENT, MR. MEYER, TO THE CUSTOMERS.
 4 YOU SAID YOU START WITH THE NUMBER OF CUSTOMERS. WHY DO YOU --
 5 WHAT'S THE SIGNIFICANCE OF THAT?
 6 **A. BECAUSE THE CUSTOMERS REPRESENT POTENTIAL REVENUES. SO IF**
 7 **YOU HAVE A CUSTOMER THAT YOU'RE PROVIDING MAINTENANCE SERVICE TO**
 8 **OR LICENSE PRODUCT TO, YOU CHARGE THEM FOR THE LICENSE, OR YOU**
 9 **CHARGE THEM FOR THE MAINTENANCE.**
 10 **SO IT STARTS WITH A NUMBER OF CUSTOMERS, AND THEN YOU**
 11 **LOOK AT HOW MANY WILL LEAVE PER YEAR BASED ON HISTORICAL TRENDS,**
 12 **AND YOU PUT A VALUE ON THOSE CUSTOMERS PER YEAR, AND THAT GIVES**
 13 **YOU YOUR REVENUE. SO IT'S CUSTOMERS, AVERAGE AMOUNT PER YEAR IN**
 14 **REVENUE, TOTAL REVENUES, AND THEN YOU DEDUCT COSTS FROM THAT.**
 15 Q. AND DID YOU SEE EVIDENCE THAT SAP'S TOP MANAGEMENT WAS
 16 THINKING ABOUT THIS DEAL IN TERMS OF THE NUMBER OF CUSTOMERS IT
 17 COULD CONVERT?
 18 **A. YES.**
 19 Q. AND SO HOW DID YOU BASE YOUR ESTIMATES IN YOUR FINANCIAL
 20 MODEL, THE 3,000, AND THEN THE CONVERSIONS TO MYSAP APPLICATIONS
 21 AND THE CROSS-SELLS?
 22 **A. I USED THEIR PROJECTIONS.**
 23 Q. SAP'S OWN PROJECTIONS?
 24 **A. THAT'S CORRECT.**
 25 Q. ALL RIGHT. GO AHEAD.
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **A. SO I STARTED WITH THEIR PROJECTIONS. I WENT TO THE**
 2 **ATTRITION RATES. AND THEN THE THIRD ROW THERE, I MULTIPLIED THE**
 3 **AVERAGE REVENUE PER CUSTOMER BASICALLY TIMES THE NUMBER OF**
 4 **CUSTOMERS.**
 5 **AND SO FOR MAINTENANCE, IT WAS \$68,000 A YEAR.**
 6 **THAT'S THE AVERAGE YOU GET FOR EACH CUSTOMER THAT'S TAKING**
 7 **MAINTENANCE. AND THAT WAS PER SAP'S BUSINESS RECORDS. AND THEN**
 8 **FROM THERE, I WENT AND IT CAME UP WITH -- AND THEN ON THE**
 9 **RIGHT-HAND SIDE, I DEALT WITH -- WHEN THEY CONVERT A CUSTOMER,**
 10 **THEY MAKE \$358,000 IN A CONVERSION AND THEN FOR THE OTHER SALES**
 11 **WHICH IS THE CROSS-SELL ITEM, THEY MAKE \$86,000 PER CROSS-SELL.**
 12 **SO I USED THOSE ITEMS TO COME UP WITH THE AVERAGE**
 13 **REVENUE PER YEAR AND THEN MULTIPLIED THAT TIMES THE NUMBER OF**
 14 **CUSTOMERS AND CAME UP WITH TOTAL REVENUE. AND SEE, THAT'S THE**
 15 **NEXT ROW. SO THAT'S YOUR CALCULATIONS THERE. AND AS YOU WORK**
 16 **DOWN, YOU THEN HAVE TO DEDUCT COSTS, AND I SAW FROM SAP'S**
 17 **FINANCIAL RECORDS THAT THEY BASICALLY WOULD HAVE PROFIT MARGINS**
 18 **OF 70 PERCENT. SO I DEDUCT COST OF 30 PERCENT, AND THAT LEAVES**
 19 **70 PERCENT THERE FOR THE PROFIT THAT -- THAT SAP WOULD MAKE.**
 20 Q. THAT'S SAP'S PROFIT AS PROJECTED BY WHOM?
 21 **A. THAT'S BASED ON SAP'S OWN RECORDS.**
 22 Q. UM-HMM.
 23 **A. AND THEN IT'S MULTIPLIED BY A DISCOUNT FACTOR, BECAUSE I RUN**
 24 **THE CALCULATIONS FROM 2005 OUT TO 2008. SO THEY'RE DISCOUNTED**
 25 **BACK TO JANUARY 2005, WHICH BECOMES -- THAT'S THAT 14 PERCENT,**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **AND THAT'S FROM SAP VALUATION DOCUMENTS.**
 2 **AND THEN I BRING IT BACK TO JANUARY 2005, AND THAT**
 3 **SAYS "AS CALCULATED." AND THEN ONCE I DO THAT, I KNOW THE VALUE**
 4 **OF THOSE CUSTOMERS. THEN I RUN IT OVER, REALLY, TWO PERIODS,**
 5 **THROUGH THE END OF 2007, RIGHT -- BASED ON HOW THEY DID IT FOR**
 6 **THE FIRST THREE YEARS. AND I ALSO RUN IT OUT THROUGH THE END OF**
 7 **OCTOBER 28, WHICH WAS THE END OF THE LICENSE PERIOD.**
 8 **AND THEN I HAD ONE MORE ITEM TO ADD TO THAT, AND I**
 9 **KNOW THAT ONCE A CUSTOMER IS CONVERTED, IT HAS FUTURE VALUE. SO**
 10 **I DO A CALCULATION SAYING THAT -- THAT A CONVERTED CUSTOMER HAS**
 11 **VALUE OUT INTO THE FUTURE, AS MS. CATZ TESTIFIED TO YESTERDAY,**
 12 **CAN BE FOR DECADES ONCE YOU CONVERTED.**
 13 **AND SO I SAY WHATEVER CUSTOMERS CONVERT, I LOOK AT**
 14 **THAT VALUE, AND I DO IT TWO WAYS. ONE IS CALLED A REVENUE**
 15 **MULTIPLE, WHICH YOU MULTIPLY THE LAST YEAR'S REVENUE BY FOUR**
 16 **TIMES, AND THAT'S THE FUTURE VALUE OF HAVING THAT CUSTOMER.**
 17 **AND THEN, SECONDLY, A PER-CUSTOMER VALUE, WHICH MEANS**
 18 **THAT FOR EVERY CUSTOMER, YOU HAVE -- YOU -- THERE'S A PRESENT**
 19 **VALUE OF THAT, AND THEN I USED \$1 MILLION. AND SO I TAKE ALL**
 20 **THOSE ITEMS, AND I PRESENT THEM AS OF JANUARY 2005, AND THAT'S**
 21 **HOW DO I MY FINANCIAL GAIN CALCULATIONS.**
 22 Q. SO YOU CAN CALCULATE, BASED ON SAP'S THINKING AT THE TIME,
 23 HOW MUCH MONEY THEY THOUGHT THEY WERE GOING TO PROFIT FROM DOING
 24 THAT?
 25 **A. THAT'S RIGHT. FROM MAINTENANCE AND CONVERTING CUSTOMERS.**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 Q. ALL RIGHT. LET'S GO TO AN EXAMPLE OF HOW YOUR CALCULATIONS
 2 WORK. BELIEVE THE NEXT SLIDE SHOWS THAT.
 3 (EXHIBIT PUBLISHED TO JURY.)
 4 BY MR. PICKETT:
 5 Q. THIS IS -- THIS IS WHAT?
 6 **A. THIS IS ONE OF THE CALCULATIONS OF -- I DID THREE. AND SO**
 7 **THIS IS THE ONE THAT IS BASED ON 3,000 MAINTENANCE CUSTOMERS**
 8 **WITH 2,000 CONVERTING TO SAP. AND WE JUST DESCRIBED THE**
 9 **CALCULATION. I THINK HERE WHAT'S IMPORTANT, IS JUST TO SEE THAT**
 10 **THERE'S, ON THE LEFT-HAND SIDE, THREE SOURCES OF REVENUE.**
 11 **SO YOU HAVE MAINTENANCE REVENUE; YOU HAVE THE**
 12 **ADDITIONAL PRODUCT SALES, WHICH IS THE INTEGRATION PRODUCTS.**
 13 **AND THEN YOU HAVE THE CONVERTED CUSTOMER SALES. AND THEN YOU'LL**
 14 **SEE YOU HAVE A VARIETY OF ROWS, BUT IT'S WHAT I DESCRIBED A**
 15 **MOMENT AGO. YOU HAVE TOTAL EXPECTED REVENUE, LESS COSTS. YOU**
 16 **COME UP WITH THE EXPECTED PROFITS. IN THIS CASE, THE REVENUE**
 17 **IS -- YOU TAKE THAT, DEDUCT THE COSTS, YOU COME UP WITH THE**
 18 **EXPECTED PROFITS.**
 19 **AND THEN I ADDED THE AMOUNT TO THE RIGHT-HAND SIDE**
 20 **THERE OF THE FUTURE FINANCIAL GAINS FROM THOSE CONVERTED**
 21 **CUSTOMERS. AND, ULTIMATELY, YOU SEE THAT THE VALUE DISCOUNTED**
 22 **AS \$1.2 BILLION -- IT'S ACTUALLY \$1,221,000,000 AS OF USING --**
 23 **FROM USING THIS SCENARIO, WHICH IS 3,000 MAINTENANCE CUSTOMERS**
 24 **WITH 2,000 CONVERTED.**
 25 **SO THAT'S AN ILLUSTRATION OF THAT CALCULATION.**

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MEYER - DIRECT (RESUMED)/ PICKETT

1 ABOUT ON THE BOTTOM LEFT, THE \$1.22 BILLION. AND THAT WAS BASED
 2 ON 3,000 MAINTENANCE CUSTOMERS WITH 2,000 CONVERTING. AND I
 3 USED A REVENUE MULTIPLE THERE OF 4 AND CAME UP WITH
 4 \$1.2 BILLION.
 5 AND THE RIGHT-HAND SIDE NUMBER ACTUALLY IS AN
 6 IMPORTANT NUMBER BECAUSE IT SHOWS THE FULL VALUE OF THE CUSTOMER
 7 CONVERSION. AND THAT'S ALSO BASED ON 3,000 MAINTENANCE
 8 CUSTOMERS, 2,000 CONVERT TO MYSAP. AND THEN THERE, I USED A
 9 MILLION DOLLARS PER CUSTOMER, WHICH REPRESENTS BASICALLY
 10 \$250,000 PER YEAR FOR 10 YEARS.
 11 THAT'S MADE UP OF MAINTENANCE, CROSS-SELL, BASED ON
 12 HOW IT'S LOOKED AT BY SAP'S MANAGEMENT AND THE UPSWITCH. SO FOR
 13 EVERY CUSTOMER THAT SWITCHED OVER TO SAP, A QUARTER MILLION
 14 DOLLARS WOULD BE MADE PER YEAR. AND OVER TEN YEARS, WHEN I
 15 DISCOUNT THAT BACK, IT'S ABOUT A MILLION DOLLARS OF NET PRESENT
 16 VALUE TO HAVE THAT CONVERTED CUSTOMER, AND THAT'S THE
 17 \$2.7 BILLION.
 18 SO MY RANGE OF BENEFITS TO SAP, BASED ON THEIR OWN
 19 PROJECTIONS, IS \$880 MILLION UP TO \$2.7 BILLION.
 20 Q. NOW, YOU EARLIER REFERENCED TO THE JURY SOME SAP ESTIMATES
 21 AT THE TIME THAT THEY COULD GET 5,000 CUSTOMERS OR THE MAJORITY
 22 OF THE CUSTOMERS, OR MR. AGASSI SAID 6,000 CUSTOMERS.
 23 IF YOU USE 5,000 OR 6,000 CUSTOMERS, IN THESE
 24 CALCULATIONS, WHAT WOULD BE THE RESULT? NOT THE PRECISE RESULT,
 25 BUT WHAT WOULD THAT -- HOW WOULD THAT IMPACT THE CALCULATION?

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MEYER - DIRECT (RESUMED)/ PICKETT

1 Q. AND YOU SAID YOU DID THREE CALCULATIONS. THIS IS ONE OF
 2 THEM?
 3 **A. THAT'S CORRECT.**
 4 Q. AND FOR THE OTHER TWO CALCULATIONS, YOU CHANGED THE -- THE
 5 ASSUMPTION ABOUT CUSTOMERS AND RECALCULATED?
 6 **A. ONE CALCULATION HAS A DIFFERENT NUMBER OF CUSTOMERS. I**
 7 **USED, I BELIEVE, IT'S 1375. AND THEN THE OTHER CALCULATION PUTS**
 8 **A HIGHER VALUE ON THE FUTURE. IT PICKS UP ALL FUTURE VALUE,**
 9 **INCLUDING MAINTENANCE, CROSS-SELL, AND THE UPSWITCH. SO IT**
 10 **GIVES YOU A TOTAL VALUATION OF THAT CUSTOMER ONCE IT'S CONVERTED**
 11 **OFF OF PEOPLESOFT OVER TO THE SAP PLATFORM.**
 12 Q. ALL RIGHT. LET'S SEE THE RESULTS OF YOUR THREE
 13 CALCULATIONS, MR. MEYER. CAN YOU DESCRIBE FOR THE JURY WHAT
 14 THIS SHOWS?
 15 (EXHIBIT PUBLISHED TO JURY.)
 16 THE WITNESS: YES. THIS IS A SUMMARY, AND IT SHOWS
 17 UNDER THE THREE CALCULATIONS WHAT I CAME UP WITH.
 18 AND THEN CALCULATION A, IS BASED ON THE 3,000
 19 MAINTENANCE CUSTOMERS THROUGH THE PERIOD OF TOMORROWNOW'S
 20 OPERATIONS. IN THAT PERIOD BASED ON WHAT WAS PROJECTED BY SAP,
 21 THERE WERE 2,250 CUSTOMERS THAT HAD THE CROSS-SELL, AND 1375
 22 WERE ACTUALLY CONVERTED TO SAP. AND THE EXPECTED VALUE UNDER
 23 THAT CALCULATION A WAS \$880 MILLION ON A PRESENT-VALUE BASIS.
 24 AND THEN I -- ON THE RIGHT-HAND SIDE, I HAVE TWO
 25 OUTCOMES FROM THE CALCULATION B. ONE OF THEM WE JUST TALKED

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MEYER - DIRECT (RESUMED)/ PICKETT

1 **A. WELL, IF YOU'RE AT 2,000 CONVERTED CUSTOMERS IN CALCULATION**
 2 **B, AND LET'S SAY YOU DOUBLE THAT TO 4,000. ON THE LOW END, IT**
 3 **WOULD BE 2.4 BILLION. AND ON THE HIGH END, IT WOULD BE FIVE**
 4 **POINT -- IT WOULD BE FIVE POINT -- ALMOST FIVE AND A HALF**
 5 **BILLION AT 4,000.**
 6 **SO YOU CAN SEE THE VALUE, PARTICULARLY WHEN YOU LOOK**
 7 **AT THE FUTURE VALUE OF THE CONVERTED CUSTOMER TO SELL MORE**
 8 **PRODUCT AND MORE LICENSE.**
 9 Q. WHY DIDN'T YOU TAKE MR. AGASSI'S ESTIMATE, 6,000 CUSTOMERS?
 10 **A. WELL, I FELT THAT I HAD A RANGE OF CONVERTED CUSTOMERS. I**
 11 **FELT THAT -- I SAW WHAT MANAGEMENT WAS PLANNING TO DO, AND I**
 12 **WANTED TO BE SOMEWHERE WHERE I THOUGHT WAS REASONABLE. AND I**
 13 **THINK WITH THESE NUMBERS HERE, I WOULD FOCUS, YOU KNOW, ON ALL**
 14 **THREE. BUT YOU'LL SEE IN A MOMENT HOW I LOOK AT THEM IN**
 15 **CONJUNCTION WITH ORACLE SIDE.**
 16 **BUT I FEEL LIKE THESE FULLY ILLUSTRATE THE POTENTIAL**
 17 **GAINS, AND I THINK THAT THE 2,000 CUSTOMER NUMBER'S RIGHT THERE**
 18 **IN THE MIDDLE OF THE EXPECTATIONS.**
 19 Q. ALL RIGHT. BEFORE WE GO TO THE ORACLE SIDE OF THE TABLE, I
 20 WANT TO REFERENCE SOME TESTIMONY FROM MR. BRANDT ON FRIDAY, THE
 21 ONLY BOARD MEMBER TO COME TO THIS TRIAL SAID -- THIS IS AT PAGE
 22 680. WE CAN -- I THINK WE HAVE THAT TRANSCRIPT IF YOUR HONOR
 23 WOULD PREFER. I COULD READ FROM IT.
 24 HERE WE GO. THE MAGIC OF TECHNOLOGY. THIS IS NOT
 25 HOW WE DID IT 30 YEARS AGO.

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MEYER - DIRECT (RESUMED)/ PICKETT

1 (EXHIBIT PUBLISHED TO JURY.)

2 BY MR. PICKETT:

3 Q. SO BEGINNING AT LINE 1, THE QUESTION TO MR. BRANDT LAST

4 FRIDAY:

5 "SAP'S BUSINESS AND ORACLE'S BUSINESS DEPENDS ON

6 ITS INTELLECTUAL PROPERTY, CORRECT SIR?

7 "THAT IS CORRECT.

8 "AND SAP TAKES STEPS TO PROTECT ITS INTELLECTUAL

9 PROPERTY FROM INFRINGEMENT, CORRECT, SIR?

10 "THAT IS CORRECT.

11 "AND, IN FACT, SAP HAS A DEPARTMENT DEVOTED TO

12 PROTECTING SAP'S INTELLECTUAL PROPERTY, CORRECT?

13 "THAT'S CORRECT."

14 AND THEN FINALLY:

15 "WHEN SAP LICENSES ITS INTELLECTUAL PROPERTY,

16 ITS SOFTWARE, IT TRIES TO GET MAXIMUM RETURN POSSIBLE

17 FROM IT, CORRECT, SIR?

18 "IT IS THE GOAL OF ANY ENTERPRISE."

19 DO THESE STATEMENTS HAVE ANY IMPACT ON YOUR ANALYSIS?

20 **A. YES, I BELIEVE THAT IT AFFIRMS THE PROCESS WE'RE GOING**

21 **THROUGH HERE ABOUT VALUING THE INTELLECTUAL PROPERTY, IN THIS**

22 **CASE, THE SOFTWARE IN THIS NEGOTIATION. AND I BELIEVE I'M**

23 **COMING UP WITH A FAIR MARKET VALUE OF THIS SOFTWARE.**

24 **IT'S NOT THE MAXIMUM VALUE THAT MAYBE ORACLE WOULD**

25 **WANT, BUT IT'S THE FAIR MARKET VALUE. BUT THIS SHOWS THAT THIS**

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MEYER - DIRECT (RESUMED)/ PICKETT

1 EXCLUSIVE RIGHTS TO THOSE COPYRIGHTED MATERIALS, WHICH IS A BIG

2 IMPACT ON VALUE.

3 AND THEN, ULTIMATELY, I DO SOME CALCULATIONS UNDER

4 THE POSITION THAT ORACLE WOULD EXPECT TO -- TO LOSE THREE TIMES

5 CUSTOMERS. AND THEN I DEMONSTRATE WHAT THE IMPACT OF ORACLE --

6 ON ORACLE OF WHAT THAT IS AT THE TIME OF THE NEGOTIATION.

7 SO THIS IS THE STRUCTURE THAT I SET UP TO EVALUATE

8 THEIR SIDE OF THE NEGOTIATION.

9 Q. SO YOU -- YOU REVIEWED ALL THE RELEVANT EVIDENCE AND

10 ANALYZED THESE THREE ISSUES FROM ORACLE'S STANDPOINT?

11 **A. THAT'S RIGHT.**

12 Q. AND AS TO GOALS, ORACLE'S GOALS FOR ITS PEOPLESOFT

13 ACQUISITION, YOUR MAIN CONCLUSIONS WAS THAT THEY WANTED A

14 REVENUE STREAM, MONEY THAT WOULD BE COMING FROM THOSE 10,000

15 CUSTOMERS?

16 **A. WELL, THAT'S RIGHT. THERE WAS ABOUT \$1.2 BILLION OF**

17 **MAINTENANCE REVENUE IN THE PEOPLESOFT AGREEMENT, PEOPLESOFT**

18 **ACQUISITION, AND THAT WOULD COME TO ORACLE UNDER PROTECTION OF**

19 **THE SOFTWARE.**

20 Q. AND WE SAW FROM THE MARKET SLIDE YESTERDAY, THE NUMBER TWO

21 AND NUMBER THREE ORACLE AND SOFTWARE COMBINED, 11 PLUS 12 TO

22 23 PERCENT AGAINST 57 PERCENT FOR SAP.

23 HOW DOES THAT RELATE TO THEIR GOAL?

24 **A. ONCE AGAIN, IT GAVE ORACLE A MUCH BIGGER FOOTPRINT. IT WAS**

25 **MUCH MORE OF A POTENTIAL THREAT TO SAP ONCE THEY DID THE**

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MEYER - DIRECT (RESUMED)/ PICKETT

1 **IS HOW LARGE TECHNOLOGY COMPANIES APPROACH THEIR INTELLECTUAL**

2 **PROPERTY. THEY WANT MAXIMUM VALUE. IT'S WHAT MR. BRANDT SAID,**

3 **BUT WE'RE HERE CALCULATING THE FAIR MARKET VALUE THAT WOULD BE**

4 **LESS THAN MAXIMUM VALUE.**

5 Q. ALL RIGHT. LET'S TURN TO THE ORACLE SIDE AND WHAT FACTORS

6 WOULD BE IMPORTANT TO ORACLE IN ITS THINKING SITTING ON THE

7 OTHER SIDE OF LICENSE NEGOTIATION TABLE?

8 **A. I HAVE A SLIDE ON THAT. IT'S SIMILAR TO THE STRUCTURE OF**

9 **THE SAP SIDE. AND SO YOU'LL SAY THAT -- YOU'LL SEE THE SAME**

10 **THREE NEGOTIATION FACTORS, AND I JUST SET THOSE UP ONCE AGAINST**

11 **OR --**

12 (EXHIBIT PUBLISHED TO JURY.)

13 THE WITNESS: THIS TIME, IT'S ORACLE'S GOALS. AND I

14 FOCUSED ON THE PEOPLESOFT ACQUISITION. TWO IS THE RISK TO

15 ORACLE OF ITS INVESTMENT IN PEOPLESOFT IF IT GIVES A LICENSE TO

16 SAP. AND THEN LASTLY, ORACLE'S EXPECTED FINANCIAL IMPACTS. AND

17 THOSE ARE JUST SOME HIGHLIGHTS FROM THE RESULTS OF MY ANALYSIS

18 THAT BASICALLY THERE'S 9,920 MAINTENANCE REVENUE CUSTOMERS AS

19 PART OF THE PEOPLESOFT ACQUISITION.

20 WITH THE ACQUISITION, THAT DOUBLES ORACLE'S

21 ENTERPRISE MARKETSHARE FOR APPLICATIONS. THAT'S UNDER GOAL ONE.

22 SO IT'S A VERY IMPORTANT ACQUISITION.

23 SECONDLY, THE UPFRONT PAID OF \$11 BILLION, INCLUDING

24 THE SOFTWARE AND MATERIALS IN THIS CASE. AND WITH THIS LICENSE,

25 A VERY IMPORTANT ISSUE IS THAT ORACLE WILL BE GIVING UP

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MEYER - DIRECT (RESUMED)/ PICKETT

1 **ACQUISITION WITH PEOPLESOFT.**

2 Q. NOW, THE RISK -- THAT'S THE RISK OF GIVING THIS LICENSE --

3 GRANTING THIS LICENSE TO -- TO WHO? TO SAP?

4 **A. TO SAP, THAT'S RIGHT.**

5 Q. AND WHAT ARE THE TWO MAIN RISKS YOU THINK ORACLE -- IF

6 ORACLE HAS TO SIGN LICENSE TO -- TO SAP FOR THIS SOFTWARE AND

7 SUPPORT MATERIALS, WHAT ARE THOSE RISKS THAT YOU CONCLUDE ARE

8 MOST IMPORTANT IN THEIR MIND?

9 **A. IT'S IMMEDIATE IMPACT ON THE TRANSACTION, BECAUSE THEY'LL**

10 **HAVE COMPETITION FOR THOSE 10,000 CUSTOMERS, AND THEY LOSE THE**

11 **EXCLUSIVE RIGHTS TO THAT SOFTWARE. SO IT'S A BIG IMPACT ON**

12 **THEIR CASH FLOW.**

13 Q. AND THEN, FINALLY, THEY'D HAVE IN MIND, WELL, WE WOULD LOSE

14 SOME MONEY IF WE DO THIS LICENSE, SO WE NEED SOMETHING TO PAY UP

15 FOR IT?

16 **A. THAT'S RIGHT. THEY NEED TO GET PAID UPFRONT, AND THEY NEED**

17 **TO UNDERSTAND WHAT THAT AMOUNT SHOULD BE.**

18 Q. ALL RIGHT. LET'S LOOK AT SOME OF THE EVIDENCE THAT LED YOU

19 TO THOSE CONCLUSIONS.

20 FIRST, LET'S GO TO EXHIBIT 4811.

21 (EXHIBIT PUBLISHED TO JURY.)

22 BY MR. PICKETT:

23 Q. WHAT IS THIS, AND WHAT DOES IT SHOW?

24 **A. THIS WAS --**

25 Q. -- A DOCUMENT I THINK WE FIRST SAW WITH MR. PHILLIPS, AND

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MEYER - DIRECT (RESUMED)/ PICKETT

1 THEN WE SAW ALSO YESTERDAY WITH MS. CATZ.
2 **A. RIGHT. THIS WAS A DOCUMENT THAT MR. PHILLIPS AND MS. CATZ**
3 **PRESENTED TO THE RATING AGENCIES WHEN ORACLE ACQUIRED PEOPLESOFT**
4 **AND JUST LAYS OUT THOSE IMPORTANT OBJECTIVES. AND I THINK**
5 **THEY'RE CONSISTENT WITH HOW WE BEEN TALKING ABOUT THE**
6 **TRANSACTION.**

7 **BUT, ONCE AGAIN, YOU HAVE TO, YOU KNOW, EXPAND THE**
8 **CUSTOMER BASE, HAVE A LARGER APPLICATIONS**
9 **RESEARCH-AND-DEVELOPMENT BUDGET. I THINK THEY -- THE**
10 **COMPETITIVE POSITIONING BASICALLY IS IMPORTANT. THAT'S THE**
11 **INCREASED MARKETSHARE IN THE ENTERPRISE SPACE.**

12 **AND THEN THIS MORE HIGH-MARGIN RECURRING REVENUE,**
13 **BECAUSE THAT'S THE \$1.2 BILLION OF MAINTENANCE REVENUE AT THE**
14 **HIGH MARGINS THAT BRING MORE THAN A BILLION DOLLARS OF CASH FLOW**
15 **TO ORACLE.**

16 **AND THEN THE NEXT TWO RELATE TO THE SHAREHOLDERS,**
17 **THAT THIS WAS A POSITIVE TRANSACTION TO THE SHAREHOLDERS IN**
18 **TERMS OF THE EARNINGS. AND THEN THE LAST ONE'S PRETTY**
19 **IMPORTANT. IT SAYS -- IT'S A LOW-RISK ACQUISITION BASED ON**
20 **PLANNED INTEGRATION.**

21 **SO ORACLE AT THE TIME, THEIR MANAGEMENT FELT THAT**
22 **BECAUSE THEY HAD THE 10,000 CUSTOMERS WHO WERE GETTING SERVICE,**
23 **THAT WAS PROTECTED BY THE SOFTWARE, THAT THIS WAS GOING TO BE --**
24 **IT'S A LOW RISK. AND NOW WE'RE PUTTING THEM INTO A NEGOTIATION**
25 **WHERE THEIR RISK GOES MUCH HIGHER, SO THAT IT'S GOING TO CHANGE**

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MEYER - DIRECT (RESUMED)/ PICKETT

1 CHANGER. HERE'S WHAT HAPPENS. THEY NOW HAVE NON-EXCLUSIVE
2 RIGHTS BASICALLY BECAUSE THEY HAVE TO -- THEY'RE IN A SITUATION
3 WHERE THEY'RE SHARING THEIR SOFTWARE WITH THE COMPETING
4 PROVIDER, THAT BEING SAP. AND THEY'RE GOING TO HAVE AN EXPECTED
5 LOSS OF CUSTOMERS MARKETSHARE AND REVENUE. SO THAT'S WHAT
6 HAPPENS TO ORACLE.

7 AND THEN ON THE GAIN SIDE, SAP PICKS UP THE SOFTWARE
8 AND CAN GO AND COMPETE TO -- TO HAVE THE CONVERTED CUSTOMERS,
9 THE MARKETSHARE GAINS, AND THEIR REVENUES. SO IT SPLITS
10 BASICALLY THE BENEFITS OF THE TRANSACTION INTO THOSE TWO
11 CATEGORIES.

12 Q. DOES ORACLE HAVE ANY -- AT THIS POINT, WE KNOW THAT SAP HAS
13 TAKEN THE PEOPLESOFT SOFTWARE WITHOUT ANY AUTHORIZATION. WE
14 KNOW THEY'VE ADMITTED ALL LIABILITY ON ALL CLAIMS. THEY'VE
15 ADMITTED THE CONTRIBUTORY INFRINGEMENT, VICARIOUS INFRINGEMENT.

16 DOES SAP HAVE ANY CHOICE TO SAY, OH, NO, WE WON'T
17 LICENSE THIS TO YOU, SAP? DOES -- DOES THAT -- IS THAT AN
18 OPTION AT THIS POINT AFTER ALL THAT SAP HAS DONE?

19 **A. WELL, IN THE NEGOTIATION, I'M PUTTING BOTH PARTIES IN THERE**
20 **AS BEING WILLING LICENSOR AND WILLING LICENSEE. AND SO JUST --**
21 **JUST LIKE WE -- WE HAVE TO HAVE ORACLE IN THIS NEGOTIATION AGREE**
22 **TO GIVE THE SOFTWARE UP, SAP HAS TO AGREE TO PAY THE FAIR VALUE**
23 **FOR THAT. SO IT'S -- THAT'S THE ASSUMPTION I MAKE IN THIS**
24 **PROCESS.**

25 Q. THAT BOTH SIDES HAVE TO BE WILLING?

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MEYER - DIRECT (RESUMED)/ PICKETT

1 **THE RISK PROFILE WHEN THEY GO INTO THE NEGOTIATION.**

2 Q. WHEN I ASKED MR. PHILLIPS WHEN WE WENT THROUGH THIS FIRST
3 LAST THURSDAY, I ASKED HIM HOW WOULD THIS CHANGE IF YOU WERE
4 GOING TO HAVE TO NEGOTIATE A LICENSE WITH SAP? AND HE SAID THE
5 WHOLE -- EVERY FACTOR WOULD CHANGE. HOW -- WHAT DOES THIS TELL
6 YOU ABOUT ORACLE'S THINKING GOING INTO A NEGOTIATION IF THEY HAD
7 TO GIVE A LICENSE TO SAP?

8 **A. I THINK IT COMES BACK TO THE FACT THEY WOULD NEED CERTAINTY.**
9 **THEY'D NEED AN UPFRONT PAYMENT. IT WOULD HAVE TO BE CHARGE**
10 **ENOUGH TO TAKE AWAY THE STING OF GIVING UP THE \$11 BILLION**
11 **EXCLUSIVE RIGHTS TO PEOPLESOFT PROPERTY.**

12 Q. ALL RIGHT. LET'S GO TO YOUR NEGOTIATION FACTOR NO. 2,
13 PLEASE, THE RISKS THAT WOULD -- ORACLE WOULD ENCOUNTER IN
14 NEGOTIATING THIS LICENSE TO SAP TO COVER WHAT THEY TOOK -- THE
15 PROPERTY THEY TOOK FROM ORACLE.

WHAT DOES THIS SLIDE SHOW?

(EXHIBIT PUBLISHED TO JURY.)

18 THE WITNESS: THIS SLIDE SHOWS BASICALLY ON LEFT-HAND
19 SIDE JANUARY 18TH, 2005, WITH THE ACQUISITION OF PEOPLESOFT,
20 ORACLE HAS EXCLUSIVE RIGHTS TO THE SOFTWARE MATERIALS. THEY'LL
21 HAVE 10,000 NEW CUSTOMERS COMING IN TO BE PART OF THE COMBINED
22 BUSINESS, 11 PERCENT INCREASE IN MARKETSHARE, AND \$1.3 BILLION
23 OF ANNUAL MAINTENANCE REVENUE.

24 AND THEN THE NEXT DAY, WHEN THEY DO THE LICENSE
25 NEGOTIATION, THAT ALL CHANGES, AND IT -- IT'S REALLY A GAME

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MEYER - DIRECT (RESUMED)/ PICKETT

1 **A. THAT'S CORRECT.**

2 **(EXHIBIT PUBLISHED TO JURY.)**

3 BY MR. PICKETT:

4 Q. ALL RIGHT. LET'S GO TO NEGOTIATION FACTOR NO. 3, WHAT
5 ORACLE WOULD BE THINKING ABOUT THE FINANCIAL IMPACT ON IT OF
6 SUCH A LICENSE.

7 YOU HAVE AN ANALYSIS OF THAT, MR. MEYER?

8 **A. YES, I'VE GOT A CHART THAT SHOWS THAT QUICKLY SORT OF THE**
9 **APPROACH I TOOK. AND IT'S SIMILAR TO THE APPROACH WITH SAP, BUT**
10 **I REVERSED THE ROLES NOW, AND INSTEAD OF NOW CALCULATING THE**
11 **GAINED SAP, I'M LOOKING AT THE IMPACT TO ORACLE AND I START ON**
12 **THE LEFT-HAND SIDE.**

13 **I USE -- IN THIS CASE, I'M USING 3,000 EXPECTED**
14 **MAINTENANCE CUSTOMERS TO BE LOST. AND THEN I'M GOING TO FIGURE**
15 **OUT IN THAT PROCESS WITH THE BLUE AREA THERE WHAT'S GOING TO**
16 **HAPPEN WITH RENEWAL RATES, AND THE EXPECTED ANNUAL REVENUES?**

17 **AND I'LL LOOK AT ORACLE'S PROFIT MARGINS. AND THEN**
18 **ULTIMATELY I'LL SHOW YOU ON THIS RIGHT-HAND SIDE THERE THE**
19 **EXPECTED FINANCIAL GAIN -- EXPECTED FINANCIAL IMPACT TO ORACLE**
20 **IF THEY AGREE TO THIS LICENSE.**

21 **AND I DO THESE CALCULATIONS OVER A TEN-YEAR PERIOD**
22 **BECAUSE, AS WE'VE BEEN TALKING ABOUT, THESE CUSTOMERS ONCE**
23 **THEY'RE CONVERTED, THEY'RE WITH THE NEW PROVIDER OF THE SOFTWARE**
24 **FOR A LONG TIME PERIOD OF TIME.**

25 Q. NOW, WE SAW VARIOUS SAP PROJECTIONS OF THE BENEFITS THEY
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MEYER - DIRECT (RESUMED)/ PICKETT

1 WOULD GET BECAUSE -- WELL, WE SAW A LOT OF -- WE SAW MANY OF
 2 THOSE PROJECTIONS, THE BENEFIT OF THEM FROM DOING THIS PROGRAM
 3 THROUGH TOMORROWNOW. BUT ORACLE DIDN'T KNOW THAT ITS SOFTWARE
 4 WAS BEING TAKEN.
 5 DID THEY HAVE ANY PROJECTIONS OF THE IMPACT OF SAP
 6 TAKING ITS SOFTWARE?
 7 **A. NO, THEY WEREN'T AWARE OF THE SOFTWARE BEING TAKEN, SO**
 8 **THERE'S NO PROJECTIONS THAT ARE AVAILABLE IN ORACLE'S RECORDS AT**
 9 **THE TIME. AND SO I WORKED FROM THE SAP MANAGEMENT EXPECTATIONS**
 10 **AND USED THOSE IN MY CALCULATIONS.**
 11 Q. THE 3,000 CUSTOMERS.
 12 **A. THAT'S CORRECT.**
 13 Q. ALL RIGHT.
 14 YOU MENTIONED THAT YOU USED AN ORACLE ACQUISITION
 15 FINANCIAL MODEL. WHAT IS THAT MODEL?
 16 **A. THAT WAS THE MODEL THAT MS. CATZ TALKED ABOUT YESTERDAY, THE**
 17 **PROJECT SPICE MODEL. I USED SOME INFORMATION FROM THAT MODEL TO**
 18 **PROVIDE FINANCIAL INFORMATION ABOUT AVERAGE REVENUE AND**
 19 **ATTRITION RATES AND OTHER INFORMATION THAT WOULD BE KNOWN ABOUT**
 20 **ORACLE'S POTENTIAL REVENUES AND PROFITS FROM THE PEOPLESFT**
 21 **CUSTOMERS.**
 22 Q. WELL, LET'S SEE HOW YOUR CALCULATION OF THE IMPACT ON ORACLE
 23 WORKED. COULD YOU DESCRIBE THAT TO THE JURY, PLEASE?
 24 **A. YES, I HAVE A SLIDE SIMILAR TO THE ONE THAT I PRESENTED WITH**
 25 **SAP. AND ONCE AGAIN, IT'S BUSY, BUT IF WE WALK DOWN FROM TOP TO**
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1013

MEYER - DIRECT (RESUMED)/ PICKETT

1 COST OF 20 PERCENT TO GET TO 80 PERCENT. AND THEN I USE
 2 DISCOUNT RATE FROM SOME ORACLE VALUATION DOCUMENTS, THAT
 3 10 PERCENT, TO BRING THE NUMBERS BACK TO JANUARY 2005 JUST LIKE
 4 I DID WITH SAP.
 5 AND THEN ULTIMATELY, I TAKE THESE CALCULATIONS OUT
 6 FOR TEN YEARS, AND THEN I DO A SIMILAR CALCULATION ON THE BOTTOM
 7 LIKE I DID WITH SAP TO LOOK AT SORT OF THE FUTURE LOSS OF NOT
 8 HAVING THAT CUSTOMER.
 9 AND I MENTIONED IT'S CALLED A CAPITALIZATION RATE,
 10 BUT BASICALLY YOU TAKE THE PROFIT AT THAT TIME AND USE A
 11 MULTIPLE AND SAY THAT BASICALLY, IF YOU HAVE THAT CUSTOMER AND
 12 YOU'RE MAKING THAT LEVEL OF PROFITS, IT'S WORTH SO MUCH GOING
 13 FORWARD. IT'S SORT OF THE VALUE OF HAVING A CUSTOMER. SO I DO
 14 THOSE CALCULATIONS, WHICH YOU'LL SEE IN A MOMENT, BUT THOSE ARE
 15 ALL THE INPUTS TO LOOKING AT THE IMPACT ON ORACLE GIVING UP THE
 16 LICENSE.
 17 Q. SO IT'S VERY SIMILAR TO THE SAP CALCULATIONS. IT'S JUST
 18 FROM THE ORACLE'S VIEWPOINT.
 19 **A. THAT'S CORRECT.**
 20 Q. ALL RIGHT. LET'S LOOK AT A CALCULATION YOU MADE WITH THE
 21 NEXT SLIDE. WHAT DOES THIS SHOW?
 22 **A. THIS CALCULATION'S BASED ON 3,000 MAINTENANCE CUSTOMERS UP**
 23 **THROUGH OCTOBER 2008. AND THEN AFTER OCTOBER 2008, IT'S BASED**
 24 **ON 1,375 CUSTOMERS CONVERTING AWAY FROM ORACLE, SO THAT'S THE**
 25 **BASIC CUSTOMER INPUT INTO THE FINANCIAL IMPACT CALCULATION.**
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1012

MEYER - DIRECT (RESUMED)/ PICKETT

1 **BOTTOM, IT HAS SIMILAR STRUCTURE.**
 2 **(EXHIBIT PUBLISHED TO JURY.)**
 3 THE WITNESS: AND ONCE AGAIN, WE'RE FOCUSING ON NOW
 4 THE IMPACT ON ORACLE, SO THESE ARE POTENTIAL LOST CUSTOMERS THAT
 5 ARE CONVERTED TO SAP. I START THERE. AND THE TOP SIDE -- I
 6 ACTUALLY USE -- IN THE ORACLE MODEL, I USE THE SAP PROJECTIONS
 7 THAT I MENTIONED A MOMENT AFORE (SIC) -- BEFORE.
 8 I FOCUSED ON TWO ITEMS. I USED BASICALLY THE 3,000
 9 MAINTENANCE CUSTOMERS ON THE TOP THERE THAT ARE LOST IN THE
 10 FIRST THREE YEARS, THREE AND A HALF YEARS. AND THEN I THEN LOOK
 11 AT THE IMPACT GOING FORWARD WITH 1375 CUSTOMERS CONVERTED AND UP
 12 TO 3,000. AND SO I RUN SOME DIFFERENT MODELS THERE.
 13 THE NEXT ROW, I USE THE CUSTOMER ATTRITION RATES
 14 THAT -- THAT A -- THREE AND A HALF PERCENT THAT, ONCE AGAIN,
 15 WOULD SHOW OVER TIME SOME CUSTOMERS ARE EXPECTED TO LEAVE BASED
 16 ON NORMAL ATTRITION.
 17 AND THEN I MULTIPLY THE RESULT OF THOSE AMOUNTS BY
 18 THE AVERAGE REVENUE PER CUSTOMER, IN THIS CASE, FROM ORACLE'S
 19 VALUATION DOCUMENTS, I USE \$130,000 PER YEAR FOR THAT REVENUE
 20 THAT WILL BE LOST PER CUSTOMER. AND I COME UP WITH A TOTAL
 21 REVENUE THAT WILL BE LOST BASED ON THE NUMBER OF CUSTOMERS. AND
 22 THAT'S THE CALCULATIONS THERE.
 23 IT'S MULTIPLIED BY A PROFIT MARGIN THAT I TAKE FROM
 24 ORACLE'S FINANCIAL RECORDS. AND THEIR RECORDS INDICATE THAT
 25 THEY MAKE ABOUT 80 PERCENT OF THIS TYPE OF REVENUE. SO I DEDUCT
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1014

MEYER - DIRECT (RESUMED)/ PICKETT

1 AND THEN YOU'LL SEE THAT I PROJECT OUT THE REVENUE,
 2 DEDUCT THE COSTS AT 20 PERCENT RIGHT THERE, LESS COSTS, COME UP
 3 WITH THE IMPACT TO PROFITS, AND THEN DETERMINE THE FUTURE VALUE
 4 OF HAVING LOST THOSE CUSTOMERS -- THAT'S THE 1375 CUSTOMERS --
 5 AT THAT POINT. AND THEN YOU'LL SEE THE ULTIMATE AMOUNT, WHICH
 6 IS AN IMPACT WITH THIS SCENARIO OF 1,386,000,000 AS OF
 7 JANUARY 2005. AND THIS IS THE RESULT OF ONE OF MY SCENARIOS, OR
 8 ONE OF MY CALCULATIONS.
 9 Q. ALL RIGHT.
 10 ARE WE READY TO PUT THE TWO SIDES TOGETHER AT THE
 11 TABLE?
 12 **A. I THINK WE HAVE ONE SUMMARY AND THEN WE GET THERE.**
 13 Q. ALL RIGHT.
 14 **A. ONE OVERALL SUMMARY.**
 15 Q. LET'S SEE THE SUMMARY, THEN.
 16 (EXHIBIT PUBLISHED TO JURY.)
 17 THE WITNESS: IS WHAT YOU HAVE HERE IS A SUMMARY
 18 SIMILAR TO WHAT I HAD FOR SAP. THIS IS THE FLIP SIDE. THIS IS
 19 THE ORACLE IMPACT. AND YOU'LL SEE THAT I'VE DONE THREE
 20 CALCULATIONS. THE FIRST CALCULATION WE JUST WALKED THROUGH,
 21 WHICH IS IN RED. THAT'S THE CALCULATION WITH 1,375 CUSTOMERS
 22 CONVERTING TO SAP. AND SO THE LOSS TO ORACLE IS \$1.36 BILLION.
 23 THE SECOND CALCULATION IS BASICALLY IS 2,000
 24 CUSTOMERS CONVERTING TO SAP, AND THAT LOSS IS \$1.82 BILLION.
 25 AND ULTIMATELY, IF 3,000 CUSTOMERS WERE TO CONVERT AWAY AND GO
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1015

MEYER - DIRECT (RESUMED)/ PICKETT

1 TO SAP, THAT LOSS TO ORACLE WOULD BE 2.46 BILLION.
 2 SO THE -- SO THOSE ARE THE THREE CALCULATIONS THAT I
 3 CAME UP WITH AND THE -- THEY SHOW YOU THE IMPACT BASED ON THE
 4 NUMBER OF CONVERTED CUSTOMERS.
 5 Q. MAINTENANCE CUSTOMERS.
 6 **A. THAT'S CORRECT.**
 7 Q. ALL RIGHT.
 8 NOW, LET'S GET THESE PARTIES TO THIS NEGOTIATION
 9 TABLE FOR THE LICENSE. LOOKING AT WHAT'S IN SAP'S MIND, THE
 10 FACTORS RELEVANT TO THEM; LOOKING AT ORACLE'S SIDE, THE FACTORS
 11 RELEVANT TO THEM, HOW DID YOU DETERMINE THE AMOUNT OF A
 12 REASONABLE LICENSE FEE THAT ORACLE AS A WILLING SELLER, SAP AS A
 13 WILLING BUYER WOULD HAVE AGREED TO?
 14 **A. WELL, FOR ALL THE NUMBERS TOGETHER -- AND I NEED TO SET THIS**
 15 **CHART UP, BECAUSE IT -- IT'S REALLY -- PUTS BOTH SIDES TOGETHER**
 16 **WITH THEIR IMPACTS AND GAINS.**
 17 **BASICALLY ON THE LEFT-HAND SIDE OF THE AXIS, YOU'LL**
 18 **SEE IT'S IN BILLIONS OF DOLLARS. THEN ON THE BOTTOM, I SORT OF**
 19 **PRESENT THE RESULTS OF THE THREE DIFFERENT CALCULATIONS. THE**
 20 **FIRST ONE, THERE'S THE 1,375 CUSTOMERS CONVERTED TO SAP. THE**
 21 **SECOND ONE IN THE MIDDLE IS THE 2,000 CONVERTED CUSTOMERS. AND**
 22 **ULTIMATELY ON THE FAR RIGHT-HAND SIDE, IT'S 3,000 CUSTOMERS**
 23 **CONVERTED TO SAP.**
 24 Q. AND JUST TO BE CLEAR, THAT IS B. IT SHOULD BE A B.
 25 **A. YEAH, THAT'S CORRECT.**

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MEYER - DIRECT (RESUMED)/ PICKETT

1 **A. WELL, FROM MY PERSPECTIVE, IT'S -- IT'S BASED ON THE FACT**
 2 **THAT THERE WERE OBVIOUSLY PROJECTIONS THAT WENT MUCH HIGHER, AND**
 3 **THERE'S ALL THE OTHER CONSIDERATIONS, POTENTIALLY THE BIG IMPACT**
 4 **ON ORACLE'S ACQUISITION OF PEOPLESOFT AND THE FACT THAT**
 5 **\$11 BILLION WAS PAID AND THAT WAS FAIR MARKET VALUE FOR THAT**
 6 **COMPANY AND ALL THE INTELLECTUAL PROPERTY AT THAT TIME.**
 7 **SO THAT PROVIDES WHAT I WOULD SAY IS THIS UPWARD**
 8 **PRESSURE ON SAYING IT'S AT LEAST 1.5 BILLION.**

9 Q. AND WHY IS IT THAT THE NUMBER OF CUSTOMERS THAT WE ASSUME
 10 ARE GOING TO BE CONVERTED TO SAP, WHETHER IT'S 1375, WHETHER IT
 11 GOES UP TO 3,000, MORE -- WHY DOES THAT HAVE THE IMPACT IT HAS?
 12 **A. WELL, TWO THINGS HAPPEN. ONE, THESE CUSTOMER CONVERSIONS**
 13 **ARE DRIVEN BY USING THE SOFTWARE IN THIS CASE. AND SECONDLY,**
 14 **ONCE A CUSTOMER IS CONVERTED, IN MYSAP NUMBERS, I HAVE THE FACT**
 15 **THAT THEY MAKE MORE MAINTENANCE, THEY SELL MORE LICENSE, AND**
 16 **THEY'RE ULTIMATELY SELLING A FULL SET OF PRODUCTS SO THEY HAVE**
 17 **LOTS OF RECURRING REVENUE FROM BOTH LICENSE AND MAINTENANCE.**
 18 **AND THE SAME THING HAPPENS ON THE ORACLE SIDE WITH ONCE THEY**
 19 **LOSE A CUSTOMER ON MAINTENANCE, THAT LOSS GOES ON FOR**
 20 **POTENTIALLY DECADES.**
 21 Q. NOW, ALL OF THE TESTIMONY GIVEN HAS BEEN BASED ON THE
 22 NEGOTIATED LICENSE FRAMEWORK; IS THAT RIGHT?
 23 **A. THAT'S CORRECT.**
 24 Q. AND YOU UNDERSTAND THAT SAP IS A PROPONENT OF A DIFFERENT
 25 MEASURE OF DAMAGES IN THIS CASE, RIGHT?
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1016

MEYER - DIRECT (RESUMED)/ PICKETT

1 **(SIMULTANEOUS COLLOQUY.)**
 2 BY MR. PICKETT:
 3 Q. 900,000,000 IS .9 BILLION?
 4 **A. YES, THAT IS CORRECT. THAT'S \$900 MILLION. SO WHAT YOU**
 5 **HAVE, IF YOU START FROM THE BOTTOM ON THE LEFT-HAND SIDE, WITH**
 6 **THE 1,375 CUSTOMERS CONVERTED, THAT GAIN TO SAP IS \$900 MILLION?**
 7 **THE IMPACT TO ORACLE IS 1.4 BILLION, SO YOU GET A**
 8 **RANGE THERE. AND THEN WHEN YOU MOVE TO THE MIDDLE, YOU'LL SEE**
 9 **THE IMPACT IF 2,000 CUSTOMERS GO TO SAP, THE GAIN TO SAP'S**
 10 **1.2 BILLION. LOSS TO ORACLE GROWS TO 1.8 BILLION, THEN**
 11 **ULTIMATELY ON THE RIGHT-HAND SIDE, THE LOSS WITH 3,000 CUSTOMERS**
 12 **TO ORACLE'S 2.5 BILLION. AND THE GAIN TO SAP'S AT 2.7 BILLION.**
 13 **SO I LOOKED AT THE RESULTS OF THAT AND THEN ALSO**
 14 **CONSIDERED ALL THE OTHER FACTORS WE TALKED ABOUT THE LAST DAY OR**
 15 **SO, AND -- FROM MY PERSPECTIVE, IN MY OPINION, I WOULD SET THAT**
 16 **THE -- THE VALUE OF FAIR MARKET LICENSE FOR THE PEOPLESOFT AND**
 17 **JDE SOFTWARE WOULD BE AT LEAST 1.5 BILLION.**
 18 **I WOULD TARGET IT IN THE MIDDLE UNDER THE 2,000**
 19 **CUSTOMERS, CERTAINLY I FEEL IT'S REASONABLE IN LIGHT OF WHERE**
 20 **YOU GO WITH THE 3,000 CUSTOMER CALCULATIONS. AND I ALSO**
 21 **UNDERSTAND THAT SAP'S MANAGEMENT HAD OTHER HIGHER PROJECTIONS.**
 22 **BUT I FEEL AT 1.5 BILLION, AT LEAST, THEN THAT WOULD BE AN**
 23 **APPROPRIATE VALUE FOR THIS LICENSE AFTER ALL OF MY RESEARCH AND**
 24 **ANALYSIS AND -- AND CONSIDERATIONS.**
 25 Q. WHY IS IT AT LEAST 1.5 BILLION?
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **A. THAT'S CORRECT.**
 2 Q. WHAT IS THAT MEASURE?
 3 **A. I BELIEVE IT'S SAP'S OPINION THAT THE DAMAGES SHOULD BE**
 4 **MEASURED JUST BASED ON THE NUMBER OF CUSTOMERS THAT ORACLE**
 5 **LOST -- ULTIMATELY LOST, AND THEN THERE'S -- THERE'S A**
 6 **CALCULATION THEY DO OF, I THINK, TWO CUSTOMERS WHERE THEY CALL**
 7 **THAT INFRINGERS' GAINS. SO IT'S LOST CUSTOMERS AND INFRINGERS'**
 8 **GAINS.**
 9 Q. AND THAT'S LOOKING AT IT FROM THE PERSPECTIVE OF JANUARY 19,
 10 2005 --
 11 **A. THAT'S CORRECT.**
 12 Q. -- WHEN THEY STARTED INFRINGE?
 13 **A. THAT'S CORRECT.**
 14 Q. AND THEN GOING FORWARD IN TIME, WHEN YOU DO A LOST
 15 PROFITS/INFRINGERS' PROFITS CALCULATION?
 16 **A. BASICALLY, IT WOULD BE FROM JANUARY 2005 THROUGH THE POINT**
 17 **IN TIME WHEN TOMORROWNOW CEASED OPERATIONS. AND THEN ALSO**
 18 **LOOKING AT WHETHER THERE'S ALSO FUTURE IMPACT, FROM SAP'S**
 19 **PERSPECTIVE, THEY DON'T LOOK AT FUTURE IMPACT. THEY STOP AT**
 20 **OCTOBER 2008.**
 21 Q. DO YOU AGREE WITH THE METHODOLOGY OF MEASURING DAMAGES THAT
 22 SAP IS ARGUING FOR?
 23 **A. FROM MY PERSPECTIVE, IN THESE CIRCUMSTANCES, THE -- THE ONLY**
 24 **WAY TO VALUE THE SOFTWARE AND THE SOFTWARE MATERIALS THAT WERE**
 25 **TAKEN, THAT PROPERTY OF ORACLE, IS THE FAIR MARKET VALUE OF THE**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **LICENSE IN THESE CIRCUMSTANCES.**
 2 Q. WHY IS THAT?
 3 **A. THERE'S -- ONE, IT GIVES YOU A CHANCE TO ACTUALLY VALUE THE**
 4 **COPYRIGHTED PROPERTY. YOU CAN LOOK AT THE PROPERTY TAKEN AND**
 5 **PUT IT INTO PERSPECTIVE OF WHAT -- WHAT YOU WOULD PAY FOR THAT**
 6 **AND HOW ONE WOULD USE IT AT THE TIME OF THAT NEGOTIATION.**
 7 **IT ALLOWS YOU TO VALUE THE IMPORTANCE OF THE SOFTWARE**
 8 **THAT'S USED BY TOMORROWNOW IN THE SAFE PASSAGE PROGRAM. YOU**
 9 **ACTUALLY CAN INSERT THAT SOFTWARE, AS THE MANAGEMENT OF SAP, DID**
 10 **INTO THAT PROGRAM AND PUT A VALUE ON THAT AND DETERMINE THAT**
 11 **VALUE WITH THE LICENSE.**
 12 **IT ALSO ALLOWS YOU TO PUT A VALUE ON THE -- THE**
 13 **BENEFITS TO SAP WHEN THEY HAVE THE SOFTWARE, CAN GO OUT AND**
 14 **HAVE -- THEY'RE IMPROVED CUSTOMER RELATIONSHIPS AT SAP. EVEN**
 15 **WHEN THEY DON'T CONVERT A CUSTOMER, THEY HAVE ADDITIONAL**
 16 **RESOURCES THAT THEY DIDN'T HAVE WITHOUT HAVING THE LICENSE. YOU**
 17 **CAN PUT A VALUE ON THAT.**
 18 **AND IT CERTAINLY IS THE ONLY WAY -- IT'S THE ONLY WAY**
 19 **IN THIS CASE TO PUT A VALUE ON THE IMPACT TO ORACLE OF THE**
 20 **PEOPLESOFT ACQUISITION. ORACLE PAID \$11 BILLION AND THERE'S NOT**
 21 **ANY WAY THAT THE LOST PROFITS APPROACH PUTS A VALUE ON THE**
 22 **IMPACT OF ORACLE OF SPENDING \$11 BILLION ON PEOPLESOFT.**
 23 **AND THEN IT ALLOWS ORACLE TO BE BASICALLY PAID FOR**
 24 **THE VALUE OF ITS PROPERTY AT -- AT THE POINT IN TIME WHEN SAP**
 25 **LAUNCHED THE PROGRAM AND -- AND HAD THE PROPERTY OF ORACLE TO**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **THE WAY YOU HAD TO MEASURE THOSE -- THOSE REMEDIES.**
 2 Q. SO LET ME SEE IF I HAVE THIS RIGHT. YOUR METHOD VALUES THE
 3 PROPERTY THAT SAP TOOK?
 4 **A. THAT'S CORRECT.**
 5 Q. AND DOES THEIR METHOD DO THAT?
 6 **A. NO IT DOES NOT.**
 7 Q. THEIR METHOD VALUES WHAT THEY ULTIMATELY DID WITH THAT
 8 PROPERTY; IS THAT FAIR?
 9 **A. THAT'S CORRECT.**
 10 Q. AND THAT'S NOT APPROPRIATE IN YOUR VIEW?
 11 **A. THAT'S CORRECT.**
 12 Q. ALL RIGHT. LET ME ASK YOU THIS: DID YOU LOOK AT -- DID YOU
 13 LOOK AT CALCULATING IT UNDER THE WRONG METHOD, THE LOST
 14 PROFITS/INFRINGERS' PROFITS METHOD?
 15 **A. I DID A CALCULATION OF LOST PROFITS; THAT'S CORRECT.**
 16 Q. AND WHY DID YOU DO THOSE CALCULATIONS?
 17 **A. WELL, THERE WAS TWO REASONS. ONE, I WANTED TO KNOW WHAT THE**
 18 **RESULT WAS IN TERMS OF WHAT WERE THE LOST PROFITS AND WHAT WERE**
 19 **THE INFRINGERS' PROFITS. AND, SECONDLY, I MENTIONED A MOMENT**
 20 **AGO, FOR SOME OTHER CAUSE OF ACTION, IT WAS THE ONLY WAY THAT**
 21 **ONE COULD MEASURE. THAT WAS -- THE METHOD WAS LOST PROFITS.**
 22 **AND SO I'VE DONE A CALCULATION OF LOST PROFITS IN THE INFRINGER**
 23 **PROFITS.**
 24 Q. AND WHAT WERE THE RESULTS?
 25 **A. THE LOST PROFIT NUMBER IS \$120 MILLION. THAT'S THE LOST**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **LAUNCH SAFE PASSAGE AND TO MAKE THE PROJECTIONS AND TO GO TO THE**
 2 **MARKET WITH ITS PLANS TO IMPACT ORACLE.**
 3 Q. ALL RIGHT. AND I THINK THERE IS A SLIDE WITH SOME BULLET
 4 POINTS ON THAT.
 5 DOES THIS EXPLAIN WHY THE METHOD SAP IS ARGUING FOR
 6 IS NOT ADEQUATE?
 7 **A. IT PROVIDES SOME OF THAT SUMMARY. AS I MENTIONED, ONE,**
 8 **THERE'S NO WAY THAT THE LOST PROFITS AND THE -- I GUESS THEY**
 9 **CALL THEM INFRINGERS' PROFITS, MEASURES THE FULL MARKET VALUE OF**
 10 **THE COPYRIGHTED WORKS. AND, OBVIOUSLY, LOST PROFITS DOES NOT**
 11 **MEASURE THE TOTAL IMPACT ON ORACLE, WHICH I MENTIONED.**
 12 **IT ALSO DOES NOT CAPTURE ALL THE ACKNOWLEDGED**
 13 **BENEFITS THAT WE'VE SEEN IN THE RECORDS OF THE INFRINGEMENT, SO**
 14 **ALL THE PLANS AND -- AND MANAGEMENT FOCUS OF SAP'S MANAGEMENT**
 15 **WITH SAFE PASSAGE. AND IT'S -- THE NEXT POINT, IT DOES NOT**
 16 **MEASURE ANY VALUE BEYOND LOST CUSTOMER REVENUES AND PROFITS,**
 17 **WHICH IS A BIG PROBLEM WITH THE APPROACH.**
 18 **AND THIRD POINT, IT'S DEPENDENT ON SAP'S EXECUTION.**
 19 **AND SO THEY'VE TAKEN THE PROPERTY SO IT -- IT'S DEPENDENT ON HOW**
 20 **SAP'S EXECUTES THE PROPERTY. IT'S NOT THE VALUE OF THOSE**
 21 **COPYRIGHTED WORKS. AND A LOT OF PROPERTY YOU SAW THEM ON MY**
 22 **SCOPE SCHEDULE, IT DOESN'T VALUE THAT.**
 23 **AND THEN -- ONE REASON I DID A LOST-PROFITS**
 24 **CALCULATION WAS THERE WERE SOME OTHER CLAIMS IN THE CASE, AND**
 25 **THEY WERE NON-COPYRIGHT. AND THAT WAS ONE OF THE -- THAT WAS**
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1022

MEYER - DIRECT (RESUMED)/ PICKETT

1 **PROFIT NUMBER. AND THEN THE INFRINGER (SIC) PROFIT'S NUMBER IS**
 2 **\$288 MILLION. AND THAT REFLECTS NOT ALL THE CUSTOMERS THAT --**
 3 **THAT WERE SAP CUSTOMERS AND ALSO TOMORROWNOW CUSTOMERS BUT A**
 4 **SUBSET, SO I THINK IT'S ABOUT 60-SOME CUSTOMERS ARE IN THE**
 5 **288 MILLION.**
 6 **AND THEN THERE'S THREE CUSTOMERS, I THINK IN THAT**
 7 **GROUP OF THE 288,000,000 WHERE THERE'S SOME ISSUES STILL THAT**
 8 **SORT OF EXIST ABOUT THE ROLE OF TOMORROWNOW IN CONVERTING THOSE**
 9 **CUSTOMERS TO SAP.**
 10 **AND SO IF I LOOK AT THE IMPACT OF THOSE THREE**
 11 **CUSTOMERS, I THINK THE NUMBER WOULD BE 236 MILLION. SO MY**
 12 **INFRINGER PROFIT'S (SIC) NUMBERS, 288 MILLION, AND THEN RANGES**
 13 **DOWN TO 236 MILLION DEPENDING ON THESE THREE CUSTOMERS.**
 14 **AND SO THAT'S WHERE I'VE COME OUT WITH THOSE**
 15 **CALCULATIONS.**
 16 Q. SO IF I COMBINE THE 120 MILLION IN LOST PROFITS WITH THE 288
 17 MILLION IN INFRINGER'S PROFITS, WHAT DO WE GET?
 18 **A. I THINK IT'S 408,000,408.**
 19 Q. BUT DOES THAT FULLY COMPENSATE ORACLE IN THIS CASE?
 20 **A. NO, IT WOULD NOT. IT WOULD NOT COMPENSATE FOR THE VALUE OF**
 21 **INTELLECTUAL PROPERTY.**
 22 Q. WHAT COMPENSATES ORACLE FOR THE VALUE OF WHAT SAP TOOK?
 23 **A. THE ONLY WAY TO DO IT IS THE FAIR MARKET VALUE OF THE**
 24 **LICENSE APPROACH AT THE 1.5 BILLION.**
 25 Q. SO THAT'S THE ANALYSIS YOU DID WITH THE 1.5 BILLION OR MORE,
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1023

MEYER - DIRECT (RESUMED)/ PICKETT

1 AT LEAST 1.5 BILLION?
 2 **A. ALL RIGHT. SO THAT'S THE PEOPLESOFT LICENSE.**
 3 Q. NOW, THERE ARE TWO OTHER LICENSES, BUT WE CAN GET THROUGH
 4 THEM A LOT MORE QUICKLY, I THINK. LET'S GO TO THE SIEBEL
 5 LICENSE. HAVE YOU ALSO ANALYZED HOW A NEGOTIATIONS FOR A
 6 LICENSE FOR THE SIEBEL SOFTWARE WOULD GO?
 7 **A. YES.**
 8 Q. AND WHAT WAS YOUR CONCLUSION FOR THE VALUE OF THE PROPERTY
 9 THAT -- THE SIEBEL PROPERTY THAT SAP TOOK?
 10 **A. IT'S AT LEAST \$100 MILLION.**
 11 Q. AT LEAST 100 MILLION?
 12 **A. THAT'S RIGHT.**
 13 Q. WHAT APPROACH DID YOU USE TO CALCULATE THAT FAIR MARKET
 14 VALUE?
 15 **A. IT WAS THE SAME APPROACH I USED WITH PEOPLESOFT, SET UP THE**
 16 **SAME STRUCTURE, SAME NEGOTIATING STRUCTURE.**
 17 Q. AND WE HAD SET THE STAGE YESTERDAY FOR THE PEOPLESOFT
 18 LICENSE. AND I ASKED YOU ABOUT THE SCOPE OF THE LICENSE THAT
 19 WOULD BE NEEDED. WHAT WILL IT COVER IN TERMS OF THE SIEBEL --
 20 WELL, THEN PEOPLESOFT, BUT NOW WE'RE TURNING TO SIEBEL, THE
 21 TIMING OF THE LICENSE, SAP'S NEED FOR THE SOFTWARE, THEIR
 22 KNOWLEDGE OF LEGAL RISKS, AND THE FACTS THEY WERE COMPETITORS.
 23 ARE THOSE FACTORS SIMILAR FOR YOUR ANALYSIS OF THE
 24 SIEBEL NEGOTIATION?
 25 **A. YES, SO THE SAME STRUCTURE, SAME FACTORS, OBVIOUSLY**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **DECIDED TO DO THIS, THEY HAD TO -- NOT ONLY TOMORROWNOW, IF**
 2 **YOU'LL RECALL WITH PEOPLESOFT, ACTUALLY HAD EXPERIENCE WITH**
 3 **PEOPLESOFT SERVICE. HERE, THE TOMORROWNOW GROUP HAD TO RAMP UP**
 4 **AND FIGURE OUT HOW THEY COULD ACTUALLY HAVE SIEBEL SERVICE AND**
 5 **THEN, ULTIMATELY, THEY USED THE SOFTWARE THAT WAS OWNED BY**
 6 **ORACLE, SO IT WAS ALL NEW TO TOMORROWNOW. THEY HAD TO RAMP UP.**
 7 Q. WHAT'S THE SIGNIFICANCE, IN YOUR OPINION, OF THE FACT THAT
 8 ORACLE PAID \$6.1 BILLION TO ACQUIRE SIEBEL?
 9 **A. I THINK IT'S SIMILAR TO THE SITUATION WITH PEOPLESOFT.**
 10 **OBVIOUSLY, IT'S A LARGE AMOUNT PAID. IT WAS A VERY IMPORTANT**
 11 **ACQUISITION FOR CRM SOFTWARE THAT ORACLE MADE. IT WAS 4,000 NEW**
 12 **CUSTOMERS TO ORACLE. AND SO THE SAME DYNAMICS, THE SAME**
 13 **SITUATION WHERE ORACLE MADE A LARGE UPFRONT INVESTMENT IN SIEBEL**
 14 **ALSO WOULD BE VERY IMPORTANT TO THIS NEGOTIATION FOR THE SIEBEL**
 15 **LICENSE.**
 16 Q. AND 4,000 CUSTOMERS AT STAKE THIS TIME RATHER THAN THE
 17 10,000 FOR PEOPLESOFT?
 18 **A. THAT'S CORRECT.**
 19 Q. ALL RIGHT. DID YOU SEE ANY EVIDENCE THAT SAP FELT
 20 THREATENED BY ORACLE'S ACQUISITION OF SIEBEL IN 2006?
 21 **A. YES, THERE WAS INFORMATION THAT -- THAT WAS FIRST IN THE**
 22 **FILES OF SAP IN LATE 2005.**
 23 Q. ALL RIGHT. THIS IS ONE EXAMPLE OF THAT?
 24 (EXHIBIT PUBLISHED TO JURY.)
 25 THE WITNESS: YES, THIS IS A DOCUMENT FROM SAP. AND
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1024

MEYER - DIRECT (RESUMED)/ PICKETT

1 **DIFFERENT INPUTS AND CONSIDERATIONS, BUT THE SAME STRUCTURE**
 2 **LOOKING AT BOTH SIDES --**
 3 Q. OKAY. ALL RIGHT.
 4 **A. OKAY.**
 5 Q. SO WHAT'S THE TIMING OF THIS LICENSE?
 6 **A. THAT WOULD BE IN SEPTEMBER 2006, WHEN THERE WAS FIRST A**
 7 **CONTRACT FOR TOMORROWNOW TO PUT SERVICE ON SIEBEL -- A SIEBEL**
 8 **PRODUCT.**
 9 Q. THAT'S THE FIRST DATE WE KNOW OF WHEN SAP TOOK THE SIEBEL
 10 PROPERTY?
 11 **A. THAT'S RIGHT. THEY PLANNED FOR A WHILE, BUT THAT'S THE**
 12 **FIRST DATE WE KNOW.**
 13 Q. ALL RIGHT. AND THAT'S BASED -- CAN YOU EXPLAIN WHAT THAT'S
 14 BASED ON?
 15 **A. YES, SO BASICALLY THIS JUST SHOWS THAT ORACLE ANNOUNCES AN**
 16 **AGREEMENT TO PURCHASE SIEBEL IN SEPTEMBER 2005. THE**
 17 **ACQUISITION'S IN JANUARY 2006. BY MAY OF 2006, SAP ANNOUNCES**
 18 **EXTENSION OF TOMORROWNOW'S SERVICE ON THE SIEBEL PRODUCTS. AND,**
 19 **ULTIMATELY, IN SEPTEMBER 29TH OF 2006, THAT'S THE FIRST**
 20 **TOMORROWNOW CONTRACT SO THAT'S WHEN WE DO THE NEGOTIATION FOR**
 21 **THIS LICENSE.**
 22 Q. AND -- AND UNLIKE WITH THE PEOPLESOFT, IT TOOK SOME TIME
 23 BECAUSE OF WHAT?
 24 **A. THIS WAS A SITUATION WHICH WAS DIFFERENT BECAUSE TOMORROWNOW**
 25 **HAD NEVER PROVIDED SERVICE ON SIEBEL PRODUCTS. AND SO WHEN SAP**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 THE -- THE TITLE IS "ORACLE ACQUISITION OF SIEBEL." IT SAYS,
 2 IMPACT ON CRM AND BUSINESS SUITE REVENUES.
 3 BY MR. PICKETT:
 4 Q. THIS IS EXHIBIT 245?
 5 **A. YES, IT WOULD BE.**
 6 Q. ALL RIGHT.
 7 **A. AND IT SAYS HERE THAT "SAP COMPETITIVE EDGE DIMINISHED BY**
 8 **40 PERCENT POST-SIEBEL ACQUISITION." AND SO WHAT THIS DOCUMENT**
 9 **IS ADDRESSING IS THAT THE CRM SOFTWARE IS VIEWED BY SAP AS BEING**
 10 **VERY IMPORTANT AND/OR SORT OF LEADING TO OTHER SAP REVENUES.**
 11 **AND SO WHAT'S IMPORTANT HERE, IT SAYS, "REVENUE UNDER**
 12 **THREAT THROUGH REDUCTION AND COMPETITIVE ABILITY," AND THAT WAS**
 13 **CALCULATED AT 40 PERCENT BY SAP'S MANAGEMENT. AND SO WHAT**
 14 **THEY'RE SAYING IS THAT WITH SIEBEL NOW AT ORACLE, THE**
 15 **COMPETITIVE OFFERINGS OF SAP IN THIS AREA HAVE DIMINISHED BY**
 16 **40 PERCENT. AND THEY ACTUALLY DO A CALCULATION, WHICH IS PRETTY**
 17 **REMARKABLE RIGHT THERE.**
 18 **IT SAYS, "AT RISK" -- AND THIS IS IN BILLIONS OF**
 19 **EUROS -- IT SAYS, THE IMPACT OF THIS COULD BE 1.52 BILLION**
 20 **EUROS, WHICH, I THINK, IS ABOUT \$2.2 BILLION.**
 21 Q. AT THE CONVERSION RATE TO DOLLARS?
 22 **A. THAT'S CORRECT. SO THIS IS NOT JUST RELATED TO MAINTENANCE**
 23 **ON SIEBEL, BUT IT'S THE OVERALL THREAT THAT SAP'S SEEING WITH**
 24 **ORACLE TEAMING UP WITH SIEBEL.**
 25 Q. ALL RIGHT. LET'S GO BACK TO THAT NEGOTIATION TABLE WITH THE
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MEYER - DIRECT (RESUMED)/ PICKETT

1 NEXT SLIDE, PLEASE.
 2 (EXHIBIT PUBLISHED TO JURY.)
 3 BY MR. PICKETT:
 4 Q. NOW, THIS IS NOT FOR PEOPLESOFT. IT'S FOR SIEBEL AND, AND
 5 THE DATE IS DIFFERENT. RATHER THAN JANUARY 19, 2005, WE'RE UP A
 6 LITTLE OVER A YEAR AND A HALF, SEPTEMBER 29, 2006. WHAT IS --
 7 WHAT DOES THIS SHOW?
 8 **A. SAME STRUCTURE AS I USED BEFORE WITH PEOPLESOFT, BUT I LAY**
 9 **OUT NOW THE GOALS WITH -- WITH THE SIEBEL LICENSE. THIS IS FROM**
 10 **SAP'S PERSPECTIVE. AND, OBVIOUSLY, THE FIRST GOAL I SEE THERE,**
 11 **IT'S A GOAL TO CONVERT CUSTOMERS TO THE MYSAP CRM. THAT'S THE**
 12 **COMPETITIVE OFFERING THAT SAP HAS THAT COMPETES WITH SIEBEL.**
 13 **AND THEN THERE'S A DOCUMENT I'LL SHOW YOU IN A -- A**
 14 **MOMENT THAT SAYS TOMORROWNOW IS ENABLER FOR FUTURE LICENSE**
 15 **REVENUE. SO IT'S IMPORTANT FROM THE PERSPECTIVE OF SAP AS A**
 16 **GOAL TO BE ABLE TO HAVE TOMORROWNOW PROVIDE SERVICE WHICH LEADS**
 17 **TO MORE REVENUE FOR SAP.**
 18 **AND THEN YOU COME DOWN TO THE IMPACT ON ORACLE, AND**
 19 **THERE'S SOME INFORMATION THAT SHOWS THE IMPACT ON ORACLE BETWEEN**
 20 **110 MILLION AND 220 MILLION RELATED TO THE SIEBEL MAINTENANCE.**
 21 **AND THEN, ULTIMATELY, THE SAP EXPECTED FINANCIAL**
 22 **GAINS, THERE'S SOME INFORMATION THAT THEY EXPECTED TO CONVERT**
 23 **200 CUSTOMERS BY 2008. AND I'VE DONE SOME CALCULATIONS LIKE THE**
 24 **OTHER ONES I'VE SHOWN YOU FOR PEOPLESOFT BUT NOW FOR SIEBEL**
 25 **PRODUCTS. AND THOSE ARE 97 MILLION TO 247 MILLION, AND THESE**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **REPRESENTS \$18 OF ORIGINALLY EXPECTED ORACLE REVENUE SO THIS**
 2 **JUST SHOWS THE IMPACT THAT TOMORROWNOW HAS ON ORACLE'S BUSINESS.**
 3 **SO THOSE ARE ALL IMPORTANT CONSIDERATIONS.**
 4 Q. SO THIS BUSINESS PLAN, VERY SIMILAR TO THE PEOPLESOFT PLAN,
 5 RIGHT?
 6 **A. YES. YES.**
 7 Q. JUST DIFFERENT NUMBERS, DIFFERENT EXPECTATIONS ABOUT
 8 CUSTOMERS, AND DIFFERENT CALCULATIONS.
 9 **A. DIFFERENT PRODUCTS AND DIFFERENT EXPECTATIONS, BUT SIMILAR**
 10 **IN THE SENSE OF OFFERING TOMORROWNOW TO SERVICE SIEBEL**
 11 **CUSTOMERS, AS WE TALKED ABOUT ON THE PEOPLESOFT SIDE.**
 12 Q. ALL RIGHT. AND LET'S LOOK AT SOME OF THE EVIDENCE YOU
 13 RELIED ON FOR SHOWING WHAT'S -- WHAT WOULD BE IN SAP'S MIND FOR
 14 THE SIEBEL NEGOTIATION.
 15 THE NEXT SLIDE, PLEASE.
 16 (EXHIBIT PUBLISHED TO JURY.)
 17 BY MR. PICKETT:
 18 Q. THIS IS EXHIBIT 958. WHAT DOES THIS SHOW, MR. MEYER?
 19 **A. THIS WAS A DOCUMENT THAT WAS PREPARED IN OCTOBER 2005. I**
 20 **THINK MR. ZIEMEN AND MR. WELZ SAW THIS DOCUMENT. IT WAS**
 21 **PRESENTED TO MR. OSWALD, ONE OF THE EXECUTIVE BOARD MEMBERS.**
 22 **AND IT SAYS THAT -- IN THAT FIRST SORT OF AREA THAT'S**
 23 **HIGHLIGHTED, IT SAYS, "THE SIEBEL CUSTOMER BASE CONSISTS OF**
 24 **4,000 CUSTOMERS." AND THEN SAYS, "INCLUDING A LARGE NUMBER OF**
 25 **JOINT EXHIBIT SAP/SIEBEL CUSTOMERS AND PRESENTS A HUGE MARKET**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **ARE GAINS TO SAP.**
 2 Q. SO WE KNOW FROM SAP'S OWN DOCUMENTS AT THE TIME WHAT WOULD
 3 BE IN THEIR MIND AT THE NEGOTIATION TABLE?
 4 **A. THAT'S CORRECT.**
 5 Q. SO LET'S GO TO THE FIRST GOAL, GOAL ONE. ACTUALLY, WE'LL GO
 6 TO ALL THREE GOALS THIS TIME FOR THE SAKE OF SPEED. WHAT DOES
 7 THIS CHART SHOW WITH RESPECT TO GOAL ONE, FACTOR 1, WHAT SAP'S
 8 GOAL WAS, FACTOR 2, WHAT SAP THOUGHT THE IMPACT ON ORACLE WOULD
 9 BE, AND NO. 3, WHAT THEY THOUGHT THEY'D GAIN FROM IT?
 10 **A. WELL, THERE'S SEVERAL THINGS NEEDED TO POINTED OUT.**
 11 **OBVIOUSLY, THE FIRST ITEM THERE ON THE RIGHT-HAND SIDE, UNDER**
 12 **THIS OCTOBER 2005 DOCUMENT, IT SAYS THE OPPORTUNITY IS TO MOVE**
 13 **THE 300-PLUS SAP CUSTOMERS, SAP AND SIEBEL HAVE IN COMMON TO**
 14 **MIGRATE THEM TO MYSAP CRM.**
 15 **SO THAT SHOWS ONCE AGAIN THE TARGETING BY SAP, LAYS**
 16 **OUT SOME OBJECTIVES THERE. KEY PERFORMANCE INDICATORS.**
 17 **I THINK IF YOU COME DOWN, IT SAYS -- DOWN THERE IN**
 18 **THE SECOND BOX SAYS, "THE MAINTENANCE OFFERING" -- IT SAYS "A**
 19 **KEY PART OF THE SAFE PASSAGE PROGRAM AND PROVIDED BY TOMORROWNOW**
 20 **CAN BE USED AS ENABLER FOR FUTURE LICENSE REVENUE." SO THAT**
 21 **SHOWS HOW TOMORROWNOW FOR SIEBEL CAN HELP SAP EARN OTHER**
 22 **REVENUES.**
 23 **AND I THINK IN A MOMENT, WE'LL TALK MORE ABOUT THIS**
 24 **BUT THERE'S A DOCUMENT THAT SAYS OVER THE LONG TERM, EVERY 1**
 25 **DOLLAR OF TOMORROWNOW STAND-ALONE REVENUE THIS YEAR IN 2006**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **OPPORTUNITY." SO THAT'S IMPORTANT TO UNDERSTAND SAP'S GOALS**
 2 **AND -- AND POTENTIAL GAINS.**
 3 **AND THEN THE -- IT GOES ON AND SAYS, THE NEXT BOX,**
 4 **"THE MAINTENANCE OFFERING -- A KEY PART SAFE PASSAGE PROGRAM AND**
 5 **PROVIDED BY TOMORROWNOW -- CAN BE USED AS ENABLER FOR FUTURE**
 6 **LICENSE REVENUE, TO GROW MAINTENANCE CONTRACT VOLUME TAKEN AWAY**
 7 **FROM ORACLE AND TO GENERATE ADDITIONAL MAINTENANCE REVENUE FOR**
 8 **SAP."**
 9 **SO ONCE AGAIN, GOES TO WHY IT WOULD BE A VALUABLE**
 10 **LICENSE FOR SAP.**
 11 Q. RIGHT. CLEARLY GOING TO HAVE TO GET A NEW SET OF GLASSES
 12 HERE, GIVEN THAT SLIDE. BUT LET'S GO ON TO ANOTHER PAGE OF THIS
 13 SLIDE. SAME DOCUMENT.
 14 (EXHIBIT PUBLISHED TO JURY.)
 15 BY MR. PICKETT:
 16 Q. AND WHAT DOES THIS SHOW IN TERMS OF SAP'S PLANNING FOR THE
 17 SIEBEL ACQUISITION BY ORACLE?
 18 **A. WELL, THIS IS THEIR BUSINESS PLANNING AS PART OF THE**
 19 **BUSINESS CASE. AND THIS ONE WOULD SHOW THAT OVER THE PERIOD**
 20 **THROUGH 2008 -- SO THIS IS 2006 THROUGH 2008, THERE WOULD BE 200**
 21 **CUSTOMERS THAT WOULD BE CONVERTED. SO IT'S INDICATIVE ONCE**
 22 **AGAIN OF THE EXPECTATIONS OF SAP.**
 23 Q. AND THAT'S -- IS THAT THE NUMBER YOU USED IN YOUR
 24 CALCULATIONS?
 25 **A. THAT'S CORRECT.**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 Q. THEIR OWN NUMBER?
 2 **A. THAT'S CORRECT.**

3 Q. ALL RIGHT. DID YOU CALCULATE THE IMPACT -- I'M SORRY. LET
 4 ME GO TO THE NEXT SLIDE, EXHIBIT 37.
 5 (EXHIBIT PUBLISHED TO JURY.)
 6 BY MR. PICKETT:

7 Q. AND YOU MENTIONED THIS. WHAT DOES THIS SHOW? WHAT'S THE
 8 SIGNIFICANCE OF THIS?
 9 **A. THIS IS A DOCUMENT THAT WAS AUTHORED BY MR. NELSON AT
 10 TOMORROWNOW, AND IT WAS AUTHORED IN 2006. AND IT MENTIONS THAT
 11 OVER THE LONG TERM, EVERY ONE DOLLAR OF TOMORROWNOW STAND-ALONE
 12 REVENUE THIS YEAR REPRESENTS \$18 OF ORIGINALLY EXPECTED ORACLE
 13 REVENUE FROM THEIR MISGUIDED ACQUISITION STRATEGY.
 14 SO IT REFERENCES BACK TO ORACLE'S ACQUISITION OF
 15 PEOPLESOFT. AND BASICALLY THE WAY IT WORKS IS THAT FOR EVERY
 16 DOLLAR OF TOMORROWNOW REVENUE, BECAUSE THEY'RE AT HALF THE PRICE
 17 OF ORACLE, IT'D BE \$2 TO ORACLE AND THEN THAT'S \$2 OF
 18 MAINTENANCE. AND IT'S A TEN-YEAR LOOK. SO IT'S TWO TIMES THE
 19 NEXT NINE YEARS.
 20 SO THAT \$1 OF TOMORROWNOW NOW SERVICE REVENUE IN YEAR
 21 ONE TAKES AWAY \$2 FROM ORACLE IN YEAR ONE, AND THEN THERE'S A
 22 LOSS FOR THE NEXT NINE YEARS TO ORACLE IS TO THAT'S THE \$18.
 23 AND SO YOU SEE THE LEVERAGE IN THE MINDSET OF
 24 TOMORROWNOW THAT IN THIS CASE, MR. NELSON'S COMMUNICATING TO THE
 25 MANAGEMENT AT SAP, SAYING WE MAKE \$1, IMPACTS ORACLE \$18 BECAUSE**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 NEGOTIATING FOR THIS LICENSE?
 2 **A. THAT'S RIGHT.**

3 Q. ALL RIGHT. LET'S GO TO THE THIRD FACTOR. HOW MUCH SAP
 4 THOUGHT IT WOULD MAKE BY TAKING THE SIEBEL PROPERTY FROM ORACLE.
 5 HOW DID YOU CALCULATE THAT?
 6 **A. I USED A SIMILAR MODEL AS TO HOW I DID THE CALCULATIONS FOR
 7 PEOPLESOFT, SO IT'S THE SAME STRUCTURE. AND I THINK HERE, WE'RE
 8 JUST SHOWING THE RESULTS OF THE CALCULATION. THIS ONE'S FOR THE
 9 200 MAINTENANCE CUSTOMERS I MENTIONED A MOMENT AGO THAT WOULD BE
 10 CONVERTED TO SAP.
 11 AND SO YOU'LL SEE THAT SAME REVENUE CATEGORIES YOU
 12 HAVE ON THE LEFT-HAND SIDE THERE, MAINTENANCE REVENUE. YOU HAVE
 13 THE ADDITIONAL PRODUCT SALES OF THE CROSS-SELL. AND THEN YOU
 14 HAVE THE CONVERTED CUSTOMERS, THE UPSWITCH, AND THEN YOU'LL SEE
 15 THE THREE CUSTOMER NUMBERS, 200, 130, AND 200.
 16 I PUT THOSE VALUES IN TO THE MODEL AND CAME UP WITH
 17 EXPECTED REVENUE THAT WOULD BE GAINED, DEDUCTED THE COSTS IT
 18 WOULD TAKE TO TEN REVENUE, AND THEN YOU'LL SEE THE PROFITS THERE
 19 ON THE NEXT COLUMN.
 20 AND THEN BASICALLY, THEN, DID A SIMILAR CALCULATION
 21 AS I DID FOR THE PEOPLESOFT GAINS TO SAP AND CAME UP WITH A
 22 FUTURE VALUE THERE TO SAP. AND, ULTIMATELY, YOU'LL SEE THAT THE
 23 TOTAL VALUE AS OF JANUARY -- OR AS OF SEPTEMBER 2006, THE TIME
 24 OF THE NEGOTIATION, WOULD BE \$96.7 MILLION TO SAP. THAT'S THEIR
 25 EXPECTED GAIN.**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **THEY LOSE THAT MAINTENANCE FOR A TEN-YEAR PERIOD.
 2 SO IT'S PRETTY SIGNIFICANT ON IMPACT.**

3 Q. DID YOU CALCULATE THE IMPACT TO ORACLE OF A LICENSE TO SAP
 4 OF THE SIEBEL PROPERTY?
 5 **A. YES, I DID.**

6 Q. AND HOW DID YOU DO THAT?
 7 **A. HERE'S THE CALCULATION.
 8 (EXHIBIT PUBLISHED TO JURY.)
 9 THE WITNESS: IT'S ACTUALLY PRETTY SIMPLE. I
 10 BASICALLY SAY THAT IF I LOOK AT SIEBEL REVENUE, AND I CAN -- ON
 11 THE FIRST BOX THERE, IF IT'S BASICALLY 50 PERCENT OF ORACLE'S
 12 PRICE, THAT'S \$7 MILLION. AND SO WE SAW FOR EVERY \$1, SIEBEL
 13 HAD 18 TIMES IMPACT ON ORACLE. SO 18 TIMES \$7.19 MILLION IS
 14 \$130 MILLION. ORACLE'S PROFIT MARGIN, 85 PERCENT. SO THE
 15 IMPACT TO ORACLE IS A HUNDRED \$10 MILLION.
 16 IF -- FROM THAT DOCUMENT, IT'S UNCLEAR EXACTLY WHAT
 17 THE AMOUNT REPRESENTS, WHETHER IT'S AT FULL VALUE OR HALF VALUE.
 18 IF IT'S AT FULL VALUE, IT'S 14.38 MILLION OF SIEBEL REVENUE
 19 MULTIPLIED TIMES 18. IT'S ABOUT \$260 MILLION AT 85 PERCENT.
 20 THAT'S A \$220 MILLION IMPACT ON ORACLE. SO IT SHOWS YOU IF YOU
 21 TAKE MR. NELSON'S LOGIC AND YOU ACCEPT IT, HOW A SMALL AMOUNT OF
 22 TOMORROWNOW REVENUE CAN REALLY IMPACT ORACLE'S REVENUE. AND
 23 THIS IS REVENUE THAT HAD BASICALLY ACQUIRED IN THE PEOPLESOFT
 24 AGREEMENT.
 25 Q. IS TO THIS IS EVIDENCE OF WHAT WOULD BE IN SAP'S MIND**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 Q. AND THAT'S ONE CALCULATION. DID YOU MAKE SOME OTHERS?
 2 **A. YES, I BASICALLY HAVE A SUMMARY THAT SHOWS I DID THE SAME
 3 TYPE OF APPROACH AS WITH PEOPLESOFT, SO IF WE GO OVER HERE --
 4 (EXHIBIT PUBLISHED TO JURY.)
 5 THE WITNESS: -- I USED FOR THE SIEBEL GAINS, THE
 6 SIMILAR SET OF CUSTOMERS THAT WERE LOST UNDER TWO SORT OF
 7 CALCULATIONS. WE JUST SAW THE \$97 MILLION THERE, ONCE AGAIN,
 8 WITH 200 CUSTOMERS CONVERTING. AND THEN ON THE RIGHT-HAND SIDE,
 9 I LOOKED AT THE FULL VALUE OF THOSE CUSTOMERS LEAVING, WHICH
 10 INCLUDES BOTH THE -- IN THIS CASE, THE GAIN OF MAINTENANCE
 11 REVENUE, THE GAIN OF CROSS-SELL, AND THE GAIN OF UPSWITCH
 12 CUSTOMERS TO SAP, WHICH MAKES IT ABOUT \$247 MILLION, ONCE AGAIN
 13 USING THAT \$1 MILLION VALUE PER CUSTOMER. SO THAT'S THE OUTCOME
 14 ON THE SIEBEL GAIN SIDE.
 15 Q. WHAT SAP WOULD THINK IT WOULD BENEFIT FROM THROUGH A LICENSE
 16 FOR THIS PROPERTY?
 17 **A. THAT'S CORRECT.****

18 Q. ALL RIGHT. LET'S GO, THEN, TO THE ORACLE SIDE OF THE TABLE.
 19 WE'VE DONE SAP. THIS IS FOR SIEBEL. LET'S GO TO THE ORACLE
 20 SIDE.
 21 WHAT FACTORS WOULD HAVE BEEN IMPORTANT TO ORACLE
 22 ENTERING INTO THAT NEGOTIATION?
 23 (EXHIBIT PUBLISHED TO JURY.)
 24 THE WITNESS: WELL, YOU'LL SEE THE GOALS THERE. ONCE
 25 AGAIN, THIS IS IN THEIR SIDE OF THE NEGOTIATION. AND THE GOALS
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MEYER - DIRECT (RESUMED)/ PICKETT

1 HERE WERE LOOKING AT ORACLE'S GOAL FOR THE SIEBEL ACQUISITION,
 2 WHICH WAS 4,000 ADDITIONAL CUSTOMERS AND THAT MAINTENANCE
 3 REVENUE.
 4 AND ONCE AGAIN, HERE, ORACLE BECAME THE LEADER IN THE
 5 MARKET AREA OF THE CRM SOFTWARE. SO ORACLE BECAME MARKET LEADER
 6 WITH THE ACQUISITION OF SIEBEL AND, AND THAT WAS VERY IMPORTANT
 7 TO ORACLE.
 8 THEN I GO DOWN AND I ADDRESS THE RISK OF THAT
 9 INVESTMENT AND THEN ULTIMATELY THE EXPECTED IMPACTS ON ORACLE.
 10 YOU'LL SEE THAT THE SIEBEL ACQUISITION WAS \$6 BILLION, INCLUDED
 11 THE SOFTWARE AND SUPPORT MATERIALS. WITH THIS LICENSE, YOU'D
 12 GIVE UP THE EXCLUSIVE RIGHTS AND THE IMPACT USING SAP'S
 13 PROJECTION OF 200 MAINTENANCE CUSTOMERS, I COME UP WITH SOME
 14 CALCULATIONS THERE ALSO.
 15 Q. ALL RIGHT. HOW WOULD A LICENSE WITH SAP FOR THIS SIEBEL
 16 PROPERTY PUT IN ORACLE'S \$6.1 BILLION INVESTMENT AT RISK?
 17 **A. WELL, ONCE AGAIN, JUST LIKE WE SAW WITH PEOPLESOF, THERE'S**
 18 **THE 4,000 CUSTOMERS ON THE LEFT-HAND SIDE, THERE'S \$500 MILLION**
 19 **OF ANNUAL MAINTENANCE REVENUE, THE MARKETSHARE, BECAME THE**
 20 **LEADER FOR ORACLE, AND THAT WOULD ALL BE SORT OF GIVEN UP AND**
 21 **DILUTED WITH THE LICENSE.**
 22 **AND SO ORACLE, ONCE AGAIN, WOULD HAVE THIS SITUATION**
 23 **WHERE DID NOT HAVE THE EXCLUSIVE USE. IT WOULD LOSE CUSTOMERS,**
 24 **MARKETSHARE AND REVENUE. AND SAP'S BENEFITS, IF THEY TAKE THE**
 25 **LICENSE, THEY HAVE THE USE OF THE MATERIALS; UNDER COPYRIGHT,**
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1037

MEYER - DIRECT (RESUMED)/ PICKETT

1 CONCLUDE THAT A REASONABLE LICENSE BETWEEN A WILLING SELLER
 2 WILLING BUYER WOULD BE?
 3 (EXHIBIT PUBLISHED TO JURY.)
 4 THE WITNESS: BASICALLY, I SET THE STRUCTURE UP HERE
 5 WITH SAP'S EXPECTED GAINS AND ORACLE'S POTENTIAL IMPACTS AND
 6 CONSIDERED THE OTHER FACTORS WE'VE TALKED ABOUT. AND FROM MY
 7 PERSPECTIVE, THE LICENSE WOULD BE AT LEAST \$100 MILLION.
 8 BY MR. PICKETT:
 9 Q. AGAIN, AT LEAST \$100 MILLION?
 10 **A. AT LEAST \$100 MILLION.**
 11 Q. AND WHY "AT LEAST"?
 12 **A. ONCE AGAIN, FOR ALL THE OTHER FACTORS, AND PARTICULARLY WITH**
 13 **THE IMPORTANCE OF THE SIEBEL ACQUISITION AND SPENDING THE**
 14 **\$6 BILLION FOR THAT COMPANY AND THE SOFTWARE, FROM MY**
 15 **PERSPECTIVE WOULD BE AT LEAST \$100 MILLION.**
 16 Q. ALL RIGHT. THANK YOU.
 17 NOW, LET'S GET TO THE THIRD AND FINAL LICENSE THAT
 18 SAP SHOULD HAVE NEGOTIATED. THAT'S THE LICENSE TO THE ORACLE
 19 DATABASE.
 20 THE COURT: EXCUSE ME, COUNSEL.
 21 NOW MIGHT BE A GOOD TIME TO TAKE A BREAK BEFORE YOU
 22 GET INTO THE LAST ONE.
 23 MR. PICKETT: VERY GOOD.
 24 THE COURT: ALL RIGHT. LADIES AND GENTLEMEN OF THE
 25 JURY, YOU ARE EXCUSED FOR 15 MINUTES.
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1036

MEYER - DIRECT (RESUMED)/ PICKETT

1 **THEY GAIN CUSTOMERS, MARKETSHARE, AND REVENUE.**
 2 Q. NOW, LET'S TURN TO THE THIRD FACTOR. HOW MUCH MONEY WOULD
 3 ORACLE EXPECT TO LOSE IF IT GAVE THIS LICENSE UP TO SAP FOR
 4 SIEBEL PRODUCTS?
 5 (EXHIBIT PUBLISHED TO JURY.)
 6 THE WITNESS: WELL, I SET UP THE SAME STRUCTURE AS
 7 YOU SAW BEFORE. IN THIS CASE, I LOOKED AT THE LOST POTENTIAL
 8 CUSTOMERS TO ORACLE, LOOK AT THE VALUES THAT ORACLE WOULD HAVE
 9 HAD THERE FOR ITS REVENUES AND ITS MARGINS AND DID A SIMILAR
 10 CALCULATION OVER THE TEN-YEAR PERIOD OF HAVING A CUSTOMER
 11 CONVERT AWAY OFF THE ORACLE PLATFORM.
 12 (EXHIBIT PUBLISHED TO JURY.)
 13 BY MR. PICKETT:
 14 Q. AND WHAT DO THE CALCULATIONS RESULT IN?
 15 **A. THE CALCULATION HERE SHOWS 200 MAINTENANCE CUSTOMERS THAT**
 16 **ARE CONVERTED AWAY AFTER OCTOBER 2008. YOU'LL SEE THE**
 17 **MAINTENANCE REVENUE THERE, BASE OF 200 CUSTOMERS. YOU'LL SEE**
 18 **THE -- THE REVENUE THAT'S GOING TO BE LOST, LESS THE COSTS AND**
 19 **THE PROFITS OF \$93 MILLION. AND THEN THE FUTURE IMPACT ON THAT**
 20 **OF \$71 MILLION. AND SO THE TOTAL EXPECTED IMPACT IS**
 21 **\$164 MILLION.**
 22 Q. ALL RIGHT. LET'S PUT THE TWO SIDES TOGETHER, ONLY THIS TIME
 23 FOR SIEBEL.
 24 LOOKING AT THE SAP SIDE, WHAT'S THEIR THINKING;
 25 LOOKING AT THE ORACLE SIDE, WHAT'S THEIR THINKING? WHAT YOU DID
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1038

MEYER - DIRECT (RESUMED)/ PICKETT

1 (THE FOLLOWING PROCEEDINGS WERE HEARD OUT OF THE
 2 PRESENCE OF THE JURY:)
 3 THE COURT: ALL RIGHT. COUNSEL, BEFORE YOU BREAK, I
 4 LOOKED AT THE LIMITING AND COMPETING LIMITING INSTRUCTIONS WITH
 5 REGARD TO THE COWLITZ COUNTY EVIDENCE. AND I'M GOING TO TAKE A
 6 LITTLE BIT FROM EACH ONE.
 7 THE INSTRUCTION THAT I WOULD GIVE WILL READ AS
 8 FOLLOWS: DURING CROSS-EXAMINATION OF ORACLE'S EXPERT WITNESS
 9 PAUL MEYER, DEFENDANTS MAY PRESENT TWO DECLARATIONS FROM
 10 CUSTOMER COWLITZ COUNTY, WASHINGTON, WHICH WERE RELIED UPON BY
 11 MR. MEYER IN FORMING HIS EXPERT OPINION.
 12 THIS EVIDENCE IS -- THE EVIDENCE IS ADMISSIBLE ONLY
 13 FOR THE PURPOSE OF EXPLAINING THE BASIS OF THE EXPERT'S OPINION.
 14 IT IS NOT OFFERED FOR THE TRUTH OF THE INFORMATION CONTAINED
 15 THEREIN AND SHOULD NOT BE CONSIDERED FOR THAT PURPOSE.
 16 THAT'S THE INSTRUCTION I'LL GIVE.
 17 I'M STILL WORKING ON THE OTHER INSTRUCTION. I'M
 18 GOING TO GO TYPE SOMETHING UP DURING THE BREAK, AND WE CAN GO
 19 OVER THAT LATER.
 20 MR. COWAN: YOUR HONOR, JUST QUICKLY, I DIDN'T SAY
 21 ANYTHING THE FIRST TIME COUNSEL SAID SOMETHING ABOUT THE ONLY
 22 BOARD MEMBER WHO TESTIFIED, AND I DIDN'T SAY SOMETHING THE FIRST
 23 SIX TIMES THEY SAID IT. I THINK WHAT THEY'RE IMPLYING IS
 24 IMPROPER. THEY'RE IMPLYING THAT THERE'S A MISSING WITNESS ISSUE
 25 HERE. THOSE BOARD MEMBERS HAVE BEEN VIDEOTAPED DEPOSITION.
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1039

MEYER - DIRECT (RESUMED)/ PICKETT

1 THEY'RE EQUALLY AVAILABLE TO BOTH SIDES TO PLAY THOSE
 2 DEPOSITIONS.
 3 AND I THINK UNDER THE LAW, IT'S IMPERMISSIBLE,
 4 IMPROPER FOR THEM TO KEEP TALKING ABOUT THERE'S ONLY ONE
 5 BOARD MEMBER WHO HAS COME TO TESTIFY AS IF THE OTHERS HAVEN'T
 6 TESTIFIED IN THIS CASE.
 7 MR. PICKETT: THERE'S A HUGE DIFFERENCE BETWEEN A
 8 LIVE WITNESS AND A VIDEOTAPE WITNESS. AND THESE ARE THEIR
 9 BOARD MEMBERS, YOUR HONOR. MOST OF THEM WORK FOR THEM.
 10 MR. APOTHEKER NO LONGER DOES, BUT AS YOU KNOW, HE'S BEEN
 11 AVOIDING SERVICE IN THIS CASE. AND I THINK IT'S PERFECTLY
 12 APPROPRIATE TO MAKE A DISTINCTION BETWEEN A LIVE WITNESS.
 13 MR. PHILLIPS HAS A BRAND-NEW JOB. TWO WEEKS INTO A
 14 NEW JOB AS C.E.O., AND HE FLEW OUT HERE FROM THE EAST COAST TO
 15 COME. I THINK THAT'S AN APPROPRIATE DISTINCTION TO MAKE.
 16 PERFECTLY APPROPRIATE, AND THEY'LL HAVE AN EXPLANATION FOR IT,
 17 I'M SURE.
 18 MR. MITTELSTAEDT: THEY CAN SAY MR. PHILLIPS DID
 19 WHATEVER THEY WANT TO SAY. ALL I'M SAYING IS IT'S
 20 IMPERMISSIBLE. IT'S IMPLYING THAT THERE'S A MISSING WITNESS
 21 PROBLEM. AND UNDER THE LAW, AS I SAY, IT'S CLEAR THAT AS LONG
 22 AS THE PERSON WAS AVAILABLE FOR DEPOSITION, THE INFERENCE
 23 THEY'RE TRYING TO SUGGEST TO THE JURY IS IMPERMISSIBLE.
 24 MR. PICKETT: NO.
 25 MR. COWAN: AND THEY DON'T -- AND, YOU KNOW, ONE
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1041

MEYER - DIRECT (RESUMED)/ PICKETT

1 THE DISTINCTION IS BETWEEN WHO APPEARED AND WHO DIDN'T. I
 2 HAVEN'T NOTICED THAT IT'S AN UNDULY PREJUDICIAL KIND OF
 3 OBSERVATION ON THE PLAINTIFF'S COUNSEL'S PART.
 4 MR. MITTELSTAEDT: TO ME, IT'S MORE THAN DESCRIPTIVE.
 5 AND IF THEY DON'T CHOOSE TO PLAY OR WE DON'T CHOOSE TO PLAY THE
 6 REMAINING VIDEOTAPE OF THE REMAINING BOARD MEMBERS, THEN IT
 7 WOULD CLEARLY BE IMPERMISSIBLE. I MEAN, THE IMPLICATION --
 8 THE COURT: I DON'T AGREE. I DON'T AGREE.
 9 OBJECTION'S OVERRULED.
 10 ALL RIGHT. TAKE -- TAKE A BREAK.
 11 MR. PICKETT: THANK YOU.
 12 (RECESS TAKEN AT 10:23 A.M.)
 13 (PROCEEDINGS RESUMED AT 10:38 A.M.)
 14 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE
 15 OF THE JURY:)
 16 THE CLERK: PLEASE BE SEATED AND COME TO ORDER.
 17 THE COURT: ALL RIGHT. CONTINUE.
 18 MR. PICKETT: THANK YOU, YOUR HONOR.
 19 Q. HOMESTRETCH, MR. MEYER. WE'RE TO THE THIRD LICENSE THAT
 20 S-A -- THAT SAP WOULD NEGOTIATE UNDER THIS MEASURE OF DAMAGES.
 21 THAT'S A LICENSE TO THE ORACLE DATABASE SOFTWARE.
 22 HOW DID YOU ANALYZE THAT LICENSE AND THE NEGOTIATIONS
 23 FOR IT?
 24 **A. IN SOME RESPECTS, I FOLLOWED THE SAME PROCESS. IT WAS A**
 25 **LITTLE SIMPLER, BUT IT'S A LICENSE FOR THE USE OF ORACLE'S**
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1040

MEYER - DIRECT (RESUMED)/ PICKETT

1 TIME, MAYBE TWO TIMES. BUT EVERY TIME WE HEAR ABOUT MR. BRANDT,
 2 WE ALSO HEAR HIM DESCRIBED AS THE ONLY BOARD MEMBER WHO WOULD
 3 COME OUT HERE AND FACE THE JURY. AND I THINK THAT'S
 4 IMPERMISSIBLE.
 5 MR. PICKETT: THE DIFFERENCE IS WE DON'T HAVE THE
 6 POWER TO BRING THEM IN BECAUSE OUR SUBPOENA POWER IS LIMITED TO
 7 A CERTAIN NUMBER OF MILES FROM THE COURTHOUSE. THEY HAVE THE
 8 POWER. THEY HAVE -- THEY'RE THEIR WITNESSES, SO IT'S -- THAT'S
 9 THE DIFFERENCE.
 10 THE COURT: DO YOU -- HAVE YOU MADE THOSE REFERENCES
 11 IN MORE THAN SIMPLY A DESCRIPTIVE FASHION? OR ARE YOU, INDEED,
 12 TRYING TO INSINUATE SOMETHING ON THE PART OF THE DEFENDANTS IN
 13 NOT PRODUCING, SUCH AS NOT PRODUCING EVIDENCE THAT THEY'RE ABLE
 14 TO PRODUCE? I MEAN, THERE ARE CERTAIN INSTRUCTIONS --
 15 MR. PICKETT: YEAH, IT'S NOT -- IT'S NOT THAT THEY'RE
 16 NOT -- IT DOESN'T GO THAT FAR AT ALL. IT'S NOT THAT THEY'RE NOT
 17 PRODUCING EVIDENCE THAT THEY'RE SUPPRESSING IN SOME WAY.
 18 IT'S JUST A VERY COMMON-SENSE, PRACTICAL DIFFERENCE
 19 THAT THE JURY CAN SEE, AND I THINK IT'S -- WE CAN COMMENT ON IT.
 20 THE COURT: I CERTAINLY NOTICED IT, AND IT HAS NOT
 21 APPEARED TO ME TO BE AN IMPROPER OBSERVATION ON THE PART OF
 22 PLAINTIFFS' COUNSEL. I MEAN, THE JURY KNOWS. THEY'VE SEEN
 23 THREE OF THE FIVE BOARD MEMBERS TESTIFY BY DEPOSITION.
 24 SO FOR YOU TO SAY THAT HE'S SUGGESTING THAT THEY
 25 HAVEN'T TESTIFIED, WELL, THEY KNOW THAT HE'S -- THEY TESTIFIED.
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1042

MEYER - DIRECT (RESUMED)/ PICKETT

1 **DATABASE SOFTWARE, AND INFORMATION WOULD BE TAKEN OUT OF THAT --**
 2 **OUT OF THAT DATABASE SOFTWARE AND PUT INTO THE APPLICATIONS THAT**
 3 **TOMORROWNOW HAD MADE. AND SO IT'S -- IT'S A NEGOTIATION FOR THE**
 4 **USE OF THAT SOFTWARE.**
 5 Q. AND WHAT WOULD THAT LICENSE COVER, THE ORACLE DATABASE
 6 LICENSE THAT SAP WOULD NEED?
 7 **A. IT WOULD COVER THE CUSTOMERS THAT WERE BENEFITING FROM**
 8 **THAT -- USING THAT DATABASE LICENSE FOR THE PERIODS OF TIME WHEN**
 9 **THEY BENEFITED. SO I HAD INFORMATION ABOUT WHEN THOSE CUSTOMERS**
 10 **WERE FIRST SERVICED BY TOMORROWNOW. AND THEN I RUN THAT**
 11 **CALCULATION FROM THOSE DATES OUT THROUGH OCTOBER 2008.**
 12 Q. DO YOU KNOW WHAT -- THE VARIOUS VERSIONS OF THE TYPE OF
 13 DATABASE SOFTWARE WOULD BE COVERED BY THE LICENSE?
 14 **A. THIS WOULD BE THE -- THE VERSION THAT WAS PART OF THE**
 15 **STIPULATION OF INFRINGEMENT, WHICH COVERED THE ENTERPRISE**
 16 **EDITION. SO THE ENTERPRISE EDITION OF THE DATABASE SOFTWARE WAS**
 17 **PART OF THE STIPULATION AS TO WHAT WAS INFRINGED BY SAP**
 18 **TOMORROWNOW, AND THAT'S THE VERSION WE'RE FOCUSING ON.**
 19 Q. SO WE -- WE KNOW WHAT THE LICENSE WOULD COVER BECAUSE WE
 20 LOOKED AT THE STIPULATION?
 21 **A. THAT'S CORRECT.**
 22 Q. THAT'S SIMILAR TO WHAT YOU DID FOR THE PEOPLESOFT AND SIEBEL
 23 LICENSES?
 24 **A. EXACTLY.**
 25 Q. AND THEN THE -- LET'S -- LET'S CUT TO THE SAP SIDE. HOW --
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1043

MEYER - DIRECT (RESUMED)/ PICKETT

1 WHAT WERE SAP'S GOALS FOR USING THE DATABASE
 2 SOFTWARE?
 3 **A. WELL, FROM MY PERSPECTIVE, BASICALLY TOMORROWNOW, AS IT**
 4 **PROVIDED ITS SERVICE TO ITS CUSTOMERS, MADE COPIES AND DID OTHER**
 5 **TYPES OF INFRINGEMENT OF THE SOFTWARE, THE APPLICATION SOFTWARE**
 6 **RELATED TO PEOPLESFT AND JD EDWARDS BUT ALSO HAD TO USE THE**
 7 **ORACLE DATABASE SOFTWARE.**
 8 **SO FROM MY PERSPECTIVE, IF THAT -- SAP IS TAKING A**
 9 **LICENSE FOR THE APPLICATION SOFTWARE AND ALL THE MATERIALS,**
 10 **THEY'D ALSO HAVE TO, IN TANDEM, TAKE A DATABASE LICENSE;**
 11 **OTHERWISE, THEY WOULDN'T BE ABLE TO EXTRACT THE DATA FROM THE**
 12 **DATABASE SOFTWARE THAT THEY WOULD NEED AT TIMES WHEN THEY'RE**
 13 **DOING THEIR VARIOUS UPDATES AND WHAT-NOT IN SERVICING THOSE**
 14 **CUSTOMERS.**
 15 Q. IS THAT TRUE OF ALL CUSTOMERS THAT TOMORROWNOW AND SAP
 16 SERVICED?
 17 **A. NOT ALL THE CUSTOMERS, NO. JUST -- IT WAS A SUBSET OF THOSE**
 18 **CUSTOMERS.**
 19 Q. ALL RIGHT. WELL, THEN LET'S -- LET'S LOOK AT HOW YOU
 20 MEASURED THE VALUE OF THE DATABASE LICENSE.
 21 (EXHIBIT PUBLISHED TO JURY.)
 22 BY MR. PICKETT:
 23 Q. THIS IS SLIDE 70. WHAT DO YOU SHOW HERE?
 24 **A. HERE, I JUST HAVE SORT OF A STRUCTURE TOP TO BOTTOM OF A**
 25 **COUPLE OF THINGS THAT I WENT THROUGH AND CONSIDERED TO COME UP**
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1045

MEYER - DIRECT (RESUMED)/ PICKETT

1 **A. THERE WAS AN ISSUE ABOUT THE -- THE SERVER CONFIGURATION OF**
 2 **TOMORROWNOW BECAUSE THE WAY ORACLE PRICES OUT THE DATABASE**
 3 **LICENSE, IT'S BASED ON THE SIZE OF THE SERVER. AND SO WE HAD**
 4 **THAT INFORMATION FROM TOMORROWNOW'S RECORDS.**
 5 **AND IN THAT PROCESS, WE WERE ULTIMATELY -- CAME TO**
 6 **UNDERSTAND I BELIEVE IT WAS SIX PROCESSORS, AND THEY CHARGE FOR**
 7 **THE SOFTWARE BASED ON THE NUMBER OF PROCESSORS. SO WE WERE ABLE**
 8 **TO COME UP WITH A CALCULATION OF -- OF SIX PROCESSORS TIMES A**
 9 **VALUE TO COME UP WITH THE TOTAL PRICING.**
 10 **SO IT WAS IMPORTANT TO UNDERSTAND THE HARDWARE**
 11 **CONFIGURATION OF TOMORROWNOW.**
 12 Q. YOU HAD TO UNDERSTAND THE HARDWARE CONFIGURATION TOMORROWNOW
 13 USED IN ORDER TO UNDERSTAND HOW THE PRICES WOULD APPLY?
 14 **A. THAT'S CORRECT.**
 15 Q. ALL RIGHT. LET'S GO TO STEP THREE. WHAT IS THAT?
 16 **A. AND THEN STEP THREE, WE HAD TO COME UP WITH A PRICE. AND SO**
 17 **IT TURNED OUT IT WAS SIX PROCESSORS AT \$40,000 PER PROCESSOR.**
 18 **SO FOR THIS DATABASE LICENSE, IT WOULD BE \$240,000**
 19 **PAID, AND THEN THERE WOULD BE ANNUAL MAINTENANCE AT ABOUT**
 20 **\$52,000 A YEAR, SO THAT'S SORT OF THE PRICE FOR EACH OF THE**
 21 **DATABASE LICENSES.**
 22 Q. FOR EACH OF THE LICENSES THAT -- CUSTOMER DATABASE THAT
 23 TOMORROWNOW WAS ACCESSING?
 24 **A. THAT'S RIGHT. SO FOR EACH CUSTOMER ULTIMATELY THAT'S IN THE**
 25 **CALCULATION, THEY WOULD NEED A DATABASE LICENSE AT \$240,000 A**
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1044

MEYER - DIRECT (RESUMED)/ PICKETT

1 **WITH THE OVERALL LICENSE.**
 2 **ULTIMATELY, I STARTED WITH UNDERSTANDING ORACLE'S**
 3 **DATABASE LICENSING PRACTICES. AND I DID THAT BECAUSE I WANTED**
 4 **TO UNDERSTAND IF ORACLE HAD EVER LICENSED ITS DATABASE SOFTWARE**
 5 **IN THESE KINDS OF CIRCUMSTANCES. AND I FOUND OUT THEY NEVER**
 6 **HAVE. THEY'D NEVER LICENSED THE DATABASE SOFTWARE TO A**
 7 **COMPETITOR TO OFFER HEAD-TO-HEAD COMPETITION IN PROVIDING**
 8 **MAINTENANCE SERVICES LIKE TOMORROWNOW WAS DOING, SO THIS WOULD**
 9 **BE A FIRST-TIME-EVER THING.**
 10 **SO FROM THAT PERSPECTIVE, I WANTED TO UNDERSTAND THAT**
 11 **PROCESS, AND I TALKED TO MR. ALLISON A COUPLE TIMES FROM ORACLE.**
 12 **I BELIEVE HE TESTIFIED IN THE TRIAL LAST WEEK.**
 13 Q. ON FRIDAY.
 14 **A. THAT'S CORRECT. AND I READ HIS TESTIMONY, AND IT WAS**
 15 **CONSISTENT WITH WHAT HE TOLD ME IN THE PAST ABOUT THE ORACLE**
 16 **DATABASE SOFTWARE AND WHY THIS WOULD BE SORT OF A UNIQUE**
 17 **LICENSING, BECAUSE THEY JUST DON'T LICENSE COMPETITORS TO**
 18 **COMPETE LIKE THIS.**
 19 Q. WAS HIS TESTIMONY TO THE JURY THE SAME AS HIS STATEMENTS TO
 20 YOU PRIOR TO YOUR DOING THIS ANALYSIS?
 21 **A. YES, SIR.**
 22 Q. ALL RIGHT. IN OUR STEP TWO -- SO HE GAVE YOU THE DATABASE
 23 LICENSES PRACTICES AS HE DESCRIBED THEM ON FRIDAY?
 24 **A. THAT'S CORRECT.**
 25 Q. AND THEN STEP TWO IS WHAT?
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **YEAR PLUS MAINTENANCE.**
 2 Q. AND WHAT WAS YOUR NEXT STEP FOR THE NUMBER OF CUSTOMERS WHO
 3 BENEFITED?
 4 **A. THAT WAS TO DETERMINE HOW MANY BENEFITING CUSTOMERS -- AND I**
 5 **HAD INFORMATION ABOUT THAT. AND I BELIEVE I HAVE A SLIDE THAT**
 6 **SHOWS THAT SOMEWHERE, THAT COUNT OF CUSTOMERS.**
 7 **(EXHIBIT PUBLISHED TO JURY.)**
 8 **THE WITNESS: AND SO WE KNEW FROM SIMILAR RESPONSES**
 9 **BY SAP IN DISCOVERY THAT 71 CUSTOMER ENVIRONMENTS HAD BEEN**
 10 **CREATED ON THE TOMORROWNOW SERVERS. SO WHEN THOSE ENVIRONMENTS**
 11 **WERE CREATED ON THE TOMORROWNOW SERVERS, THEY THEN ACCESSED**
 12 **ORACLE'S DATABASE. AND SO THOSE CUSTOMERS WOULD NEED A LICENSE**
 13 **TO ORACLE'S DATABASE SOFTWARE.**
 14 **AND THEN WE WERE ABLE TO DETERMINE THAT THERE WERE**
 15 **FIXES THAT WERE DEVELOPED ON THE 71 CUSTOMER ENVIRONMENTS**
 16 **THAT -- THAT WERE USING THE DATABASE SOFTWARE. SO THAT SECOND**
 17 **GROUP IS BASICALLY WHAT'S CALLED CONFIRMED CROSS-USE WITH ORACLE**
 18 **LOCAL DATABASE ENVIRONMENTS. AND THAT'S THE NEXT 43 CUSTOMERS.**
 19 **AND THEN THE LAST GROUP IS JUST CUSTOMERS OF**
 20 **TOMORROWNOW THAT HAD THE HUMAN RESOURCE APPLICATION AND THAT**
 21 **NUMBER BASICALLY ASSUMES THAT THOSE CUSTOMERS TOOK -- TOOK**
 22 **BENEFITS FROM THE FIXES AND UPDATES THAT CAME OUT OF THE FIRST**
 23 **TWO GROUPS, SO THE TOTAL IS 172 CUSTOMERS THAT WOULD NEED A**
 24 **SEPARATE DATABASE LICENSE FROM THE PERSPECTIVE OF THIS -- THIS**
 25 **NEGOTIATION.**
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MEYER - DIRECT (RESUMED)/ PICKETT

1 Q. AND HOW MUCH DID YOU CONCLUDE THE DATABASE LICENSE FEE WOULD
 2 BE?
 3 **A. THE -- HERE'S THE CALCULATION. IT'S PRETTY SEPARATE**
 4 **FORWARD.**
 5 **(EXHIBIT PUBLISHED TO JURY.)**
 6 THE WITNESS: I MENTIONED A MOMENT AGO THERE WERE 172
 7 CUSTOMERS. EACH ONE WOULD TAKE A LICENSE AT \$240,000. THE
 8 ANNUAL MAINTENANCE RUNS 52,800, AND THEN THE TIME PERIOD IS FROM
 9 THE TIME EACH OF THE CUSTOMERS BECAME A TOMORROWNOW CUSTOMER
 10 THROUGH OCTOBER 2008. AND THEN WHEN YOU DO THE MATH OF THAT,
 11 IT'S \$55.6 MILLION. THAT'S THE TOTAL FOR THE DATABASE LICENSE.
 12 MR. PICKETT: ALL RIGHT. LET ME GO TO THE NEXT
 13 SLIDE.
 14 **(EXHIBIT PUBLISHED TO JURY.)**
 15 BY MR. PICKETT:
 16 Q. OH, I'M SORRY. I MAYBE DIDN'T HEAR IT. MAYBE YOU MISSPOKE.
 17 DO THE CUSTOMERS TAKE THE DATABASE LICENSE OR DOES TOMORROWNOW
 18 TAKE A DATABASE LICENSE FOR EACH CUSTOMER AS TO WHO'S DATABASE
 19 IT ACCESSES?
 20 **A. IT WOULD BE TOMORROWNOW THAT WOULD BE TAKING THE LICENSE AND**
 21 **THEY'RE THE ONES PROVIDING SERVICE TO THE CUSTOMERS. SO THESE**
 22 **ARE ALL ON TOMORROWNOW SERVERS.**
 23 **THAT'S WHERE THE DATABASE RESIDES.**
 24 Q. AND YOU CALCULATE IT OFF THE CONFIGURATIONS THAT TOMORROWNOW
 25 HAD.

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MEYER - DIRECT (RESUMED)/ PICKETT

1 MR. PICKETT: ALL RIGHT. THANK YOU. I HAVE NO
 2 FURTHER QUESTIONS.
 3 I WOULD LIKE TO MOVE NOT INTO EVIDENCE BUT AS AN
 4 EXHIBIT FOR THE RECORD THE DEMONSTRATIVES.
 5 THE COURT: ALL RIGHT. IS THERE ANY OBJECTION --
 6 MR. COWAN: NO, YOUR HONOR.
 7 THE COURT: -- TO --
 8 MR. PICKETT: ALL RIGHT. WE'LL PREPARE THAT EXHIBIT,
 9 YOUR HONOR.
 10 THE COURT: ALL RIGHT. THAT WILL BE ADMITTED.
 11 MR. MITTELSTAEDT, ARE YOU GOING TO CONDUCT THE
 12 CROSS-EXAMINATION?
 13 MR. MITTELSTAEDT: YES, YOUR HONOR.
 14 THE COURT: ALL RIGHT. AND IS NOW THE APPROPRIATE
 15 TIME FOR ME TO GIVE THE LIMITING INSTRUCTION? ARE YOU GOING TO
 16 USE THAT EVIDENCE?
 17 MR. MITTELSTAEDT: LATER ON. BUT GO AHEAD.
 18 THE COURT: OKAY. ALL RIGHT.
 19 MR. MITTELSTAEDT: JUST SO WE DON'T FORGET.
 20 THE COURT: OKAY.
 21 ALL RIGHT. LADIES AND GENTLEMEN, DURING THE
 22 CROSS-EXAMINATION OF ORACLE'S EXPERT WITNESS THAT WE JUST HEARD
 23 AND ABOUT WHICH MR. MITTELSTAEDT IS ABOUT TO ENGAGE IN, THE
 24 DEFENDANTS MAY PRESENT TWO DECLARATIONS FROM CUSTOMERS OF
 25 COWLITZ COUNTY, WASHINGTON. THESE DECLARATIONS ARE RELIED UPON
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MEYER - DIRECT (RESUMED)/ PICKETT

1 **A. EXACTLY.**
 2 Q. ALL RIGHT. NOW, LET'S SUM UP THEN HERE.
 3 **(EXHIBIT PUBLISHED TO JURY.)**
 4 BY MR. PICKETT:
 5 Q. THE FIRST LICENSE, THE PEOPLESFT LICENSE WE'VE CALLED IT,
 6 INCLUDES THE JD EDWARDS SOFTWARE. YOU SAY THAT'S AT LEAST
 7 1.5 BILLION?
 8 **A. THAT'S CORRECT.**
 9 Q. AND IS IT IMPORTANT -- WELL, THERE WE GO.
 10 **(EXHIBIT PUBLISHED TO JURY.)**
 11 BY MR. PICKETT:
 12 Q. IS IT IMPORTANT THAT IT'S AT LEAST IN YOUR VIEW -- I MEAN,
 13 YOU'RE NOT AT 1.5 BILLION. YOU'RE "AT LEAST," RIGHT?
 14 **A. I -- THAT'S CORRECT. AND I THINK FROM THE CHARTS WE SHOWED**
 15 **TODAY AND THE RESULTS OF MY CALCULATIONS, THERE'S CERTAINLY**
 16 **REASON TO HAVE THE VALUE HIGHER. BUT I FELT THAT THIS WAS A**
 17 **REASONABLE PLACE TO BE. AND I'M COMFORTABLE WITH "AT LEAST,"**
 18 **AND CERTAINLY ONE COULD -- COULD COME UP WITH COME UP WITH VERY**
 19 **SOUND LOGIC TO HAVE A HIGHER AMOUNT.**
 20 Q. ALL RIGHT. AND WE SEE THE SIEBEL AND THE DATABASE. SO IN
 21 YOUR OPINION, MR. MEYER, THE TOTAL DAMAGES IN THIS CASE ARE AT
 22 LEAST 1.655 -- SIX HUNDRED THOUSAND? YOU CAN PROBABLY SAY THAT
 23 NUMBER BETTER THAN I.
 24 **A. MAYBE NOT, BUT IT'S \$1,655,600,000, WOULD BE THE DAMAGES.**
 25 **AT LEAST THAT AMOUNT; THAT'S CORRECT.**

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

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MEYER - DIRECT (RESUMED)/ PICKETT

1 BY PLAINTIFFS' DAMAGES EXPERT IN FORMING HIS OPINIONS.
 2 THE EVIDENCE CONTAINED IS ADMISSIBLE ONLY FOR THE
 3 PURPOSE OF -- THE PURPOSE OF EXPLAINING THE BASIS OF MR. MEYER'S
 4 OPINION. IT IS NOT OFFERED FOR TRUTH OF THE INFORMATION
 5 CONTAINED IN THE DECLARATION AND SHOULD NOT BE CONSIDERED BY YOU
 6 FOR THAT PURPOSE.
 7 ALL RIGHT. COUNSEL?
 8 CROSS-EXAMINATION
 9 BY MR. MITTELSTAEDT:
 10 Q. GOOD MORNING, MR. MEYER.
 11 **A. GOOD MORNING.**
 12 Q. MY NAME IS BOB MITTELSTAEDT. I'M GOING TO ASK YOU SOME
 13 QUESTIONS.
 14 YOU ARE BEING PAID BY ORACLE TO TESTIFY ON ITS BEHALF
 15 IN THIS CASE; IS THAT CORRECT?
 16 **A. MY FIRM WOULD BE.**
 17 Q. AND YOUR FIRM, YOU OWN WITH ONE OTHER PERSON; IS THAT
 18 CORRECT?
 19 **A. THAT'S NOT CORRECT.**
 20 Q. YOU'VE BEEN PAID HOW MUCH?
 21 **A. WELL, MY FIRMS -- 'CAUSE I -- WHEN I BEGAN THIS ASSIGNMENT**
 22 **IN 2007, I WAS WITH A LARGE PUBLICLY TRADED COMPANY CALLED**
 23 **NAVIGANT CONSULTING. AND I THINK IN THAT TIME FRAME WE WERE AT**
 24 **NAVIGANT -- WOULDN'T HAVE THE EXACT AMOUNT, BUT NAVIGANT**
 25 **CONSULTING WAS PAID ABOUT TWO AND A HALF MILLION DOLLARS. AND**
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1075

MEYER - CROSS / MR. MITTELSTAEDT

1 Q. THE NEXT SENTENCE SAYS:
 2 "THE DOWNLOADS WERE CONDUCTED BY TOMORROWNOW'S
 3 EMPLOYEES USING CERTAIN LAPTOPS AND DESKTOPS AS
 4 WELL AS DEDICATED DOWNLOAD SERVERS LOCATED AT
 5 TOMORROWNOW'S DATA CENTER IN BRYAN, TEXAS."
 6 DO YOU SEE THAT?

7 **A. RIGHT. THAT'S FROM THE EIGHTH AMENDED SUPPLEMENTAL
 8 RESPONSE TO -- THIS IS THE DEFENDANTS' INTERROGATORY RESPONSES,
 9 DECEMBER 4TH, 2009.**

10 Q. AND YOUR UNDERSTANDING WAS THAT THIS LICENSE THAT YOU'RE
 11 TELLING US WHAT THE ROYALTY WOULD BE, WOULD PERMIT TOMORROWNOW
 12 TO ENGAGE IN THAT CONDUCT, CORRECT?

13 **A. WELL, BACK IN MY REPORT WHERE I ACTUALLY ADDRESS THE VALUE
 14 OF THE LICENSE, I HAVE A SCOPE SECTION AND I ADDRESS WHAT THE
 15 SCOPE IS.**

16 **BUT I WOULD LEAVE IT TO OTHERS AS TO WHERE THINGS
 17 HAPPENED. THE SCOPE OF THE MATERIALS THAT WERE TAKEN IS THE
 18 SCOPE OF THE LICENSE.**

19 Q. BUT, SIR, I WANT TO HAVE YOU BE MORE PRECISE THAN THAT.
 20 THIS LICENSE THAT WE HAVE ALL HEARD ABOUT, THE
 21 LICENSE WOULD, IN PART, PERMIT TOMORROWNOW TO DOWNLOAD THE
 22 MATERIALS THAT IT DOWNLOADED, CORRECT?

23 **A. AS A WHOLLY-OWNED SUBSIDIARY OF SAP, YES, THEY WOULD HAVE
 24 A LICENSE. TOMORROWNOW WOULD HAVE A LICENSE TO DO WHAT THEY
 25 ACTUALLY DID.**

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

1077

MEYER - CROSS / MR. MITTELSTAEDT

1 **QUESTION.**
 2 Q. FOR EXAMPLE --
 3 **A. IT SOUNDS LIMITING FOR SOME REASON. I NEED TO UNDERSTAND
 4 WHY.**

5 Q. I WANT TO UNDERSTAND WHAT'S THE SCOPE OF LICENSE THAT YOU
 6 HAVE IN MIND, SO LET ME ASK THE QUESTION THIS WAY:
 7 UNDER THE LICENSE THAT YOU'RE TALKING ABOUT, COULD
 8 TOMORROWNOW GO OUT AND SELL ORACLE SOFTWARE AS ITS OWN
 9 SOFTWARE?

10 **A. NO. IT CAN DO WHAT IT ACTUALLY TOOK IN THE REAL WORLD, IN
 11 THE REAL WORLD. SO IT ACTUALLY, IN THE REAL WORLD, DOWNLOADED
 12 MILLIONS OF THINGS, CREATED THOUSANDS OF COPIES, ALL THESE
 13 ENVIRONMENTS THAT ACTUALLY DID THAT. THAT'S ALL BEEN AGREED
 14 UPON. SO THAT BUCKET OF WHAT IT DID, ACTUALLY DID, ALL THAT
 15 PROPERTY IS IN THE SCOPE OF THE LICENSE. THAT'S WHAT I VALUED.**

16 Q. OKAY. WE ARE --
 17 **A. THAT'S ACTUALLY WHAT -- WHAT THEY TOOK IS WHAT HAS BEEN
 18 VALUED, THE ACTUAL TAKING.**

19 Q. WE ARE GETTING CLOSE HERE.
 20 TOMORROWNOW DID THAT FOR THE PURPOSE OF PROVIDING
 21 SUPPORT TO ITS CUSTOMERS, CORRECT?

22 **A. IF YOU ARE ASKING WAS TOMORROWNOW A SERVICE ENTITY THAT
 23 WANTED TO PROVIDE SUPPORT TO PEOPLESFT CUSTOMERS, I HAVE BEEN
 24 TESTIFYING ABOUT THAT, YES, THAT'S WHAT THEY WOULD DO WITH IT
 25 AS PART OF THE SAFE PASSAGE PROGRAM. YES, I AGREE WITH THAT.**

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1076

MEYER - CROSS / MR. MITTELSTAEDT

1 Q. I AM NOT ASKING YOU ABOUT THE CORPORATE OWNERSHIP. I AM
 2 JUST ASKING ABOUT THE SCOPE OF YOUR LICENSE.
 3 IT WOULD BE TO PERMIT TOMORROWNOW TO DOWNLOAD
 4 MATERIALS FOR THE PURPOSES OF PROVIDING SUPPORT TO ITS
 5 CUSTOMERS, CORRECT?

6 **A. I DON'T FOLLOW YOUR QUESTION NOW.**
 7 **IT WOULD ALLOW TOMORROWNOW TO DO THE THINGS THAT IT
 8 DID -- ITS DOWNLOADING ACTIVITY. WHAT IT ACTUALLY DID WITH
 9 DOWNLOADS, IT COULD DO THAT AS PART OF THE LICENSE.**

10 Q. BUT IT WAS IMPORTANT TO YOU TO UNDERSTAND WHAT TOMORROWNOW
 11 DID IN ORDER TO FIGURE OUT WHAT THIS LICENSE WAS, RIGHT?

12 **A. WELL, I HAVE THAT. IT'S FOUND -- THE STIPULATED LIABILITY
 13 INFRINGEMENT ISSUES. I HAVE THAT. SO -- AND I HAVE IT AS PART
 14 OF THE INTERROGATORIES.**

15 **I DON'T UNDERSTAND YOUR QUESTION.**

16 Q. LET ME TRY TO EXPLAIN IT TO YOU OR ASK IT A DIFFERENT WAY.
 17 IN GENERAL TERMS, SIR, YOUR LICENSE WOULD ALLOW
 18 TOMORROWNOW TO DOWNLOAD SOFTWARE SUPPORT MATERIALS FROM
 19 ORACLE'S WEBSITE, CORRECT? PART OF WHAT IT WOULD DO?

20 **A. YES. I WOULD AGREE WITH THAT. THAT WAS PART OF WHAT THE
 21 DOWNLOADS ACTUALLY DID, THEN THEY COULD DO THAT.**

22 Q. OKAY. FOR THE PURPOSE OF PROVIDING SUPPORT TO
 23 TOMORROWNOW'S CUSTOMERS, CORRECT?

24 **A. SEE, THAT'S WHERE I DON'T UNDERSTAND THE QUESTION. IT'S
 25 LIKE YOU ARE TRYING TO MAKE THIS -- I DON'T UNDERSTAND THE**

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1078

MEYER - CROSS / MR. MITTELSTAEDT

1 Q. OKAY. AS OPPOSED TO REPACKAGING IT AS TOMORROWNOW
 2 SOFTWARE AND GOING OVERSEAS SOMEPLACE TO RESELL IT AS THEIR OWN
 3 TOTALLY UNRELATED TO SUPPORT ACTIVITIES, CORRECT?

4 **A. RIGHT.**

5 Q. THE LICENSE WOULDN'T PERMIT THAT, WOULD IT?
 6 **A. THAT'S RIGHT. IT'S GEARED TOWARDS THE ACTUAL DOWNLOADING
 7 OF WHAT WAS TAKEN.**

8 Q. AND YOU WILL AGREE THAT THAT DOWNLOADING AND THE COPYRIGHT
 9 INFRINGEMENT WAS DONE BY TOMORROWNOW IN SERVICING ITS SUPPORT
 10 CUSTOMERS, CORRECT?

11 **A. I CAN AGREE THAT -- IN A GENERAL SENSE. IT JUST WASN'T
 12 PART OF HOW I HAD TO VIEW THE SCOPE OF THE LICENSE. I KNEW THE
 13 ACTUAL PROPERTY AND THAT'S WHAT IT COVERS. SO, WHATEVER.**

14 Q. OKAY.
 15 LET'S TURN NOW TO THIS HYPOTHETICAL LICENSE. AND AS
 16 I UNDERSTAND YOUR CONCEPTUAL APPROACH, YOU ARE TRYING TO
 17 CONDUCT A HYPOTHETICAL NEGOTIATION AND TO FIGURE OUT WHAT
 18 WILLING BUYERS AND SELLERS WOULD BE WILLING TO PAY FOR THIS
 19 LICENSE. CORRECT?

20 **A. I AGREE WITH THAT.**

21 Q. AND THE TEST IS THE AMOUNT THAT A LICENSOR AND LICENSEE,
 22 HERE ORACLE AND SAP, WOULD HAVE AGREED UPON AT THE TIME THE
 23 COPYRIGHT INFRINGEMENT BEGAN IF BOTH HAD BEEN REASONABLY AND
 24 VOLUNTARILY TRYING TO REACH AN AGREEMENT.

25 **A. RIGHT. THAT'S THE DEFINITION OF WILLING.**

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MEYER - CROSS / MR. MITTELSTAEDT

1 Q. OKAY.

2 AND, IN OTHER WORDS, THE AMOUNT -- YOU ARE TRYING TO

3 ARRIVE AT THE AMOUNT THAT A PRUDENT LICENSEE WHO WANTED TO

4 ENTER INTO THIS BUSINESS PROPOSITION WOULD HAVE BEEN WILLING TO

5 PAY AS A ROYALTY AND YET BE ABLE TO MAKE A REASONABLE PROFIT

6 WHICH AMOUNT WOULD HAVE BEEN ACCEPTABLE BY A PRUDENT LICENSOR

7 WHO WAS WILLING TO GRANT A LICENSE.

8 IS THAT ANOTHER WAY OF SAYING WHAT YOU ARE TRYING TO

9 GET AT?

10 **A. NO, NOT NECESSARILY. I THINK THAT YOU ARE NOW TRYING TO**

11 **LIMIT IT. AND THERE'S DEBATE ABOUT WHETHER THE LICENSEE HAS TO**

12 **MAKE PROFITS, BUT THAT'S OVERRID BY OTHER ISSUES.**

13 **THIS IS WHAT TWO PARTIES WOULD AGREE TO THAT ARE**

14 **BOTH THERE IN A WILLING FASHION. ONE NEEDS A LICENSE, ONE HAS**

15 **TO GIVE THE LICENSE. THEY ARE NOT THERE UNDER ANY KIND OF**

16 **DURESS. THEY ALL HAVE OPEN INFORMATION AVAILABLE TO THEM IN**

17 **JANUARY 2005. BUT THERE'S NO EXPECTATION THAT SOMEONE HAS TO**

18 **MAKE REASONABLE PROFIT. THAT'S NOT WHAT ALWAYS COMES OUT OF**

19 **THESE NEGOTIATIONS.**

20 Q. WOULD YOU TURN TO PARAGRAPH 154 AT PAGE 102 OF YOUR

21 REPORT?

22 THE COURT: COUNSEL, WHAT IS THE TAB NUMBER OF THE

23 REPORT? WHAT IS THE EXHIBIT NUMBER? DOES ANYONE KNOW?

24 THE WITNESS: WHAT PAGE WAS THAT?

25 MR. MITTELSTAEDT: 102.

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1081

MEYER - CROSS / MR. MITTELSTAEDT

1 **LICENSEE WHO DESIRED AS A BUSINESS PROPOSITION**

2 **TO OBTAIN A LICENSE TO MANUFACTURE AND SELL A**

3 **PARTICULAR ARTICLE EMBODYING THE" AND I'VE**

4 **INSERTED "COPYRIGHTS, WOULD HAVE BEEN WILLING TO**

5 **PAY AS A ROYALTY AND YET BE ABLE TO MAKE A**

6 **REASONABLE PROFIT IN WHICH AMOUNT WOULD HAVE**

7 **BEEN ACCEPTABLE BY A PRUDENT LICENSOR WHO WAS**

8 **WILLING TO GRANT A LICENSE."**

9 **SO IT HAS TO BE -- ONE WANTS THE PROFIT AND ONE HAS**

10 **TO BE ABLE TO GRANT IT ON THOSE TERMS. THAT'S GEORGIA-PACIFIC**

11 **AND I AGREE WITH THAT.**

12 Q. DID YOU READ THE PART ABOUT "YET BE ABLE TO MAKE A

13 REASONABLE PROFIT"?

14 **A. RIGHT. BUT IT'S IN CONJUNCTION WITH THE LICENSOR HAS TO**

15 **BE WILLING TO GRANT IT ON THOSE TERMS. SO THERE'S A GIVE AND**

16 **TAKE ON THAT. THAT'S HOW THAT WORKS.**

17 Q. SO WE ARE CLEAR, WE ARE TRYING TO RECONSTRUCT WHAT WOULD

18 HAVE HAPPENED IN A NEGOTIATION THAT DID NOT ACTUALLY TAKE

19 PLACE, CORRECT?

20 **A. RIGHT. I HAVE BEEN CLEAR TO THE JURY THAT THIS IS A**

21 **NEGOTIATION THAT DID NOT TAKE PLACE.**

22 Q. IT NEVER HAPPENED BECAUSE FOR ONE REASON, ORACLE DID NOT

23 APPROACH SAP TO OFFER A LICENSE BECAUSE ORACLE IS NOT IN THE

24 BUSINESS OF OFFERING LICENSES FOR ITS SOFTWARE AND SUPPORT

25 MATERIALS TO THIRD PARTIES. THAT'S ONE REASON IT DIDN'T

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1080

MEYER - CROSS / MR. MITTELSTAEDT

1 THE WITNESS: THANK YOU.

2 MR. MITTELSTAEDT: I AM TOLD IT'S NOT IN THE BINDER,

3 BUT THE WITNESS HAS ONE WITH HIM, BUT YOUR HONOR DOESN'T. SO

4 WE WILL --

5 MR. PICKETT: PARAGRAPH 154 STARTS AT PAGE 101.

6 (PAUSE IN THE PROCEEDINGS.)

7 BY MR. MITTELSTAEDT:

8 Q. YOU CAN READ AS MUCH OF IT AS YOU WANT TO, BUT I AM

9 REFERRING TO THE PARAGRAPH THAT YOU QUOTED.

10 MR. PICKETT: THE PARAGRAPH STARTS ON PAGE 101.

11 (PAUSE IN THE PROCEEDINGS.)

12 THE COURT: GO AHEAD, MR. MITTELSTAEDT.

13 MR. MITTELSTAEDT: WE WILL PROVIDE ONE.

14 THE COURT: I WILL FIND ONE.

15 BY MR. MITTELSTAEDT:

16 Q. DO YOU SEE THE PART THAT YOU QUOTE THERE?

17 **A. YES, FROM GEORGIA-PACIFIC. YES, I SEE THAT.**

18 Q. YOU SEE ABOUT HALFWAY DOWN WHERE IT STARTS "THAT IS THE

19 AMOUNT"?

20 **A. YES, I AM WITH YOU.**

21 Q. WOULD YOU READ OUT LOUD WHAT IT SAYS?

22 **A. I LOST MY THOUGHT.**

23 **"WOULD HAVE AGREED UPON IF BOTH HAD BEEN**

24 **REASONABLY AND VOLUNTARILY TRYING TO REACH AN**

25 **AGREEMENT; THAT IS, THE AMOUNT WHICH A PRUDENT**

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1082

MEYER - CROSS / MR. MITTELSTAEDT

1 HAPPEN?

2 MR. PICKETT: OBJECTION.

3 THE COURT: SUSTAINED.

4 BY MR. MITTELSTAEDT:

5 Q. AS YOU UNDERSTAND IT, THIS HYPOTHETICAL NEGOTIATION HAS TO

6 BE REASONABLE, CORRECT?

7 **A. I AGREE WITH THAT.**

8 Q. AND IT MUST BE BASED ON OBJECTIVE INFORMATION?

9 **A. I AGREE WITH THAT.**

10 Q. RATHER THAN SUBJECTIVE OR EXCESSIVELY SPECULATIVE

11 INFORMATION, CORRECT?

12 **A. I WOULD AGREE WITH THAT.**

13 Q. WOULD YOU ALSO AGREE THAT THE PURPOSE HERE IS NOT TO BE

14 PUNITIVE?

15 **A. RIGHT. I HAVE BEEN CLEAR ABOUT THAT ISSUE. THE FAIR**

16 **MARKET VALUE OF THE LICENSE. THERE SHOULDN'T BE ANYTHING**

17 **PUNITIVE ABOUT IT. I AGREE WITH THAT.**

18 Q. THE PURPOSE IS NOT TO PUNISH BAD BEHAVIOR, IS IT?

19 **A. I AGREE WITH THAT.**

20 Q. DO YOU ALSO AGREE YOU DON'T JUST ASK THE SELLER HOW MUCH

21 HE WOULD INSIST ON?

22 **A. ABSOLUTELY. THAT'S NOT PART OF THE PROCESS.**

23 Q. THAT WOULD PROBABLY RESULT IN A NUMBER THAT'S TOO HIGH?

24 **A. WELL, THAT WOULD GO BACK TO ONE WANTS TO MAXIMIZE**

25 **INTELLECTUAL PROPERTY VALUE. BUT THAT'S THE MAXIMUM VALUE,**

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CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, TUESDAY, NOVEMBER 9, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

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Raynee H. Mercado

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

Diane E. Skillman

DIANE E. SKILLMAN, CSR, RPR, FCRR

WEDNESDAY, NOVEMBER 10, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL.)	JURY TRIAL
)	
PLAINTIFFS,)	NO. C 07-01658 PJH
)	
VS.)	VOLUME 7
)	
SAP AG, ET AL.,)	PAGES 1188 - 1420
)	
DEFENDANTS.)	OAKLAND, CALIFORNIA
)	FRIDAY, NOVEMBER 12, 2010

Certified Copy

TRANSCRIPT OF PROCEEDINGS

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(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY:

RAYNEE H. MERCADO, CSR NO. 8258
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1196

1 YOU ALL CAN ARGUE YOUR VERY -- YOUR RESPECTIVE
 2 POSITIONS ON WHAT THAT TESTIMONY MEANS. YOU CAN TAKE THE
 3 POSITION THAT IT BEARS ON THEIR CREDIBILITY. YOU CAN TAKE THE
 4 POSITION THAT, WELL, IT ONLY GOES TO THE EXTENT OF THE DAMAGES
 5 IN THE CASE. I DON'T THINK THAT THAT IS REALLY OF TREMENDOUS
 6 SIGNIFICANCE.
 7 WHAT I THINK IS IMPORTANT -- SO I WOULD ALLOW THIS
 8 TESTIMONY IN, AND BOTH OF YOU CAN ARGUE ABOUT IT WHICHEVER WAY
 9 YOU BELIEVE YOU -- YOU THINK IS APPROPRIATE. BUT MY CONCERN
 10 IS -- IS THAT THE JURY HAS TO BE TOLD, AND WE'LL DO THAT THROUGH
 11 A CURATIVE INSTRUCTION, THAT IRRESPECTIVE OF WHAT THE DIRECTORS
 12 SAY, THAT THERE IS NO INTENT TO DISAVOW LIABILITY ON THE PART OF
 13 THE SAP. THAT NEEDS TO BE SAID CLEARLY.
 14 AND, FRANKLY, WITH REGARD TO THE CURATIVE
 15 INSTRUCTIONS, YOU ALL SAY THAT KIND OF BUT NOT AS DIRECTLY AS I
 16 THINK IT SHOULD BE SAID, AND THEN YOU GO ON TO ARGUE WHAT THE
 17 IMPORT IS. AND I'M NOT AS CONCERNED ABOUT THE SECOND PART OF IT
 18 BECAUSE I, FRANKLY, THINK THAT THIS CASE IS ALL ABOUT DAMAGES.
 19 WE'VE TOLD THE JURY OVER AND OVER AGAIN IT'S ALL ABOUT DAMAGES.
 20 I THINK YOU ALL SHOULD PUT ON WHATEVER EVIDENCE YOU
 21 THINK SUPPORTS YOUR POSITION AND MAKE WHATEVER ARGUMENTS YOU
 22 THINK ARE APPROPRIATE ON THE BASIS OF THE EVIDENCE THAT YOU'VE
 23 PUT ON.
 24 AND I DON'T THINK IT'S REALLY THE COURT'S
 25 RESPONSIBILITY TO TELL THE JURY HOW THEY SHOULD BE LOOKING AT
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1198

1 THEIR LAST PARAGRAPH?
 2 MR. BOIES: I THINK WE WERE LOOKING -- I WAS LOOKING
 3 AT OUR LAST PARAGRAPH.
 4 THE COURT: OKAY.
 5 MR. BOIES: AND I THINK THAT THE -- YOU COULDN'T HAVE
 6 JUST THE FIRST THREE WITHOUT HAVING A FOURTH PARAGRAPH THAT
 7 EXPLAINED HOW THEY OUGHT TO -- HOW THE JURY OUGHT TO INTERPRET
 8 SOME OF THAT. SO I DO THINK THAT THE FOURTH PARAGRAPH HAS -- IS
 9 IMPORTANT.
 10 THE COURT: WELL, I AGREE. AND THE FIRST SENTENCE IS
 11 FINE. BUT I'M NOT -- I'M NOT GOING TO TELL THE JURY THAT THEY
 12 ARE TO DISREGARD THE TESTIMONY BECAUSE THEY CAN CONSIDER THE
 13 TESTIMONY FOR THE PURPOSES THAT YOU ALL ARE BOTH ADVANCING.
 14 I THINK -- AND I WOULDN'T GIVE EXAMPLES OF ARGUMENT
 15 OR QUESTIONS THAT SHOULD BE IGNORED EITHER.
 16 MR. BOIES: YOU COULD -- YOUR HONOR, YOU COULD STOP
 17 AFTER THE END OF THE FIRST SENTENCE. YOU COULD HAVE THE FIRST
 18 THREE PARAGRAPHS, AND THEN THAT FIRST SENTENCE OF THE LAST
 19 PARAGRAPH.
 20 THE COURT: YEAH. I COULD DO THAT.
 21 MR. LANIER: WE WOULD NOT OBJECT TO THAT, YOUR HONOR.
 22 THE COURT: OKAY.
 23 DID YOU HAVE SOMETHING TO ADD, MR. HOWARD?
 24 MR. HOWARD: NOT TO THAT PARAGRAPH, YOUR HONOR.
 25 THE COURT: OKAY.
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1197

1 THAT EVIDENCE. THEY SHOULD LOOK AT IT IN ANY WAY THAT'S
 2 PERMISSIBLE. AND AS LONG AS THERE'S SOMETHING ON THE RECORD
 3 THAT SAYS THAT THERE IS NO DISAVOWAL OF LIABILITY, I THINK THAT
 4 WE'VE TAKEN CARE OF THE ISSUE THAT CONCERNS ME, WHICH IS MY
 5 CONFUSION OF THE JURY, SO --
 6 MR. LANIER: YOUR HONOR, THEN, THAT WOULD LEAD US,
 7 THEN, TO A POSSIBILITY OF RESOLVING THE CURATIVE INSTRUCTION
 8 ISSUE. THE FIRST THREE PARAGRAPHS, I THINK, ARE ACTUALLY AGREED
 9 AT THIS POINT.
 10 THE COURT: YEAH.
 11 MR. LANIER: AND THAT LAST PARAGRAPH COULD SIMPLY BE
 12 SOMETHING AS STRAIGHTFORWARD "AS NOTWITHSTANDING WHAT EVIDENCE
 13 YOU MAY HAVE HEARD, YOU SHOULD BE INSTRUCTED" OR "I AM
 14 INSTRUCTING YOU THAT SAP AG AND SAP AMERICA HAVE STIPULATED TO
 15 CONTRIBUTORY AND VICARIOUS LIABILITY. THEY STAND BEHIND THAT
 16 STIPULATION AND DO NOT DISAVOW IT. THEY ARE NOT ARGUING THEY
 17 ARE NOT LIABLE."
 18 THAT LAST SENTENCE WAS BAD, BUT WE CAN COME UP WITH
 19 SOMETHING BETTER.
 20 THE COURT: YEAH.
 21 MR. LANIER: AND I THINK THAT WOULD GET TO YOUR
 22 HONOR'S CONCERN, AND THAT, OBVIOUSLY, IS OUR POSITION.
 23 MR. BOIES: YOUR HONOR, I DO THINK THAT WITH RESPECT
 24 TO THAT LAST PARAGRAPH --
 25 THE COURT: ARE WE LOOKING AT YOUR LAST PARAGRAPH OR
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1199

1 (OFF-THE-RECORD DISCUSSION.)
 2 THE COURT: OKAY. I THINK THAT THAT'S PRETTY MUCH
 3 AKIN TO YOURS. IT'S -- IT'S WHAT COMES AFTER THAT FIRST
 4 SENTENCE OF THE THIRD PARAGRAPH THAT YOU ALL START COMPETING.
 5 AND -- OKAY. ARE YOU -- ARE WE IN AGREEMENT, THEN?
 6 MR. BOIES: WELL, YES, YOUR HONOR, IT'S POINTED OUT
 7 TO ME THAT MY FRIEND AND I MAY HAVE BEEN OVERLY OPTIMISTIC.
 8 MR. HOWARD SAYS THAT THERE WAS ONE ISSUE THAT YOU HAD
 9 WITH OUR -- WITH OUR FIRST THREE PARAGRAPHS.
 10 MR. LANIER: YEAH, THERE IS A -- MR. BOIES IS RIGHT.
 11 IN ITEM 2, THERE'S A DIFFERENCE BETWEEN -- IN THE ARTICULATION
 12 OF POINT 2 IN THE SECOND PARAGRAPH?
 13 THE COURT: RIGHT.
 14 MR. LANIER: THEIRS SAYS THEY INTENTIONALLY
 15 MATERIALLY CONTRIBUTED TO OR INDUCED. WE ACTUALLY TOOK FROM IT
 16 THE MODEL INSTRUCTION AND SAID THEY INTENTIONALLY INDUCED OR
 17 MATERIALLY CONTRIBUTED TO WHICH -- WHICH WE SUBMIT IS FROM THE
 18 MODEL INSTRUCTION. THERE'S IS -- THAT'S A DIFFERENCE.
 19 THE COURT: WHAT DIFFERENCE DOES IT MAKE IN TERMS OF
 20 JUST THE ORDER? IT HAS BOTH COMPONENTS.
 21 MR. HOWARD: THAT'S NOT THE DIFFERENCE I WAS POINTING
 22 OUT, YOUR HONOR. THAT IS A DIFFERENCE, BUT I DON'T THINK THE
 23 ORDER OF THE WORD IS SIGNIFICANT. THE MORE IMPORTANT DIFFERENCE
 24 IS THAT AFTER "INACTION," WE HAVE INSERTED THE LANGUAGE
 25 "COMBINED WITH SPECIFIC KNOWLEDGE," PURSUANT TO OUR DISCUSSION
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1312

MEYER - CROSS (RESUMED) / MITTELSTAEDT

1 IN YOUR CALCULATION, INSTEAD OF 3,000, WE USE 358. AND WE USE
 2 86; 358 BEING ALL THE CUSTOMERS THAT WENT TO TOMORROWNOW, AND
 3 86, ALL THE CUSTOMERS WHO BOUGHT ANYTHING FROM SAP WHILE THEY
 4 WERE A TOMORROWNOW CUSTOMER. SO WE TAKE THOSE TOP NUMBERS.
 5 YOUR ROYALTY CALCULATION WOULD BE CONSIDERABLY LOWER,
 6 WOULDN'T IT?
 7 **A. THE CUSTOMERS ARE ONLY ONE FACTOR THAT GOES INTO THE ENTIRE**
 8 **ANALYSIS. BUT IF WE WERE TO CHANGE THAT FACTOR, WE'D HAVE TO GO**
 9 **BACK AND DO THE ANALYSIS AND ALL THE OTHER THINGS THAT WENT INTO**
 10 **THE DETERMINATION -- I'VE SPENT A COUPLE DAYS TESTIFYING**
 11 **ABOUT -- YOU WOULD THEN DO THAT ANALYSIS, AND I DESCRIBED IT IN**
 12 **DEPOSITION OVER THREE DAYS HOW THAT WOULD HAPPEN.**
 13 Q. OKAY.
 14 BUT CAN YOU ANSWER "YES" OR "NO"? IF YOU USE THOSE
 15 ACTUAL NUMBERS, YOUR ROYALTY CALCULATION WOULD BE CONSIDERABLY
 16 LOWER, WOULDN'T IT, "YES" OR "NO"?
 17 **A. IF YOU PUT THOSE NUMBERS IN THE CALCULATIONS AND CONSIDERED**
 18 **EVERYTHING ELSE, I AGREE THE NUMBERS WOULD GO DOWN.**
 19 Q. HAVE YOU RUN YOUR MODEL WITH THOSE ACTUAL NUMBERS?
 20 **A. NO, IT WAS NOT RELEVANT TO ME.**
 21 Q. DO YOU HAVE ANY IDEA WHAT THE OUTCOME WOULD BE?
 22 **A. I'VE NOT RUN THAT.**
 23 Q. WOULDN'T IT BE ABOUT \$70 MILLION?
 24 **A. I NEED TO KNOW YOUR MATH.**
 25 Q. OKAY.
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1314

MEYER - REDIRECT / PICKETT

1 Q. ALL RIGHT. NOW, WE SAW OTHER ESTIMATES OF SAP'S TOP
 2 MANAGEMENT. THEIR GOAL WAS 50 PERCENT OF THE CUSTOMERS. HOW
 3 MANY WOULD 50 PERCENT OF THE CUSTOMERS BE?
 4 **A. WELL, BASICALLY THERE WAS 10,000 CUSTOMERS, 9,920, SO IT**
 5 **WOULD BE 5,000 MAINTENANCE CUSTOMERS. AND IF THOSE ALSO**
 6 **CONVERTED TO MYSAP, IT WOULD BE 5,000 ON THE CONVERSION ON THE**
 7 **LICENSE SIDE.**
 8 Q. AND IF YOU EXPECTED TO GET THAT NUMBER RATHER THAN THE LOWER
 9 NUMBER YOU USED, WHAT WOULD BE THE LICENSE FEE UNDER THOSE
 10 CIRCUMSTANCES, IN YOUR OPINION?
 11 **A. WELL, IT WOULD GO UP. IT WAS OBVIOUSLY -- IT WOULDN'T**
 12 **DOUBLE, BUT IT WOULD BE CLOSE TO \$5 BILLION. 5,000 CONVERTED.**
 13 Q. NOW, LET'S LOOK AT SAP'S LAWYERS' ASSUMPTION, 358. DID
 14 ANYBODY HAVE A CRYSTAL BALL BACK IN JANUARY 2005 TO MAKE AN
 15 EXPECTATION, TO MAKE A PREDICTION, TO MAKE A PROJECTION ABOUT
 16 HOW MANY CUSTOMERS WOULD BE CONVERTED ONCE SAP STARTED TAKING
 17 THE SOFTWARE?
 18 **A. NO, THERE WAS NO CRYSTAL BALL. IT WAS JUST BASED ON**
 19 **MANAGEMENT'S BEST UNDERSTANDING WHERE THE PLAN WAS GOING TO GO**
 20 **AND WHAT THEY WANTED TO ACCOMPLISH.**
 21 Q. NOW, LET'S TALK FOR A MINUTE ABOUT THE LOST PROFITS,
 22 INFRINGERS' PROFITS MEASURES. YOU UNDERSTAND THERE ARE TWO
 23 MEASURES OF DAMAGES, CORRECT?
 24 **A. THAT'S CORRECT.**
 25 Q. AND ONE YOU THINK APPROPRIATE AND ONE YOU THINK IS DEAD
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1313

MEYER - CROSS (RESUMED) / MITTELSTAEDT

1 MR. MITTELSTAEDT: NO FURTHER QUESTIONS.
 2 THE COURT: ALL RIGHT.
 3 REDIRECT?
 4 REDIRECT EXAMINATION
 5 BY MR. PICKETT:
 6 Q. GOOD MORNING, MR. MEYER. BEEN A FEW DAYS.
 7 **A. GOOD MORNING.**
 8 Q. LET ME JUST START ON THAT LAST POINT.
 9 YOU'VE RUN SOME MODELS FOR THE FAIR MARKET VALUE OF A
 10 LICENSE THAT SAP SHOULD HAVE RECEIVED IN JANUARY -- SHOULD HAVE
 11 GOTTEN IN JANUARY 2005, RIGHT?
 12 **A. THAT'S CORRECT.**
 13 Q. AND YOU USED HOW MANY MAINTENANCE CUSTOMERS IN THAT
 14 CALCULATION?
 15 **A. IN THE CALCULATION FOR MAINTENANCE, I USE 3,000 CUSTOMERS.**
 16 **THAT GOES UP THROUGH OCTOBER '08.**
 17 Q. ALL RIGHT. AND WHAT'S THE MINIMUM AMOUNT THAT YOU BELIEVE
 18 THE PEOPLESOFT LICENSE -- THE LICENSE FEE FOR THAT PEOPLESOFT
 19 SOFTWARE SHOULD HAVE BEEN AS OF JANUARY 2005?
 20 **A. THE -- YOU'RE ASKING WHAT THE MINIMUM AMOUNT OF THE**
 21 **LICENSE --**
 22 Q. MINIMUM AMOUNT. RIGHT?
 23 **A. IT'S \$1.5 BILLION -- AT LEAST 1.5 BILLION FOR -- FOR THE**
 24 **LICENSE AT THAT POINT IN TIME. AND THAT INCLUDES THE**
 25 **MAINTENANCE CUSTOMERS.**
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1315

MEYER - REDIRECT / PICKETT

1 WRONG?
 2 **A. THAT'S CORRECT.**
 3 Q. NOW, UNDER THE ONE THAT IS DEAD WRONG, THAT'S -- WHAT
 4 MEASURE IS THAT?
 5 **A. THE -- THE MEASURE OF LOOKING AT THE LOST PROFITS IN THIS**
 6 **CASE TO MEASURE THE VALUE OF THIS LICENSE. THAT WOULD BE**
 7 **TOTALLY INAPPROPRIATE.**
 8 Q. ALL RIGHT. YOU NEVERTHELESS LOOKED AT THAT AND WHAT WAS THE
 9 TOTAL NUMBER UNDER YOUR CALCULATIONS UNDER THE PROFITS MEASURE,
 10 THE WRONG MEASURE?
 11 **A. IT WAS 120 MILLION FOR CALCULATION OUT THROUGH 2015.**
 12 Q. AND HOW ABOUT THE INFRINGERS' PROFITS?
 13 **A. THAT NUMBER WAS 288 MILLION, WAS MY UPPER BOUND. AND THEN**
 14 **THERE'S THREE CUSTOMERS I MENTIONED TO MR. MITTELSTAEDT THAT**
 15 **TAKES IT DOWN TO 236 ON THE LOWER END OF THAT.**
 16 Q. SO WHAT'S -- IN YOUR OPINION, UNDER THAT MEASURE, WHAT'S THE
 17 TOTAL AMOUNT OF DAMAGES?
 18 **A. WELL, I THINK THE 288 PLUS 120 MILLION, THAT'S -- I THINK**
 19 **IT'S -- IT ROUNDS TO 409 MILLION. SO ON MR. MITTELSTAEDT'S**
 20 **CHART, IT SHOULD BE 409.**
 21 Q. 409 MILLION. AND THEN ON THE SAP SIDE, MR. MITTELSTAEDT
 22 SAID 40 MILLION IN HIS OPENING, AND NOW WE HEARD 22 MILLION, AS
 23 YOU CORRECTED HIM TUESDAY, RIGHT?
 24 **A. THAT'S CORRECT.**
 25 Q. BUT THE 22 OR 40 ALL THE WAY TO 409 MILLION, THAT'S NOT
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1316

MEYER - REDIRECT / PICKETT

1 ENOUGH, IS IT?

2 **A. THERE'S NO WAY THAT THAT WOULD COMPENSATE ORACLE FOR THE**

3 **PROPERTY THAT WAS TAKEN IN JANUARY 2005 TO LAUNCH THE BUSINESS**

4 **THAT SAP LAUNCHED.**

5 Q. AND WHY IS THAT?

6 **A. BECAUSE WHEN YOU LOOK AT THE GOALS AND THE IMPACT ON ORACLE**

7 **AND THE EXPECTATIONS THAT SAP HAD WHEN THEY LAUNCHED THE SAFE**

8 **PASSAGE PROGRAM, AT THAT POINT IN TIME, WHEN ORACLE HAD JUST**

9 **SPENT \$11 BILLION AND HAD 10,000 CUSTOMERS THAT IT WANTED TO**

10 **BRING INTO ITS BUSINESS, THAT'S EXACTLY WHEN SAP LAUNCHED THAT**

11 **COMPETING PROGRAM TO TAKE THOSE CUSTOMERS THAT WERE UNCERTAIN**

12 **AND BRING THEM OVER TO SAP.**

13 **SO IT'S CRITICAL, THE TIMING. AND THAT'S EXACTLY WHY**

14 **THERE'S ALL THAT SENIOR EXECUTIVE INVOLVEMENT IN THE SAFE**

15 **PASSAGE PROGRAM AND THAT FIVE WEEKS OF PLANNING IN DECEMBER '04**

16 **AND JANUARY '05.**

17 Q. ALL RIGHT. LET'S GO BACK TO YOUR ANALYSIS OF THE PEOPLESOFT

18 LICENSE.

19 LET'S SHOW SLIDE 48, PLEASE AGAIN.

20 (EXHIBIT PUBLISHED TO JURY.)

21 BY MR. PICKETT:

22 Q. ALL RIGHT. THIS IS A CHART WE SAW, OH, MONDAY OR TUESDAY.

23 AND CAN YOU REMIND THE JURY WHAT THIS SHOWS?

24 **A. RIGHT. THIS RELATES TO THE PEOPLESOFT LICENSE AND THE**

25 **PROPERTY THAT WAS -- WAS TAKEN BY SAP AND TOMORROWNOW. AND THE**

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1318

MEYER - REDIRECT / PICKETT

1 Q. LET'S GO TO THE EVIDENCE FROM SAP ABOUT THE NUMBER OF

2 CUSTOMERS THEY EXPECTED TO GET FROM THIS DEAL.

3 LET'S GO TO SLIDE 21.

4 (EXHIBIT PUBLISHED TO JURY.)

5 BY MR. PICKETT:

6 Q. NOW, WHAT DOES THIS SHOW?

7 **A. THIS IS A SUMMARY THAT WE WENT THROUGH ON MY DIRECT**

8 **TESTIMONY. AND FROM MY PERSPECTIVE, IT CLEARLY INVOLVES AND**

9 **DEMONSTRATES THE -- THE EXECUTIVE BOARD AT SAP AND WHAT IT FELT**

10 **IT COULD ACCOMPLISH IF IT LAUNCHED THE TOMORROWNOW BUSINESS WITH**

11 **THE INFRINGING SOFTWARE IN THIS PACKAGE OF OTHER RESOURCE AT SAP**

12 **THAT BECAME SAFE PASSAGE.**

13 **AND YOU'LL SEE THOSE VALUES THERE BASICALLY RANGE --**

14 **I THINK ON THE CONVERTED CUSTOMER SIDE, IT RANGES FROM A LOW OF**

15 **1,375 CUSTOMERS IN THE FIRST DOCUMENT AT THE TOP, AND THEN ON**

16 **THE HIGH SIDE, IT WOULD BE MR. AGASSI AT 6,000 CUSTOMERS.**

17 **THAT'S ON THE CONVERSION.**

18 **AND ON MAINTENANCE, I BELIEVE IT RANGES FROM --**

19 **BASICALLY, I THINK THE RANGE IS 2,000 TO 6,000 MAINTENANCE**

20 **CUSTOMERS. THIS ALL COMES FROM THE DOCUMENTS OF THE MANAGEMENT**

21 **AT SAP.**

22 Q. AT THE TIME OF THE LICENSE THAT SHOULD HAVE BEEN NEGOTIATED?

23 **A. THAT'S EXACTLY RIGHT. THAT'S -- WHEN THE PROPERTY WAS --**

24 **WAS TAKEN AND THE PROGRAM WAS LAUNCHED AND THE IMPACT ON ORACLE**

25 **WAS SOUGHT, THIS IS EXACTLY WHAT THOSE PROJECTIONS WERE.**

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1317

MEYER - REDIRECT / PICKETT

1 **WAY IT WORKS IS THAT THE VALUES CHANGE BASED ON THE NUMBER OF**

2 **CUSTOMERS THAT CONVERT TO SAP.**

3 **SO ON THE LOW END, THAT ASSUMES THAT 1,375 CUSTOMERS**

4 **CONVERT TO SAP. AND YOU'LL SEE THAT THE -- THE GAIN IS**

5 **\$900 MILLION TO SAP. AND THEN THE IMPACT TO ORACLE IS**

6 **1.4 BILLION.**

7 **AND THEN ACROSS THE CHART, YOU GO TO 2,000 CONVERTED**

8 **CUSTOMERS, AND THEN TO 3,000 CONVERTED CUSTOMERS. ON THE 3,000**

9 **SIDE, YOU'LL SEE THAT ULTIMATELY THERE, SAP ACTUALLY GAINS**

10 **\$2.7 BILLION BECAUSE THEY HAVE TREMENDOUS UPSIDE TO THE ABILITY**

11 **TO CROSS-SELL AND UPSSELL CONVERTED CUSTOMERS TO SAP SOFTWARE.**

12 **ORACLE'S IMPACT IS THAT TWO AND A HALF BILLION ON THE**

13 **3,000 CUSTOMER CALCULATIONS. IN THE MIDDLE IS WHERE I SORT OF**

14 **CENTERED MY FOCUS AT THE 1.5 BILLION AT LEAST THAT AMOUNT, AND**

15 **THAT'S UNDER THE POSITION THAT SAP'S MANAGEMENT WOULD CONVERT**

16 **2,000 CUSTOMERS OVER TO SAP AND THEN HAVE THOSE CUSTOMERS**

17 **AVAILABLE FOR MAINTENANCE, ADDITIONAL INTEGRATION LICENSE, AND**

18 **THEN SELLING THE WHOLE SUITE OF THE SAP APPLICATIONS TO THOSE**

19 **CUSTOMERS.**

20 Q. AND JUST TO BE CLEAR, IF YOU ASSUME -- WELL, WE SAID 5,000

21 CUSTOMERS, THAT WOULD BE EVEN HIGHER, RIGHT?

22 **A. THAT'S CORRECT. IT WOULD TAKE YOU OUT TO THE RIGHT THERE AT**

23 **A HIGHER LEVEL.**

24 Q. BUT YOU FOCUSED ON THIS ONE WITH 2,000 CUSTOMERS.

25 **A. THAT IS CORRECT. THAT'S WHERE I FOCUSED.**

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1319

MEYER - REDIRECT / PICKETT

1 Q. YOU DIDN'T SEE ANY EVIDENCE THAT THE SAP BOARD WAS THINKING,

2 OH, WE'RE ONLY GOING TO GET 358 CUSTOMERS, DID YOU?

3 MR. MITTELSTAEDT: OBJECT, LEADING AND ARGUMENTATIVE.

4 THE COURT: OVERRULED.

5 THE WITNESS: NO, I DID NOT. IN FACT, WHEN

6 MR. MITTELSTAEDT ASKED ME THIS MORNING ABOUT THE TOMORROWNOW

7 NUMBERS, THAT WAS TOMORROWNOW AS A STAND-ALONE COMPANY. I

8 FOCUSED ON TOMORROWNOW INTEGRATED INTO SAFE PASSAGE AS PART OF

9 THE STEP ONE, STEP TWO, AND STEP THREE BUSINESS OPPORTUNITY TO

10 CONVERT ORACLE CUSTOMERS OVER TO THE SAP PLATFORM.

11 BY MR. PICKETT:

12 Q. ALL RIGHT. LET'S GO TO EXHIBIT 12, THE FIRST ONE YOU LIST

13 HERE AT SLIDE 24.

14 WE'VE SEEN THAT ONE BEFORE.

15 (EXHIBIT PUBLISHED TO JURY.)

16 BY MR. PICKETT:

17 Q. LET'S GO TO THE GRAPH THAT SHOWS THE \$897 MILLION PROJECTION

18 OF SAP'S EXECUTIVE BOARD.

19 (EXHIBIT PUBLISHED TO JURY.)

20 MR. PICKETT: THAT'S THE ONE.

21 Q. NOW, YOU HEARD SAP'S COUNSEL SAY THIS WAS ONLY AN

22 ASSUMPTION. DO YOU AGREE WITH THAT CHARACTERIZATION OF THE

23 SIGNIFICANCE OF THIS EVIDENCE?

24 **A. NO, I DON'T. BECAUSE THIS DOCUMENT WAS SHARED AND ROUTED**

25 **AND HAD INPUT FROM MR. BRANDT AND MR. AGASSI, WHO WERE LEADING**

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1320

MEYER - REDIRECT / PICKETT

1 **THE ACQUISITION OF TOMORROWNOW. BUT THEN IT WENT TO THE OTHER**
 2 **EXECUTIVE BOARD MEMBERS ALSO. SO THEY ALL RECEIVED THIS**
 3 **INFORMATION, HAD INPUT ON IT. AND THIS IS THE DOCUMENT, WHEN**
 4 **YOU ADD UP THE -- THE DIFFERENT CUSTOMER COUNTS THERE FOR**
 5 **MAINTENANCE, IT COMES UP TO 3,000, AND THAT'S ONLY THROUGH**
 6 **DECEMBER OF 2007. THAT'S IN THREE YEARS.**
 7 **THE MIDDLE LINE OF CROSS-SELL, WHICH IS THE**
 8 **INTEGRATED SOFTWARE, ADDS UP 2,000, I THINK, 250 CUSTOMERS AFTER**
 9 **THREE YEARS ALONE.**
 10 **AND THEN ULTIMATELY AT THE TOP, THE -- THEY CALL**
 11 **UPSWITCH, THAT REALLY IS THE SWITCHING OVER TO THE SAP PLATFORM.**
 12 **THAT'S AT 1,375 CUSTOMERS FOR THREE YEARS. AND SO THEY WOULD**
 13 **HAVE ANOTHER TEN MONTHS UNDER LICENSE, AND THEN AFTER THAT, THEY**
 14 **WOULD HAVE A GROUP OF CUSTOMERS THAT WOULD BE WITH SAP, AS**
 15 **MS. CATZ SAID, FOR POTENTIALLY DECADES.**
 16 Q. SO UNDER SAP'S BOARD OWN ANALYSIS, 900 MILLION IN THE FIRST
 17 THREE YEARS AND BILLIONS TO FOLLOW?
 18 A. WELL, THAT'S RIGHT. BUT LOOK AT THE BOTTOM OF THIS CHART.
 19 LOOK AT THE GROWTH THAT'S BEING PROJECTED. THAT'S EVEN AS
 20 IMPORTANT. I MENTIONED IT ON MY DIRECT TESTIMONY.
 21 YOU GO FROM BASICALLY A HUNDRED MILLION IN THE FIRST
 22 YEAR TO 250 MILLION IN THE SECOND YEAR TO ALMOST 600 MILLION IN
 23 THAT LAST YEAR. SO YOU SEE THAT THEY'RE PROJECTING THAT THEY'RE
 24 PICKING UP TRACTION, THEY'RE MOVING CUSTOMERS, THEY'RE HAVING
 25 SUCCESS. AND THAT'S THE REAL PAYOFF OF DOING -- USING THE
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1322

MEYER - REDIRECT / PICKETT

1 SOME PORTIONS YOU WERE NOT SHOWN BY SAP'S COUNSEL.
 2 RECALL FOR THE JURY WHO EXACTLY MR. AGASSI IS.
 3 **A. MR. AGASSI IS ON THE EXECUTIVE BOARD, AND THEY CALL HIM**
 4 **THE -- THINK THE CTO, THE CHIEF TECHNOLOGY OFFICER. I BELIEVE**
 5 **HE'S IN CHARGE OF PRODUCT AT SAP. SO HE'S A BOARD MEMBER, A**
 6 **LEAD MANAGEMENT PERSON, AND ALSO IN CHARGE OF PRODUCT.**
 7 Q. ALL RIGHT. LET'S SEE IF WE CAN GET THE RIGHT PAGE HERE.
 8 310, LINE 25 TO 311.
 9 (EXHIBIT PUBLISHED TO JURY.)
 10 (OFF-THE-RECORD DISCUSSION.)
 11 BY MR. PICKETT:
 12 Q. OKAY. HERE WE HAVE.
 13 FIRST, QUESTION TO MR. AGASSI -- THINK I TOOK THIS
 14 DEPOSITION, SO I SHOULD HAVE REMEMBERED. I ASKED HIM,
 15 "DID YOU SEE ANY PROJECTIONS OF EITHER THE
 16 REVENUES OR THE NUMBERS OF CUSTOMERS THAT WOULD BE
 17 CONVERTED?
 18 "A. IT WAS IN THE ORIGINAL CASE.
 19 "Q. IN THE BUSINESS PROPOSAL?
 20 "YES.
 21 "Q. AND THAT'S THE ONLY TIME YOU'RE AWARE
 22 OF ANY SUCH CALCULATION?
 23 "NO, THERE WAS -- ON A PERIODIC BASIS, WE WOULD
 24 SEE TRACKING NUMBERS OF WHERE WE WERE.
 25 "POST ACQUISITION?
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1321

MEYER - REDIRECT / PICKETT

1 **SOFTWARE TO CONVERT THE CUSTOMERS.**
 2 Q. NOW, LET'S GO TO A VERY MUCH RELATED EXHIBIT, PX4814, IT'S
 3 THE NEXT SLIDE, 25.
 4 (EXHIBIT PUBLISHED TO JURY.)
 5 BY MR. PICKETT:
 6 Q. JUST SO THERE'S NO DOUBT ABOUT IT, THIS ROAD MAP IS -- THAT
 7 DOCUMENT WE JUST SAW IS PART OF THE ROAD MAP, RIGHT?
 8 **A. THAT'S RIGHT. IT'S IN THIS MR. ZIEMEN DOCUMENT. IT'S THE**
 9 **ROAD MAP.**
 10 Q. AND WHO GAVE INPUT INTO THAT ANALYSIS AND EXTENSIVE GUIDANCE
 11 INTO THAT ANALYSIS THAT LED TO THE 900 MILLION IN THE FIRST 3
 12 YEARS AND BILLIONS TO FOLLOW?
 13 **A. THERE'S THE -- WE DREW THAT UP ON THE DIRECT TESTIMONY, AND**
 14 **IT SAYS -- RIGHT THERE, IT SAYS, "HENNING, LEO, GERD, AND SHAI**
 15 **HAD GIVEN INPUT AND EXTENSIVE GUIDANCE ON THIS," DEVELOPING OF**
 16 **THIS PLAN. AND "LEO" OBVIOUSLY IS MR. APOTHEKER, AND "SHAI" IS**
 17 **MR. AGASSI. "GERD," I BELIEVE, IS MR. BRANDT. AND I THINK**
 18 **IT'S -- IS IT HENNING KAGERMANN? I THINK THAT'S HOW IT PLAYS**
 19 **OUT.**
 20 **THOSE WERE THE EXECUTIVE BOARD MEMBERS THAT WERE**
 21 **RUNNING THE COMPANY DAY TO DAY AND IN CHARGE OF ALL THE**
 22 **FUNCTIONAL DISCIPLINES, SALES AND -- AND PRODUCT AND SERVICE**
 23 **AND -- AND -- AND FINANCE, ALL OF THOSE IMPORTANT FUNCTIONS.**
 24 Q. ALL RIGHT. AND FINALLY ON THIS POINT, JUST SO THERE'S NO
 25 DOUBT ABOUT IT, LET'S GO TO MR. AGASSI'S DEPOSITION TESTIMONY,
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1323

MEYER - REDIRECT / PICKETT

1 "A. POST ACQUISITION."
 2 AND THEN THE DEPOSITION CONTINUES.
 3 "AND DID YOU HAVE REASON TO QUESTION THOSE
 4 PROJECTIONS, EITHER THE ONES PRESENTED IN JANUARY 7,
 5 2005 BUSINESS PLAN OR SUBSEQUENTLY?
 6 "A. I THOUGHT WE COULD -- WE COULD DO
 7 BETTER."
 8 AND THE JANUARY 7, 2005, BUSINESS PLAN IS THE ONE WE
 9 JUST SAW WITH THE 900 MILLION IN THE FIRST THREE YEARS.
 10 **A. WELL, THAT'S RIGHT. THAT WAS DEVELOPED IN DECEMBER 2004,**
 11 **AND THAT BECAME THE BASIS FOR THE GO-FORWARD INTEGRATION OF SAFE**
 12 **PASSAGE AND LAUNCH.**
 13 Q. SO THEN I ASKED MR. AGASSI -- JUST TO BE SURE, I SAID.
 14 "AND BETTER THAN THE ORIGINAL PROJECTION, JANUARY
 15 7TH?
 16 "AND BETTER THAN THE EXECUTION."
 17 NOW, THE EXECUTION IS WHAT?
 18 **A. THAT -- THAT MEANS THAT BASICALLY WHEN SAFE PASSAGE WITH**
 19 **TOMORROWNOW WENT TO MARKET, THEN SAP WOULD HAVE DONE A BETTER**
 20 **JOB OF EXECUTING ON THE PLAN. THEY WOULD HAVE GOTTEN THEIR**
 21 **SALES FORCE MORE COORDINATED, MORE EFFICIENT, MORE TIED INTO THE**
 22 **GOALS OF THE PLAN, AND THEN HOW THEY ALSO WRAPPED IN TOMORROWNOW**
 23 **WITH THEIR BUSINESS.**
 24 **SO THAT'S SORT OF THE EXECUTION OF THE PLAN AFTER**
 25 **JANUARY 2005.**
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1324

MEYER - REDIRECT / PICKETT

1 Q. QUESTION:
 2 "WHY DID YOU THINK YOU COULD DO BETTER THAN THE
 3 ORIGINAL PROJECTION JANUARY 7?
 4 "A. BECAUSE I THOUGHT THAT GIVEN THE
 5 DISRUPTION ORACLE HAS PUT ON THE MARKET, THERE
 6 WILL BE BETTER ACCEPTANCE BY PEOPLESOFT'S
 7 CUSTOMERS."
 8 THEN THE FINAL --
 9 "DID YOU HAVE ANY ASSESSMENT OF HOW MANY OF THE
 10 12,000 PEOPLESOFT CUSTOMERS MIGHT BE SUBJECT TO
 11 CONVERSION BY SAP?
 12 "NO, NOT EXACT NUMBER."
 13 AND I SHOULD SAY -- I DON'T THINK THERE'S ANY
 14 DISAGREEMENT -- IT'S 9,920. THIS WAS EARLY IN THE CASE SO WE
 15 WERE STILL TRYING TO PIN THAT DOWN.
 16 SO "NO, NOT EXACT NUMBER."
 17 THEN I ASKED MR. AGASSI, "HALF?"
 18 "I THOUGHT THAT IF ORACLE WOULD DO A BAD JOB, WE
 19 COULD SEE A SIMILAR DISTRIBUTION OF THE CUSTOMERS AS
 20 THE SHARE OF CUSTOMERS BETWEEN SAP AND ORACLE.
 21 "AND WHAT'S THAT RATIO? YOU'RE BIGGER THAN
 22 ORACLE.
 23 "YES.
 24 "DO YOU KNOW WHAT ROUGHLY THAT IS? 60/40?
 25 "YEAH, SOMETHING LIKE THAT."

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1326

MEYER - REDIRECT / PICKETT

1 Q. SO THE PROJECTION WE USED TO -- THE PROJECTION WAS USED BY
 2 THE BOARD TO LAUNCH THE SAFE PASSAGE PROGRAM?
 3 **A. THAT'S CORRECT.**
 4 Q. THE PROJECTION WAS USED BY THE BOARD TO TAKE AWAY ORACLE'S
 5 PEOPLESOFT SOFTWARE?
 6 **A. THAT IS CORRECT.**
 7 Q. THE BOARD USED THE PROJECTION TO RISK SERIOUS LIABILITY; IS
 8 THAT CORRECT?
 9 **A. THAT -- THAT SEEMS CORRECT.**
 10 Q. AND YOU USED THE BOARD'S PROJECTION TO MEASURE DAMAGES?
 11 **A. THAT'S CORRECT.**
 12 Q. NOW, I'M GOING TO GO THROUGH JUST A FEW TOPICS THAT WERE
 13 RAISED YES- -- OR TUESDAY AND THIS MORNING AND CLEAR UP A COUPLE
 14 OF THINGS.
 15 FIRST, YOU SAW SOME EVIDENCE THIS MORNING THAT
 16 MR. ZEPECKI WAS REFERRING TO A 5 PERCENT PENETRATION RATE OF THE
 17 CUSTOMER BASE.
 18 DO YOU RECALL THAT?
 19 **A. YES, I DO.**
 20 Q. AND WAS HE TALKING ABOUT THIS KIND OF A PROGRAM THAT THE
 21 BOARD WAS TALKING ABOUT?
 22 **A. NO, IT WAS ENTIRELY DIFFERENTLY. HE WAS TALKING ABOUT**
 23 **TOMORROWNOW AS SORT OF A STAND-ALONE BUSINESS, SORT OF COMING**
 24 **IN, BASICALLY JOINING SAP, AND BEING DEALT WITH SORT OF IN**
 25 **ISOLATION AND DOING THE SAME OLD THING THEY HAD DONE BEFORE.**

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1325

MEYER - REDIRECT / PICKETT

1 SO WHAT'S THE SIGNIFICANCE OF MR. AGASSI'S TESTIMONY,
 2 MR. MEYER?
 3 **A. WELL, FROM MY PERSPECTIVE, MR. AGASSI, ONE, HE MENTIONS THE**
 4 **DISRUPTION TO ORACLE'S CUSTOMERS BECAUSE HE REALIZED THAT THE**
 5 **CUSTOMERS WERE COMING INTO ORACLE FROM PEOPLESOFT AND THERE WAS**
 6 **THE OPPORTUNITY TO CONVERT THOSE CUSTOMERS. AND HE FELT THAT IF**
 7 **ORACLE DIDN'T DO A GOOD JOB, THAT THIS PROGRAM OF SAP'S COULD**
 8 **HAVE GATHERED -- COULD HAVE GAINED FOR SAP UP TO THEIR MARKET**
 9 **SHARE, WHICH WAS BASICALLY 60 PERCENT.**
 10 **AND SO HE FELT THAT WAS THE OPPORTUNITY THEY HAD IF**
 11 **ORACLE DIDN'T DO A GREAT JOB AND SAP HAD ACTUALLY EXECUTED ON**
 12 **THE PLAN THE WAY HE FELT THEY WERE CAPABLE.**
 13 Q. SO THAT WOULD LEAD TO ABOUT 6,000 CUSTOMERS?
 14 **A. THAT'S CORRECT.**
 15 Q. ALL RIGHT. NOW, THE BOARD MADE A DECISION TO LAUNCH THE
 16 SAFE PASSAGE PROGRAM BASED ON A PROJECTION.
 17 IS THAT A FAIR STATEMENT?
 18 **A. THAT'S CORRECT.**
 19 Q. NOW, WHETHER YOU CALL IT A GOAL, A PROJECTION, A SCENARIO,
 20 THERE WAS AN ANALYSIS DONE; IS THAT FAIR?
 21 **A. THAT'S CORRECT.**
 22 Q. AND DID THE BOARD HAVE ANY INPUT INTO THAT ANALYSIS?
 23 **A. YES, THEY HAD SUBSTANTIAL INVOLVEMENT. IN FACT, I WOULD SAY**
 24 **THEY WERE DIRECTLY INVOLVED IN THE BUSINESS PLAN AND THE**
 25 **PROJECTIONS.**

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1327

MEYER - REDIRECT / PICKETT

1 **IT WASN'T A 5 PERCENT PENETRATION BASED ON COMBINING**
 2 **TOMORROWNOW INTO SAFE PASSAGE AS THE CORNERSTONE STEP ONE. SO**
 3 **REALLY, IT'S -- IT'S APPLES AND ORANGES. IT'S TOMORROWNOW**
 4 **SEPARATE, ISOLATED, AND NOT AS PART OF AN INTEGRATED**
 5 **GO-TO-MARKET STRATEGY THAT THEY ACTUALLY DEVELOPED WITH**
 6 **TOMORROWNOW IN THE FOLD.**
 7 Q. YOU WERE ASKED ON TUESDAY ABOUT A CONVERSATION OVER THE
 8 PHONE YOU HAD WITH THREE ORACLE EXECUTIVES.
 9 DO YOU RECALL THAT?
 10 **A. YES, I DO.**
 11 Q. AND SO THERE'S NO CONFUSION, DID YOU SIMPLY ACCEPT WHAT
 12 MR. ELLISON AND MS. CATZ AND MR. PHILLIPS TOLD YOU ABOUT THEIR
 13 EXPECTATIONS?
 14 **A. NO, I DID NOT. I HAD THAT CONVERSATION JUST TO GET AN**
 15 **OVERALL PERSPECTIVE FROM MANAGEMENT ABOUT HOW SIGNIFICANT AND**
 16 **WHAT THE OVERALL IMPACT COULD BE TO THE COMPANY IF THEY AGREED**
 17 **TO THIS LICENSE BACK IN JANUARY 2005.**
 18 **AND SO I DESCRIBED TO THEM THAT -- THE NATURE OF THE**
 19 **LICENSE, LIKE WE'VE TALKED ABOUT IN COURT. AND THEN I SOUGHT**
 20 **FROM THEM JUST THEIR GENERAL FEELING AND FEEDBACK BECAUSE THEY**
 21 **HAD JUST BEEN PART OF THE BIGGEST ACQUISITION OF A SOFTWARE**
 22 **COMPANY IN HISTORY, BUYING PEOPLESOFT FOR \$11 BILLION. AND SO**
 23 **THEIR INFORMATION WAS HELPFUL AS BACKGROUND.**
 24 **BUT AS I SAID AT TRIAL THIS WEEK AND I SAID IN MY**
 25 **DEPOSITION FOUR OR FIVE TIMES, IF I HAD NEVER TALKED TO THEM, I**

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MEYER - REDIRECT / PICKETT

1 **WOULD HAVE COME TO THE SAME OPINIONS THAT I'VE GIVEN YOU HERE**
 2 **TODAY.**

3 Q. IN FACT, WHAT DID THEY TELL YOU THEY THOUGHT THE IMPACT
 4 WOULD BE?

5 **A. WELL, THEY SAID THAT POTENTIALLY COULD BE 30 TO 50 PERCENT.**
 6 **AND AS THE CONVERSATION WENT ON, THEY SAID, IT'S AT LEAST**
 7 **\$3 BILLION. THEY NEVER CAME BELOW \$3 BILLION. THEY FELT IT**
 8 **WOULD ACTUALLY BE DEVASTATING TO THE COMPANY BECAUSE THEY JUST**
 9 **BOUGHT THIS VERY IMPORTANT ASSET FOR A LOT OF MONEY.**

10 Q. NOW, LET ME GO BACK FOR JUST A MOMENT TO A HYPOTHETICAL THAT
 11 SAP'S COUNSEL ASKED YOU TO ASSUME AT ONE POINT ON TUESDAY. HE
 12 ASKED YOU TO ASSUME THAT THE PARTIES -- THAT ORACLE'S EXECUTIVES
 13 HAD TOLD YOU SOMEHOW THAT THEY WOULD ONLY LOSE 358 CUSTOMERS.
 14 IS THERE ANY EVIDENCE WHATSOEVER THAT ORACLE WOULD
 15 HAVE HAD THAT EXPECTATION IN JANUARY 2005?

16 **A. NO, JUST -- IT'S JUST NOT PART OF THE ANYTHING AT ALL.**
 17 **THERE WOULD JUST -- ORACLE HAD NO IDEA ABOUT THE USE OF THE**
 18 **SOFTWARE BY SAP, AND -- AND THERE'S NO INFORMATION AT ALL THAT**
 19 **I'VE SEEN, AND IT'S JUST NOT -- IT'S JUST A NONSTARTER. DOESN'T**
 20 **EXIST.**

21 Q. NOW, YOU TESTIFIED ABOUT RUNNING ROYALTY. IN YOUR VIEW, IS
 22 THERE -- IS THERE ANY BASIS TO CONCLUDE THAT THE PARTIES WOULD
 23 HAVE AGREED TO A RUNNING ROYALTY?

24 **A. IN THESE CIRCUMSTANCES, ABSOLUTELY NOT. IT DOESN'T MAKE ANY**
 25 **SENSE AT ALL.**

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MEYER - REDIRECT / PICKETT

1 **A. YES, I DO.**

2 Q. LET'S TAKE A LOOK AT SLIDE 11 FROM YOUR DIRECT EXAMINATION.
 3 (EXHIBIT PUBLISHED TO JURY.)

4 BY MR. PICKETT:

5 Q. COULD YOU REMIND THE JURY AGAIN WHAT THIS SLIDE DEPICTS WITH
 6 RESPECT TO SCOPE OF THE LICENSE?

7 **A. YES, IT'S AN IMPORTANT SLIDE, AND IT'S A DIFFICULT CONCEPT**
 8 **BECAUSE A LICENSE IS HARD TO SORT OF GET YOUR HANDS AROUND. AND**
 9 **WHAT THIS CHART WAS MEANT TO DO, AND MAYBE IT WASN'T OBVIOUS, IS**
 10 **THAT IN THIS CASE, THEY'RE NOT JUST GETTING A LICENSE TO BE**
 11 **ABLE -- AND GO GIVE SERVICE ON PEOPLESFT CUSTOMERS. THEY**
 12 **ACTUALLY RECEIVED REAL PROPERTY, REAL SOFTWARE.**

13 **AND SO ON THE LEFT-HAND SIDE IS JUST SORT OF LEGAL**
 14 **RIGHTS AT THE TOP, 105 COPYRIGHT REGISTRATIONS, AND THEN IT SORT**
 15 **OF DEPICTS HOW THAT TOOK FORM, YOU KNOW. IT'S AT LEAST HUNDREDS**
 16 **OF THOUSANDS OF SOFTWARE FILES, AT LEAST THOUSANDS OF COPIES OF**
 17 **ENTIRE APPLICATIONS, AND AT LEAST HUNDREDS OF THOUSANDS OF**
 18 **DOWNLOADS. SO THAT'S SORT OF THE ACTIVITY.**

19 **BUT THE VISUAL OF THE PROPERTY IS ON THE RIGHT-HAND**
 20 **SIDE. THE RIGHT-HAND SIDE, THESE ARE -- THIS IS ACTUAL PROPERTY**
 21 **THAT -- THAT SAP/TOMORROWNOW RECEIVED. AND THEY RECEIVED THESE**
 22 **IN THE FORM OF SOFTWARE OBJECTS, SOFTWARE UPDATES, THESE BUG**
 23 **FIXES AND PATCHES THAT MR. ELLISON TALKED ABOUT HERE AT TRIAL,**
 24 **THE SOFTWARE APPLICATIONS, THE INSTRUCTIONAL MANUALS, AND THESE**
 25 **CUSTOM SOLUTIONS.**

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MEYER - REDIRECT / PICKETT

1 Q. WHY NOT?

2 **A. BECAUSE OF THE MAGNITUDE OF THE RISK TO ORACLE OF LICENSING**
 3 **ITS IMPORTANT SOFTWARE TO ITS CHIEF COMPETITOR, SAP. AND I JUST**
 4 **CAN'T EMPHASIZE ENOUGH HOW IMPORTANT IT IS THAT WE'RE IN**
 5 **JANUARY 2005 ON THE HEELS OF THE PEOPLESFT ACQUISITION FOR**
 6 **\$11 BILLION AND THE NEXT DAY, YOU'RE GIVING YOUR CHIEF**
 7 **COMPETITOR, WHO HAS STILL DOUBLE YOUR MARKETSHARE IN THE ERP**
 8 **MARKET, THIS VERY IMPORTANT LICENSE THAT BASICALLY IS THE KEYS**
 9 **TO OPENING UP THE CUSTOMER DOOR AND 10,000 CUSTOMERS AND GOING**
 10 **IN AND SAYING, HEY, WE HAVE THE SAME THING THAT ORACLE HAS. WE**
 11 **CAN SERVICE YOU FROM NOW FOR THE NEXT TEN YEARS ON YOUR OLD**
 12 **SYSTEMS AND HELP YOU GET TO NEW SYSTEMS OVER TIME.**

13 **THAT'S JUST A VERY VALUABLE ASSET THAT ORACLE PAID**
 14 **\$11 BILLION FOR. SO YOU HAVE TO WORK THAT INTO THE EQUATION.**
 15 **THERE'S JUST -- IT'S JUST HOW IT HAS TO BE DONE. AND IT HAS TO**
 16 **BE PAID UP FRONT SO THAT ORACLE IS NOT SITTING THERE WONDERING,**
 17 **AM I GOING TO BE PAID \$10 MILLION, \$20 MILLION, A HUNDRED**
 18 **MILLION DOLLARS?**

19 **AND YOU'VE SEEN THE RESULTS OF THE OTHER SIDE OF THE**
 20 **CALCULATIONS, AND THERE'S NO WAY THEY COULD EVER JUSTIFY AND**
 21 **ACCEPT THE RUNNING ROYALTY.**

22 Q. LET ME TURN TO THE NEXT TOPIC. MR. MITTELSTAEDT ASKED YOU
 23 SOME QUESTIONS ABOUT THE SCOPE OF WHAT'S TO BE VALUED FOR THESE
 24 LICENSES.
 25 DO YOU RECALL THAT?

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MEYER - REDIRECT / PICKETT

1 **THIS IS A WIDE VARIETY OF REAL PROPERTY THAT YOU HAVE**
 2 **BASICALLY IN JANUARY 2005 TO GO OUT AND SERVICE. SO YOU DON'T**
 3 **HAVE TO SIT THERE YOURSELF AND ACTUALLY CREATE THE SOFTWARE.**
 4 **YOU HAVE THE SOFTWARE. AND THAT'S THE REAL PROPERTY THAT --**
 5 **THAT I'M VALUING. IT'S NOT SOMETHING -- IT'S NOT EVEN**
 6 **INTANGIBLE. IT'S REAL PROPERTY THAT WAS TAKEN.**

7 Q. AND WOULD YOU LOWER THE VALUE OF WHAT THEY TOOK IF SOMEHOW,
 8 THEY HAD DECIDED NOT TO USE IT YEARS LATER?

9 **A. NO, BECAUSE THEY BASICALLY HAD THIS IN THEIR -- IN THEIR**
 10 **POSSESSION TO DO WHATEVER THEY WANTED TO DO. IT COULD HAVE GONE**
 11 **TO 10,000 PEOPLESFT CUSTOMERS; PLUS, MORE IMPORTANTLY, THE**
 12 **4,000 JOINT CUSTOMERS, THE CUSTOMERS THAT ALREADY WERE SAP THAT**
 13 **HAD PEOPLESFT. AND THEY COULD GO TO THOSE CUSTOMERS AND SAY,**
 14 **WE HAVE THIS SOFTWARE AND WE CAN NOW SERVICE PEOPLESFT AND MAKE**
 15 **YOU ONE COMBINED UNIFIED PLATFORM.**

16 Q. NOW, ANOTHER QUESTION YOU GOT ASKED ON TUESDAY WAS ABOUT
 17 WHETHER THERE WAS ROOM FOR SAP TO MAKE A PROFIT.
 18 DO YOU RECALL THAT?

19 **A. YES, I WAS ASKED THAT.**

20 Q. AND ASSUMING DEFENDANTS HAVE TO MAKE A PROFIT, ASSUMING
 21 THAT, AT YOUR OPINION OF THE VALUE OF THE THREE LICENSES, THE
 22 PEOPLESFT, THE SIEBEL, AND THE DATABASE, IS THERE STILL AN
 23 OPPORTUNITY FOR SAP TO MAKE A PROFIT AT THE LICENSE FEE OPINIONS
 24 THAT YOU HAVE?

25 **A. YES, BASED ON MY VALUATION OF LICENSES, SAP COULD HAVE TAKEN**

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MANDIA - DIRECT / MR. HOWARD

1 **WE COMPRESSED ANOTHER TEN TERABYTES OF DATA. WE LOOKED AT**
2 **APPROXIMATELY 22 AND A HALF TERABYTES OF DATA.**

3 Q. YOU'VE USED THIS TERM "TERABYTE". CAN YOU GIVE THE JURY A
4 SENSE OF HOW MUCH DATA YOU ARE TALKING ABOUT WHEN YOU ARE
5 TALKING ABOUT A TERABYTE?

6 **A. YES, I CAN.**

7 **A TERABYTE, WHEN YOU START TALKING ABOUT IT, I START**
8 **REALIZING IT'S LIKE TALKING ABOUT THE SIZE OF THE UNIVERSE OR**
9 **THE SPEED OF LIGHT. IT BECOMES THAT DIFFICULT THING TO**
10 **EXPLAIN. I WILL DO MY BEST.**

11 **IF YOU TAKE ONE TERABYTE -- LET'S GO DOWN TO A BYTE.**
12 **THINK OF A LETTER AS A SINGLE BYTE OF INFORMATION. IF YOU TAKE**
13 **THAT AND MAKE IT A TERABYTE, THAT'S A TRILLION LETTERS. IF YOU**
14 **PRINT OUT JUST THE TERABYTE OR A TRILLION LETTERS, THAT ENDS UP**
15 **BEING APPROXIMATELY 250 MILLION PAGES OF MATERIAL BOTH SIDED,**
16 **FRONT AND BACK.**

17 **THAT WOULD BE A 10-MILE STACK OF PAPER IF YOU JUST**
18 **STACKED IT ON TOP OF EACH OTHER. THAT'S 10 MILES OF PAPER FOR**
19 **A SINGLE TERABYTE. AND WE HAD TO LOOK AT, IN THIS CASE, OVER**
20 **20 TIMES THAT AMOUNT OF DATA THAT WAS RELEVANT TO THIS**
21 **INVESTIGATION.**

22 Q. DID YOU DO THAT ALL BY YOURSELF?

23 **A. NO, I DIDN'T. I RELIED ON OTHER MANDIANT EMPLOYEES TO**
24 **ASSIST IN THIS MATTER.**

25 **I HAD APPROXIMATELY 12 TO 15, TO THE BEST OF MY**
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MANDIA - DIRECT / MR. HOWARD

1 **SO IF WE PRINTED OUT A SINGLE TERABYTE OF PAPER --**
2 **ANOTHER WAY TO EXPLAIN A TERABYTE -- IF WE LAY THAT PAPER END**
3 **TO END, A SINGLE TERABYTE WOULD CIRCLE THE GLOBE IN**
4 **DOUBLE-SIDED PRINTOUTS ONE AND THREE QUARTERS TIMES. THAT'S**
5 **WHAT THE GLOBES REPRESENT IS THE AMOUNT OF DATA THAT WAS**
6 **DOWNLOADED BY TOMORROWNOW REPRESENTS NEARLY NINE CIRCLES AROUND**
7 **THE GLOBE OF PRINTED DATA DOUBLE-SIDED.**

8 Q. DOES THIS REPRESENT ALL OF THE DOWNLOADS THAT TOMORROWNOW
9 EVER TOOK FROM ORACLE'S WEBSITE?

10 **A. NO. THIS REPRESENTS THE LOWER BOUNDS. THERE'S SOME**
11 **REASONS WHY.**

12 **ONE WE KNOW BASED ON TESTIMONY THAT AT LEAST A**
13 **MILLION FILES WERE DOWNLOADED DURING THE DEVELOPMENT OF TITAN,**
14 **AND THAT THOSE MILLION FILES WERE DELETED.**

15 **SECOND, WE DIDN'T DECOMPRESS EVERY ONE OF THESE**
16 **FILES. A LOT OF THEM WERE IN A COMPRESSED FORMAT. SO THE**
17 **NUMBER CAN ONLY GO UP FROM THAT.**

18 **AND, THIRD, WE DIDN'T GET TO SEE EVERY SYSTEM.**
19 **THERE WERE MACHINES PRODUCED TO MANDIANT THROUGH THIS**
20 **INVESTIGATION AFTER I HAD SUBMITTED MY SUPPLEMENTAL REPORT.**
21 **AND THEY HAD HUNDREDS OF THOUSANDS OF DOWNLOADS ON THOSE**
22 **SYSTEMS, BUT WE SIMPLY COULDN'T TALLY THEM UP IN TIME TO PUT**
23 **THEM IN OUR REPORT. SO THIS REPRESENTS THE LOWER BOUNDS.**

24 MR. HOWARD: THANK YOU. YOU CAN TAKE THAT DOWN NOW.

25 ///
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MANDIA - DIRECT / MR. HOWARD

1 **RECOLLECT, OTHER MANDIANT EMPLOYEES TO HELP ME GO THROUGH THIS**
2 **DATA. AND WE SPENT SOMEWHERE BETWEEN 13 TO 15,000 HOURS ON OUR**
3 **INVESTIGATION TO UNDERSTAND HOW DID TOMORROWNOW OBTAIN, COPY,**
4 **MODIFY AND DISTRIBUTE ORACLE SOFTWARE AND SUPPORT MATERIALS.**

5 Q. WHAT CONCLUSION WERE YOU ABLE TO REACH ABOUT TOMORROWNOW'S
6 DOWNLOADING OF ORACLE'S MATERIALS?

7 **A. WELL, THE CONCLUSION I REACHED IS THAT TOMORROWNOW RELIED**
8 **ON MASS DOWNLOADING OF ORACLE SOFTWARE AND SUPPORT MATERIALS**
9 **FROM THE ORACLE WEBSITE, AN IMPROPER ACCESS TO THAT SITE IN**
10 **REGARDS TO TERMS OF USE AND LICENSING.**

11 Q. AND DO YOU HAVE A DEMONSTRATIVE TO HELP YOU EXPLAIN WHAT
12 YOU FOUND IN TERMS OF THE VOLUME OF DOWNLOADING?

13 **A. YES, I DO.**

14 MR. HOWARD: LET'S PUT THAT UP ON THE SCREEN,
15 PLEASE.

16 (SLIDE DISPLAYED ON SCREEN.)

17 BY MR. HOWARD:

18 Q. THAT IS AT TAB 1 OF YOUR BINDER, SIR. THAT IS PLAINTIFFS'
19 DEMONSTRATIVE 11.

20 WHAT DOES THIS SHOW US?

21 **A. WELL, WHEN WE LOOKED AT THE DOWNLOADS, WE FOUND OVER**
22 **10 MILLION ORACLE FILES HAD BEEN DOWNLOADED BY TOMORROWNOW.**
23 **THAT'S WHAT HAPPENED TO BE THERE WHEN WE DID OUR INVESTIGATION**
24 **AND REACHED INTO TOMORROWNOW'S SERVERS AND SYSTEMS TO SEE WHAT**
25 **THEY HAD. IT WAS OVER FIVE TERABYTES IN SIZE.**

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MANDIA - DIRECT / MR. HOWARD

1 BY MR. HOWARD:
2 Q. MOVING FROM DOWNLOADS TO COPIES OF ORACLE'S ENTERPRISE
3 APPLICATION SOFTWARE AND DATABASE SOFTWARE, DID TOMORROWNOW
4 HAVE COPIES OF THAT SOFTWARE AS WELL ON ITS SYSTEMS?
5 **A. YES, THEY DID.**

6 Q. HOW DID THE AMOUNT OF THE SOFTWARE APPLICATION COPIES AND
7 THE DATABASE SOFTWARE COPIES COMPARE TO THE AMOUNT OF THE
8 DOWNLOADS THAT YOU FOUND?
9 **A. BY SIZE, REALIZE THAT THE COPIES OF ORACLE APPLICATION**
10 **SOFTWARE AND ORACLE DATABASE SOFTWARE, THERE'S STILL THOUSANDS**
11 **OF FILES.**

12 **BY SIZE, THERE WAS FIVE TERABYTES OF DATA FOR THE**
13 **DOWNLOADS. THERE WAS OVER TWICE THAT, OR OVER TEN TERABYTES OF**
14 **DATA FOR THE ORACLE APPLICATION SOFTWARE AND THE ORACLE**
15 **DATABASE SOFTWARE BY VOLUME. IT'S A CONSIDERABLE AMOUNT.**

16 Q. WHAT KINDS OF ENTERPRISE APPLICATION SOFTWARE COPIES AND
17 DATABASE SOFTWARE COPIES DID YOU FIND ON TOMORROWNOW'S SYSTEMS?

18 **A. WELL, I THINK AT THE HIGHEST LEVEL WE SAW PEOPLESOF, JDE,**
19 **SIEBEL AND ORACLE DATABASE PRODUCTS.**

20 **THEN YOU COME DOWN A RUNG, THERE'S SOME PRODUCTS**
21 **SUCH AS THE FINANCIALS, HRMS, THERE'S STUDENT ADMINISTRATION,**
22 **EPM, CRM, PEOPLE TOOLS. WE ESSENTIALLY FOUND, I THINK, ALL OF**
23 **THE SOFTWARE THAT WAS RELEVANT TO THE FOURTH AMENDED COMPLAINT**
24 **IN THIS CASE. IT WAS ALL THERE.**

25 Q. WHEN YOU SAY "JDE", YOU MEAN J.D. EDWARDS?

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MANDIA - DIRECT / MR. HOWARD

1 **A. I MEAN J.D. EDWARDS, WORLD, AND ONE WORLD OR ENTERPRISE**
 2 **ONE.**
 3 Q. SO THOSE ARE TWO DIFFERENT PRODUCT LINES UNDER
 4 J.D. EDWARDS?
 5 **A. YES.**
 6 Q. HOW MANY COPIES OF ORACLE'S ENTERPRISE APPLICATION
 7 SOFTWARE AND ORACLE'S DATABASE SOFTWARE DID YOU FIND?
 8 **A. WELL, THERE WAS ABOUT 7,100 OR MORE COPIES OF ORACLE**
 9 **APPLICATION SOFTWARE AND ORACLE DATABASE SOFTWARE. I MADE A**
 10 **DEMONSTRATIVE TO GO THROUGH THESE NUMBERS.**
 11 MR. HOWARD: LET'S PUT THAT UP, PLEASE.
 12 (SLIDE DISPLAYED ON SCREEN.)
 13 BY MR. HOWARD:
 14 Q. WHAT DOES THIS SHOW?
 15 **A. WELL, THIS SHOWS THAT IN THE CD BINDERS, AND THERE'S 727**
 16 **COPIES OF ORACLE APPLICATION SOFTWARE, ORACLE DATABASE**
 17 **SOFTWARE.**
 18 **WHAT THESE CD BINDERS WERE IS WHEN TOMORROWNOW**
 19 **LANDED A NEW CLIENT OR OBTAINED A NEW CLIENT, THEY HAD AN**
 20 **ON-BOARDING PROCESS. DURING THAT ON-BOARDING PROCESS, THEY**
 21 **COLLECTED PHYSICAL COPIES OF ORACLE APPLICATIONS SOFTWARE AND**
 22 **ORACLE DATABASE SOFTWARE, AND THEY PUT IT INTO BINDERS.**
 23 **AND WHEN WE WENT THROUGH THOSE BINDERS, THERE WAS --**
 24 **ACTUALLY, MERRILL LEGAL SOLUTIONS WAS AGREED BY BOTH SIDES TO**
 25 **GO THROUGH THE BINDERS AND DO AN INVENTORY OF THOSE BINDERS.**
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MANDIA - DIRECT / MR. HOWARD

1 **STIEBEL ENVIRONMENTS; AND 39 ORACLE DATABASE COPIES.**
 2 **THESE ARE ALL NUMBERS THAT DEFENDANTS AGREE WITH.**
 3 Q. NOW, YOU'VE USED THE TERM "ENVIRONMENT" HERE. CAN YOU
 4 EXPLAIN WHAT THAT IS?
 5 **A. I THINK THE SIMPLEST WAY TO DEFINE AN ENVIRONMENT IS IT'S**
 6 **AN INSTALLATION OF ORACLE APPLICATION SOFTWARE OR ITS**
 7 **CORRESPONDING DATABASE. EITHER OR.**
 8 Q. NOW YOU SAID THAT THE DEFENDANTS HAVE AGREED WITH THESE
 9 NUMBERS AS WELL AND YOU'VE MENTIONED A STIPULATION. LET'S LOOK
 10 AT THAT BRIEFLY.
 11 THAT'S IN YOUR BINDER AT TAB 4.
 12 MR. HOWARD: YOUR HONOR, THAT'S JOINT TRIAL
 13 EXHIBIT 2. IT IS ALSO IN THE JURY NOTEBOOKS TITLED "TRIAL
 14 STIPULATION AND ORDER NUMBER THREE." THAT'S THE FOURTH
 15 DOCUMENT IN THE JURY'S NOTEBOOK.
 16 BY MR. HOWARD:
 17 Q. AND, MR. MANDIA, IF I CAN TURN YOUR ATTENTION TO WHAT I
 18 BELIEVE THE BOTTOM OF PAGE 3, PARAGRAPH 16.
 19 AND IT'S UP ON THE BOARD.
 20 (DOCUMENT DISPLAYED ON SCREEN.)
 21 **A. UH-HUH.**
 22 Q. DO THOSE NUMBERS THERE HAVE MEANING TO YOU?
 23 **A. WELL, THESE NUMBERS WERE DERIVED FROM THE MANDIANT REPORT.**
 24 Q. AND IT SAYS THERE THAT EACH OF THOSE COPIES THAT YOU
 25 FOUND, THE DEFENDANTS HAVE STIPULATED TO, EACH OF THEM
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MANDIA - DIRECT / MR. HOWARD

1 **WE FOUND 727 COPIES OF ORACLE APPLICATION SOFTWARE AND ORACLE**
 2 **DATABASE SOFTWARE. THAT WAS A STARTING POINT FOR THE CREATION**
 3 **OF ENVIRONMENTS.**
 4 **FROM THERE, THE ORACLE APPLICATION SOFTWARE AND**
 5 **ORACLE DATABASE SOFTWARE WAS COPIED TO THE CD JUKEBOX. THE CD**
 6 **JUKEBOX WAS HARD DRIVES. THEY WERE TAKING THE INSTALL MEDIA,**
 7 **THE PHYSICAL DISKS SET OF TOMORROWNOW THAT THEY WERE COLLECTING**
 8 **FROM THEIR CUSTOMERS, AND THEN FOR THE MOST PART, THEY WOULD**
 9 **PUT THEM ON AN INTERMEDIATE STORAGE AREA CALLED THE CD JUKEBOX.**
 10 **AND THEN FROM THERE, THEY WOULD MAKE THE ENVIRONMENTS THAT WILL**
 11 **GO OVER IN THE NEXT SLIDE.**
 12 Q. ARE THESE NUMBERS IN DISPUTE?
 13 **A. NO, THEY ARE NOT.**
 14 Q. DEFENDANTS HAVE AGREED TO THEM?
 15 **A. IT IS MY UNDERSTANDING THAT IN THE STIPULATION DATED**
 16 **SEPTEMBER 29TH OF THIS YEAR, THAT THESE NUMBERS WERE AGREED TO**
 17 **AS BEING THE AT LEAST THIS MANY COPIES WERE IN THE CD BINDERS**
 18 **AND THE CD JUKEBOX.**
 19 MR. HOWARD: LET'S GO TO YOUR NEXT SLIDE.
 20 (SLIDE DISPLAYED ON SCREEN.)
 21 BY MR. HOWARD:
 22 Q. WHAT DOES THIS SHOW US?
 23 **A. THIS SHOWS THE NUMBER OF ENVIRONMENTS THAT EXISTED OVER**
 24 **TIME AT TOMORROWNOW. THERE'S 6,189 PEOPLESOFT ENVIRONMENTS**
 25 **THAT EXISTED OVER TIME THERE; 29 J.D. EDWARDS ENVIRONMENTS; 31**
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MANDIA - DIRECT / MR. HOWARD

1 CONSTITUTE AN INFRINGEMENT OF ONE OR MORE OF THE STIPULATED
 2 REGISTERED WORKS?
 3 **A. YES.**
 4 Q. HOW LONG DID IT TAKE YOU TO FIND ALL OF THESE COPIES OF
 5 ORACLE'S APPLICATION SOFTWARE AND DATABASE SOFTWARE?
 6 **A. WELL, IT TOOK A BIT OF TIME. IT WASN'T LIKE THE DATA WAS**
 7 **GIVEN TO US ALL AT ONCE.**
 8 **THE DATA CAME IN SEQUENCES. AS IT WAS BEING**
 9 **PRODUCED, WE'D REVIEW IT. AND WE STARTED REVIEWING THE DATA --**
 10 **WE GOT INVOLVED IN THE CASE IN 2007. BUT THE DATA STARTED**
 11 **BEING PRODUCED TO MANDIANT SOMEWHERE IN 2008. REVIEWED THAT**
 12 **DATA IN 2008 AND SUBMITTED OUR FIRST REPORT IN NOVEMBER OF**
 13 **2009.**
 14 **THERE WAS NEW DATA EMERGING THE WHOLE TIME. TO**
 15 **INCLUDE, WE DID A SUPPLEMENTAL REPORT IN FEBRUARY OF 2010,**
 16 **FEBRUARY, I BELIEVE, 12TH, 2010 BASED ON ALL THE NEW DATA**
 17 **COMING FORWARD.**
 18 **EVEN SINCE WE'VE SUBMITTED OUR SUPPLEMENTAL REPORT,**
 19 **THERE'S BEEN ADDITIONAL DATA PRODUCED THAT WE SIMPLY COULD NOT**
 20 **INCLUDE THAT WOULD BOLSTER MY CONCLUSIONS.**
 21 Q. HOW LONG DID IT TAKE FOR THE DEFENDANTS TO AGREE TO THE
 22 NUMBERS THAT YOU FOUND, THE NUMBERS OF COPIES OF THE SOFTWARE
 23 THAT YOU FOUND?
 24 **A. WELL, THESE NUMBERS WERE COMMUNICATED BY FEBRUARY 12TH OF**
 25 **2010. THE STIPULATION IS DATED SEPTEMBER 29 OF 2010. SO OVER**
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MANDIA - DIRECT / MR. HOWARD

1 **SEVEN MONTHS.**
 2 Q. NOW, HOW WELL DO THESE NUMBERS, THESE COPIES THAT YOU
 3 FOUND REPRESENT ALL OF THE COPIES OF ORACLE SOFTWARE THAT
 4 TOMORROWNOW EVER HAD ON ITS SYSTEMS OF APPLICATIONS SOFTWARE
 5 AND DATABASE SOFTWARE?
 6 **A. AGAIN, IT'S A LOWER BOUNDS. YOU CAN ONLY FIND WHAT YOU**
 7 **CAN FIND. MANDIANT DID NOT GET TO REVIEW EVERY SYSTEM AT**
 8 **TOMORROWNOW. WE DIDN'T GET TO LOOK AT ALL THE DIFFERENT FIELD**
 9 **OFFICES. WE FOCUSED OUR INVESTIGATION ON BRYAN, TEXAS.**
 10 Q. WERE YOU ABLE TO REVIEW SOME OF THE 26,000 INSTANT MESSAGE
 11 CHATS THAT THE DEFENDANTS PRODUCED AFTER YOU SUBMITTED YOUR
 12 SUPPLEMENTAL REPORT?
 13 **A. I DID REVIEW SOME.**
 14 Q. I WANT YOU TO HAVE THOSE IN MIND.
 15 YOU UNDERSTAND THAT SAP ACQUIRED TOMORROWNOW IN
 16 JANUARY OF 2005?
 17 **A. YES.**
 18 Q. TAKING INTO ACCOUNT THE INSTANT MESSAGE CHATS THAT YOU'VE
 19 REVIEWED AND YOUR ONLY ANALYSIS, WHAT DID YOU OBSERVE ABOUT THE
 20 NATURE OF TOMORROWNOW'S DOWNLOADING PRIOR TO JANUARY OF 2005
 21 COMPARED TO AFTER?
 22 **A. WE DON'T HAVE EXACT NUMBERS OF DOWNLOADS THAT OCCURRED**
 23 **DURING THAT TIME FRAME, BUT WHAT WE DO KNOW IS THAT TITAN WAS**
 24 **DEVELOPED AFTER JANUARY OF 2005.**
 25 **AND, TITAN, TO REFRESH YOUR RECOLLECTION, IS A MASS**
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MANDIA - DIRECT / MR. HOWARD

1 **THE CROSS USE ACTUALLY GOES UP FROM PRIOR TO JANUARY OF 2005 TO**
 2 **AFTERWARDS. IT WAS APPROXIMATELY 90 PERCENT PRIOR TO**
 3 **JANUARY 1ST OF 2005 AND GOES UP TO 94 PERCENT OVER TIME.**
 4 **WHAT THAT MEANS IS IF I RECEIVED A FIX FROM**
 5 **TOMORROWNOW, THERE WAS A 94 PERCENT CHANCE OR MORE THAT**
 6 **SOMEBODY ELSE'S SOFTWARE WAS USED TO DEVELOP THAT FIX OR MY**
 7 **SOFTWARE IS USED TO DEVELOP THAT FIX BUT OTHER FOLKS BENEFITED**
 8 **FROM IT.**
 9 Q. AND HOW ARE YOU USING THE TERM "FIX"?
 10 **A. A FIX IS JUST AN UPDATE. IT'S A CODE, IT COULD BE OTHER**
 11 **THINGS, BUT IT IS JUST AN UPDATE OR A FIX TO SOFTWARE.**
 12 Q. NOW, WHAT DID YOU OBSERVE ABOUT TOMORROWNOW'S CROSS USE OF
 13 ONE CUSTOMER'S LOGIN CREDENTIALS FOR CUSTOMER CONNECTION TO
 14 DOWNLOAD FOR ANOTHER CUSTOMER?
 15 **A. I THINK WE HAVE A SPECIFIC EXAMPLE SHOWING THAT THERE WAS**
 16 **CROSS USE OF CREDENTIALS, MEANING WHEN SOFTWARE IS BEING**
 17 **DOWNLOADED FROM ORACLE'S WEBSITE, IT'S SUPPOSED TO BE**
 18 **DOWNLOADED -- IF YOU ARE DOWNLOADING ON BEHALF OF CUSTOMER A,**
 19 **YOU ARE SUPPOSED TO USE CUSTOMER A'S USER ACCOUNT AND PASSWORD**
 20 **AND ONLY DOWNLOAD THOSE FILES FOR CUSTOMER A AND THEN ONLY USE**
 21 **THEM FOR CUSTOMER A'S BENEFIT. BUT WE SAW CROSS USE WHERE THE**
 22 **CREDENTIAL IS BEING USED -- RATHER MISHANDLED.**
 23 Q. WOULD YOU TURN TO TAB 5 IN YOUR BINDER, PLEASE?
 24 AND THAT'S AT INSTANT MESSAGE CHAT BETWEEN SHELLEY
 25 NELSON AND ROD RUSSELL DATED APRIL 17, 2007.
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MANDIA - DIRECT / MR. HOWARD

1 **DOWNLOADING TOOL. IT WAS MADE BY TOMORROWNOW TO GET ORACLE**
 2 **SOFTWARE AND SUPPORT MATERIALS FASTER. THAT WAS ITS PRIMARY**
 3 **PURPOSE.**
 4 **SO IT'S LIKELY, BECAUSE TITAN WAS DEVELOPED AFTER**
 5 **JANUARY 1ST, 2005, AND IT ENHANCED THE SPEED AT WHICH**
 6 **TOMORROWNOW COULD OBTAIN ORACLE SOFTWARE AND SUPPORT MATERIALS,**
 7 **THAT THE DOWNLOADING ONLY INCREASED.**
 8 Q. COMPARING THE SAME TWO TIME PERIODS, BEFORE JANUARY OF
 9 2005 AND AFTER, WHAT DID YOU OBSERVE ABOUT THE AMOUNT OF COPIES
 10 OF ORACLE'S ENTERPRISE APPLICATION SOFTWARE AT TOMORROWNOW?
 11 **A. WELL, THERE WERE MORE COPIES MADE, MORE ENVIRONMENTS MADE**
 12 **AFTER JANUARY 1ST, 2005 THAN BEFORE.**
 13 Q. NOW, CAN YOU EXPLAIN WHAT YOU MEAN BY "CROSS USE"?
 14 **A. CROSS USE, IN THE BEST WAY TO EXPLAIN IS, IT'S USING**
 15 **SOMEONE ELSE'S -- BASICALLY, YOU ARE RECEIVING SOMETHING THAT**
 16 **WAS BUILT IN SOMEONE ELSE'S SOFTWARE OR YOUR SOFTWARE IS**
 17 **ACTUALLY USED TO BENEFIT SOMEBODY ELSE.**
 18 **IT'S A MISALIGNMENT OF THE SOFTWARE USED TO CREATE**
 19 **SOMETHING FOR SOMEBODY ELSE. CASE IN POINT WOULD BE CUSTOMER A**
 20 **SOFTWARE BEING USED TO BENEFIT CUSTOMERS B, C OR D.**
 21 Q. NOW, COMPARING THESE SAME TWO TIME PERIODS, BEFORE
 22 JANUARY 2005 AND AFTER JANUARY 2005, WHAT DID YOU OBSERVE ABOUT
 23 THE AMOUNT OF CROSS USE, THAT IS, USING ONE CUSTOMER'S SOFTWARE
 24 TO CREATE FIXES FOR OTHER CUSTOMERS?
 25 **A. FOR THE FIXES THAT PREDOMINATED AFTER JANUARY 1ST OF 2005,**
 DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

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MANDIA - DIRECT / MR. HOWARD

1 DO YOU KNOW WHO SHELLEY NELSON IS?
 2 **A. YES.**
 3 Q. WHO IS SHE?
 4 **A. SHELLEY NELSON IS THE VP OF GLOBAL SUPPORT FOR TOMORROWNOW**
 5 **AND SHE'S THE WIFE OF ANDREW NELSON, WHO IS THE CEO OF**
 6 **TOMORROWNOW OR WHO WAS THE CEO.**
 7 Q. IS SHE RELATED TO GREG NELSON, THE CHIEF INFORMATION
 8 OFFICER?
 9 **A. I BELIEVE THEY ARE RELATED.**
 10 Q. NOW, WHAT IS THE DATE OF THIS CHAT?
 11 **A. THIS INSTANT MESSAGE IS DATED APRIL 17TH OF 2007.**
 12 Q. IS THAT BEFORE OR AFTER ORACLE BROUGHT THIS LAWSUIT?
 13 **A. THIS IS APPROXIMATELY A MONTH AFTER THE LAWSUIT. THE**
 14 **LAWSUIT WAS FILED, I BELIEVE, ON MARCH 22ND, 2007.**
 15 Q. WHAT DOES THIS CHAT MEAN TO YOU?
 16 **A. MY INTERPRETATION OF THIS CHAT, AS YOU SEE, RODERIC**
 17 **RUSSELL AT 4:01:53 SAY:**
 18 **"DO YOU HAVE A SECOND FOR A QUESTION? I NEED TO**
 19 **RESEARCH A FIX THAT WAS GIVEN TO A CLIENT BY**
 20 **ORACLE AND I NEED TO FIND A CLIENT WITH A**
 21 **CURRENT MAINTENANCE END DATE SO I CAN LOGIN TO**
 22 **CUSTOMER CONNECTION."**
 23 **THAT'S HOW CUSTOMER CONNECTION WORKED. IF YOU HAD A**
 24 **MAINTENANCE AGREEMENT WITH ORACLE, YOUR USER ID AND PASS PHRASE**
 25 **WOULD WORK WITH ORACLE, BUT OVER TIME, IF YOU STOPPED DOING**
 DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

MANDIA - DIRECT / MR. HOWARD

1 MAINTENANCE WITH ORACLE, YOUR CREDENTIAL WOULD NO LONGER WORK
 2 ON ORACLE'S CUSTOMER CONNECTION SITE.
 3 SO WHAT RODERIC RUSSELL IS ASKING IS, I NEED A
 4 CUSTOMER'S USER ID AND PASS PHRASE THAT IS STILL ON ORACLE'S
 5 MAINTENANCE SO I CAN LOGIN TO THE CUSTOMER CONNECTION SITE TO
 6 RESEARCH SOMETHING.
 7 AND THE ANSWER WITHIN 25, 30 SECONDS, I DO MY MATH,
 8 30 SECONDS IS FROM SHELLEY NELSON, WHO IS REPRESENTED AS
 9 TNWIFETEX IS "ROBERT HALF, BEAR STEARNS."
 10 THERE'S YOUR CUSTOMER CONNECTION ID. NOT ONLY DOES
 11 SHE NOT SHOW AN INTEREST IN WHAT CUSTOMER ARE YOU ABOUT TO
 12 SUPPORT, MR. RUSSELL, BUT SHE ALSO GIVES HIM TWO OPTIONS.
 13 ROBERT HALF OR BEAR STEARNS.
 14 THIS IS A VERY COMMON PATTERN WE SAW IN THESE
 15 INSTANT MESSAGES WHERE THERE'S INDIVIDUALS AT TOMORROW SAYING,
 16 I NEED A WORKABLE AND WORKING CREDENTIAL SO I CAN LOGIN TO DO
 17 THINGS FOR WHOEVER THEY HAD TO HELP.

18 Q. THANK YOU.
 19 MR. HOWARD: YOU CAN TAKE THAT DOWN.
 20 BY MR. HOWARD:
 21 Q. MR. MANDIA, I WANT YOU TO FOCUS ON A DIFFERENT TIME PERIOD
 22 NOW. WE HAVE TALKED ABOUT THE LAWSUIT BEING FILED IN MARCH OF
 23 2007.
 24 WHAT DID YOU OBSERVE ABOUT THE NATURE OF
 25 TOMORROWNOW'S DOWNLOADING BEFORE MARCH OF 2007 COMPARED TO
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MANDIA - CROSS / MR. COWAN

1 EARLIER?
 2 A. YES, IT IS.
 3 Q. MR. MANDIA, HOW MANY COMPUTER FORENSIC INVESTIGATIONS HAVE
 4 YOU BEEN INVOLVED WITH OVER THE COURSE OF YOUR CAREER?
 5 A. APPROXIMATELY A HUNDRED.
 6 Q. HOW DOES THIS INVESTIGATION COMPARE TO THOSE OTHERS?
 7 A. THERE WAS MORE RELEVANT DATA FOR US TO REVIEW AND MORE
 8 DATA TAKEN FROM ONE SITE THAN IN ANY OF MY OTHER
 9 INVESTIGATIONS. BY VOLUME, 22 AND A HALF TERABYTES IS THE MOST
 10 I HAVE SEEN.
 11 MR. HOWARD: THANK YOU.
 12 NOTHING FURTHER, YOUR HONOR.
 13 THE COURT: ALL RIGHT. CROSS-EXAMINATION?
 14 MR. COWAN: MAY I APPROACH, YOUR HONOR?
 15 THE COURT: YES.
 16 CROSS-EXAMINATION
 17 BY MR. COWAN:
 18 Q. GOOD AFTERNOON, MR. MANDIA. HOW ARE YOU?
 19 A. I AM DOING GOOD, SIR.
 20 Q. YOU RECALL WE MET A LITTLE LESS THAN SIX MONTHS AGO FOR
 21 TWO DAYS DURING WHICH TIME I HAD THE OPPORTUNITY TO DEPOSE YOU
 22 FOR THE BETTER PART OF TWO DAYS.
 23 DO YOU RECALL THAT?
 24 A. I RECALL THAT.
 25 Q. WE MAY TALK A LITTLE BIT ABOUT SOME OF THOSE THINGS, BUT I
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MANDIA - DIRECT / MR. HOWARD

1 AFTER?
 2 A. THE DOWNLOADING FROM TOMORROWNOW'S BRYAN IP ADDRESS IS
 3 ULTIMATELY STOPPED WITHIN A MONTH OF THE LAWSUIT.
 4 Q. DID OTHER DOWNLOADING CONTINUE?
 5 A. THERE ARE SOME INSTANT MESSAGES THAT SUGGEST THAT SOME
 6 OTHER DOWNLOADING CONTINUED.
 7 Q. IS THIS ONE THAT WE JUST SAW ONE OF THOSE?
 8 A. IT SHOWS THAT CREDENTIALS ARE BEING SHARED, BUT WE DID NOT
 9 SEE A CORRESPONDING DOWNLOAD FROM THE BRYAN IP ADDRESSES FOR
 10 THAT CONNECTION.
 11 Q. HOW ABOUT THE COPYING OF ORACLE'S ENTERPRISE SOFTWARE
 12 APPLICATIONS? HOW DOES THAT COMPARE BEFORE MARCH OF 2007, WHEN
 13 ORACLE BROUGHT THE LAWSUIT, AND AFTER?
 14 A. I LOOKED INTO THIS, AND ONE OF THE THINGS I NOTICED WAS
 15 FROM MARCH 22, WHEN THE LAWSUIT WAS FILED, TO ABOUT APRIL OF
 16 2008, TOMORROWNOW CREATED A MINIMUM OF 563 ADDITIONAL
 17 ENVIRONMENTS. SO THEY CONTINUED TO MAKE ENVIRONMENTS AFTER THE
 18 LAWSUIT.
 19 Q. AND HOW ABOUT CROSS USE; DID THAT CHANGE FROM BEFORE MARCH
 20 OF 2007 TO AFTER MARCH OF 2007?
 21 A. OF THE FIXES THAT I REVIEWED, AND I REVIEWED OVER
 22 90 PERCENT OF THEM, THE CROSS USE REMAINED THE SAME DURING THAT
 23 TIME FRAME, MEANING THE CROSS USE BEING DONE IN 2006 AND 2007
 24 WAS VIRTUALLY IDENTICAL.
 25 Q. IS THAT THE SAME 94 PERCENT RATE THAT YOU DESCRIBED
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MANDIA - CROSS / MR. COWAN

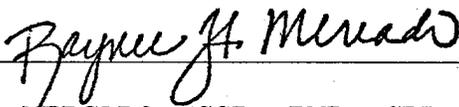
1 WILL TRY TO BE BRIEF. OKAY?
 2 A. OKAY.
 3 Q. BEFORE WE GET INTO EXPLAINING FOR THE JURY HOW, IF AT ALL,
 4 WHAT YOU JUST -- THE INFORMATION YOU JUST PROVIDED IN RESPONSE
 5 TO MR. HOWARD'S QUESTIONS RELATE ANY WAY TO DAMAGES, I WANT TO
 6 UNDERSTAND A LITTLE BIT MORE ABOUT THE SCOPE OF YOUR EXPERTISE.
 7 OKAY?
 8 A. OKAY.
 9 Q. YOU ARE NOT AN EXPERT WHO CAN GIVE OPINIONS ON DAMAGES IN
 10 SOFTWARE CASES, RIGHT?
 11 A. I DON'T HOLD MYSELF OUT AS AN EXPERT THAT CAN GIVE AN
 12 OPINION ON DAMAGES. NO.
 13 Q. AND SO TO BE CLEAR, YOU ARE NOT OFFERING ANY EXPERT
 14 OPINIONS REGARDING DAMAGES IN THIS CASE, AND MORE SPECIFICALLY,
 15 YOU HAVEN'T DONE ANY ANALYSIS (SIC) OF ANY REASONS WHY ANY
 16 SPECIFIC CUSTOMER LEFT ORACLE TO GO TO TOMORROWNOW, HAVE YOU?
 17 A. I HAVE NOT.
 18 Q. AND YOU ARE NOT AN EXPERT ON SOFTWARE LICENSES, ARE YOU?
 19 A. I DON'T HOLD MYSELF OUT AS AN EXPERT IN SOFTWARE
 20 LICENSING.
 21 Q. YOU ARE NOT A COPYRIGHT EXPERT EITHER, ARE YOU?
 22 A. I AM NOT A COPYRIGHT EXPERT.
 23 Q. YOU HAVE NEVER WORKED AS A DEVELOPER IN DEVELOPING
 24 ENTERPRISE APPLICATION SOFTWARE, HAVE YOU?
 25 A. I HAVE NOT WORKED AS A DEVELOPER.
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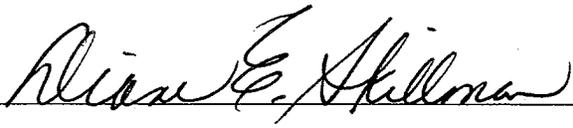
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CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, FRIDAY, NOVEMBER 12, 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

SATURDAY, NOVEMBER 13, 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 8
)	
SAP AG, ET AL.,	)	PAGES 1421 - 1511
)	
DEFENDANTS.)	OAKLAND, CALIFORNIA
)	MONDAY, NOVEMBER 15, 2010

Certified Copy

TRANSCRIPT OF PROCEEDINGS

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REPORTED BY:

RAYNEE H. MERCADO, CSR NO. 8258
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1 AND SHELLEY NELSON SAYS, "PLEASE GIVE ME INFO.
 2 NEED TO KNOW DETAILS ON," QUOTE, "WE CRASHED THE
 3 ORACLE WEBSITE AND YOUR TEAM'S DEVELOPMENT ON SCRIPTS
 4 TO DOWNLOAD."
 5 JOHN TANNER SAYS, "AS WE WERE PULLING THE ALERTS,
 6 TECHNOTES, AND FAQ'S, WE PULLED TOO HARD AND CAUSED
 7 SUPPORTWEB" -- THAT'S THE SIEBEL WEBSITE AT ORACLE --
 8 "TO GO INTO FAILOVER. I CHECKED MY INTERIOR SOURCES
 9 AND NO ONE NOTICED IN TECH SUPPORT."
 10 SHELLEY NELSON SAYS, "MESSAGE I'M GETTING THIS
 11 MORNING IS WE CRASHED ORACLE WEBSITE AND POTENTIALLY
 12 MADE OURSELVES VISIBLE WHEN WE WANT TO BE UNDER THE
 13 RADAR."
 14 THAT'S THE END OF THAT ONE.
 15 THE LAST ONE IS EXHIBIT -- PLAINTIFFS' EXHIBIT 55.
 16 THIS IS A MESSAGE FROM JOO WAH LOW, A PEOPLESOFT TECH SUPPORT
 17 ENGINEER AT TOMORROWNOW, AND NAT VONG, WHO IS THE PEOPLESOFT'S
 18 APPLICATIONS ENVIRONMENTS ANALYST, THE PEOPLE THAT MAKE THE
 19 COPIES OF THE APPLICATIONS, THE ENVIRONMENTS. AND THIS IS DATED
 20 APRIL 10TH, 2007, ABOUT 3 WEEKS AFTER THE LAWSUIT IS FILED.
 21 AND JOO WAH LOW SAYS, REFERRING TO THE LAWSUIT,
 22 "THERE'S TOO MUCH REFERENCES OF THE TERM 'ROGUE
 23 EMPLOYEE' ON THE NET."
 24 NAT VONG SAYS, "THEN AGAIN, ORACLE SAID THEY GOT
 25 50 NAMES. HE-HE-HE."
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1 NAT VONG SAYS, "I HOPE NO ONE GETS BLAMED FOR
 2 THIS. EVERYONE WAS JUST FOLLOWING ORDER FROM ABOVE."
 3 THE COURT: ALL RIGHT.
 4 MR. HOWARD: YOUR HONOR, SUBJECT TO THE RESERVATIONS
 5 WE'VE TALKED WITH (SIC), PLAINTIFFS REST.
 6 THE COURT: ALL RIGHT. THANK YOU.
 7 ALL RIGHT. BEFORE WE START THE DEFENSE CASE, LADIES
 8 AND GENTLEMEN, THERE ARE A FEW STIPULATED FACTS THAT I WANT TO
 9 CONVEY TO YOU. AS YOU RECALL, I'VE INDICATED TO YOU WHEN THE
 10 PARTIES AGREE ABOUT A PARTICULAR FACT, YOU MUST TREAT THAT FACT
 11 AS HAVING BEEN PROVEN, AND THERE ARE FOUR SUCH FACTS THAT I WANT
 12 TO ADVISE YOU OF AT THIS TIME.
 13 ONE, THE -- THE PARTIES STIPULATE THAT THE DEFENDANTS
 14 CANNOT IDENTIFY THE CUSTOMER WHOSE SOFTWARE WAS USED TO CREATE
 15 AT LEAST 95 DIFFERENT LOCAL ENVIRONMENTS.
 16 TWO, TOMORROWNOW COPIED MILLIONS OF UPDATES AND
 17 SUPPORT MATERIALS FOR JD EDWARDS WORLD, FOR JD EDWARDS
 18 ENTERPRISE ONE, PEOPLESOFT, AND SIEBEL BY DOWNLOADING THEM FROM
 19 ORACLE WEBSITES ON TO TOMORROWNOW'S COMPUTERS. IT THEN FURTHER
 20 COPIED CERTAIN PORTIONS OF THOSE MATERIALS BETWEEN TOMORROWNOW'S
 21 SERVERS.
 22 AND NUMBER THREE, TOMORROWNOW COUNTED APPROXIMATELY
 23 5 MILLION ORACLE SUPPORT FILES ON ITS SYSTEMS IN 2008.
 24 AND FOUR, IN AN EWEK ARTICLE ENTITLED "ORACLE WARNS
 25 SAP TO STEP LIGHTLY," DATED JANUARY 26TH, 2005, ORACLE'S C.E.O.
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1 JOO WAH LOW SAYS, "I WORRIED SOMEONE GETS THE
 2 BLAME FOR ALL OF THIS."
 3 "YEP, THEY GOT 50 MORE."
 4 THEN SAYS, BY THE WAY, "BTW IS LESS ASTERISK,
 5 ASTERISK, ASTERISK, ASTERISK, STILL V," THAT'S A
 6 CUSTOMER CONNECTION I.D., CREDENTIAL TO LOG ON.
 7 "STILL WHAT? VALID?"
 8 "YEAH," NAT VONG SAYS, "BUT TRY NOT TO USE IT."
 9 JOO WAH LOW SAYS, "I HAVE NOT TOUCHED CC," THAT'S
 10 CUSTOMER CONNECTION, THE WEBSITE, "SINCE."
 11 "IT'S VERY DIFF," DIFFICULTY.
 12 "FOR CASE RESEARCH."
 13 NAT VONG SAYS "I CAN IMAGINE."
 14 "I DON'T KNOW OVER THERE" -- JOO WAH LOW IS IN
 15 SINGAPORE -- "BUT HERE IN THE STATES, IT IS TAKING
 16 SNAPSHOT OF EVERYONE'S HARD DRIVE."
 17 JOO WAH LOW SAYS, "OH, REALLY? HOW?"
 18 NAT VONG SAYS, "HEARD THEY BROUGHT IN COMPUTER
 19 FORENSICS, PROBABLY LOOKING FOR EVIDENCE."
 20 AND THEN JOO WAH LOW SAYS, "IT'S INTERESTING, BUT
 21 SCARY."
 22 NAT VONG, "IT IS."
 23 JOO WAH LO SAYS, "ACTUALLY, I'M WORRIED
 24 INDIVIDUALS MIGHT BE BLAMED FOR THIS ISSUE."
 25 "IT'S A CORPORATE THING."
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1 LARRY ELLISON WAS QUOTED AS SAYING IN RESPONSE TO SAP'S
 2 ACQUISITION OF TOMORROWNOW, QUOTES, THAT'S OUR INTELLECTUAL
 3 PROPERTY AND THEY SHOULD BE CAUTIOUS, UNQUOTE.
 4 ALL RIGHT. AND I ALSO WANT TO CLEAR UP ONE OTHER
 5 THING WITH YOU ALL BEFORE WE START ON THE DEFENDANTS' CASE.
 6 NOW, ON OCTOBER 29TH, SAP AG AND ITS WHOLLY OWNED
 7 SUBSIDIARY SAP AMERICA STIPULATED TO THEIR OWN LIABILITY IN THIS
 8 CASE FOR CONTRIBUTORY COPYRIGHT INFRINGEMENT. THIS WAS A
 9 DECISION MADE AND AUTHORIZED BY THE SAP EXECUTIVE BOARD, WHICH
 10 IS THE HIGHEST DECISION-MAKING MANAGEMENT AUTHORITY IN THE
 11 COMPANY.
 12 NOW, SAP'S STIPULATION TO CONTRIBUTORY COPYRIGHT
 13 INFRINGEMENT IS INCLUDED IN YOUR BINDER AT TAB 6. IT'S CALLED
 14 THE "TRIAL STIPULATION AND ORDER REGARDING CONTRIBUTORY
 15 INFRINGEMENT." THE STIPULATION HAS NOW BECOME AN ORDER OF THE
 16 COURT.
 17 NOW, THIS STIPULATION MEANS THAT SAP AMERICA AND SAP
 18 AG HAVE ADMITTED THAT THEY -- ONE, THAT THEY KNEW OR HAD REASON
 19 TO KNOW OF THE INFRINGING ACTIVITY OF TOMORROWNOW; AND, TWO,
 20 THAT THEY INTENTIONALLY MATERIALLY CONTRIBUTED TO THE INFRINGING
 21 ACTIVITY.
 22 NOW, WHILE MERE KNOWLEDGE OF INFRINGING CONDUCT IS
 23 INSUFFICIENT TO SHOW CONTRIBUTORY INFRINGEMENT; INACTION,
 24 COMBINED WITH SPECIFIC KNOWLEDGE CAN, IN SOME CASES, CONSTITUTE
 25 MATERIAL CONTRIBUTORY INFRINGEMENT.
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MCDERMOTT - DIRECT / LANIER

1 A. WELL, SAP SOLD WHAT WE CALL AN INTEGRATED PLATFORM OF
 2 APPLICATIONS. SOMETIMES THIS IS REFERRED TO AS SAP ERP. OTHER
 3 TIMES, YOU'LL HEAR IT REFERRED TO AS THE SAP BUSINESS SUITE, BUT
 4 IT ENCOMPASSED AN INTEGRATION OF PRODUCTS, FINANCIALS, PEOPLE
 5 MANAGEMENT, CUSTOMER MANAGEMENT, SUPPLIER MANAGEMENT. AND OUR
 6 CLAIM TO SUCCESS WAS REALLY THAT WE INTEGRATED AND DESIGNED THE
 7 SYSTEM ON AN END-TO-END-PROCESS BASIS.
 8 Q. IN DOING YOUR JOB, DID YOU SPEND A LOT OF TIME WITH
 9 CUSTOMERS AND POTENTIAL CUSTOMERS?
 10 A. INDEED, I DO.
 11 Q. DID YOU COME TO LEARN WHAT WAS ON THEIR MIND, WHAT THEY
 12 WANTED, WHAT THEY WERE WORRIED ABOUT?
 13 A. YES. CUSTOMERS REALLY ARE FOCUSED ON RUNNING THEIR BUSINESS
 14 BETTER. AND SOME OF THEM WANT TO DO THAT BY BEING MORE
 15 EFFICIENT, MEANING RUN AT A LOWER COST SO THEY IMPROVE THEIR
 16 PROFITABILITY. OTHERS WANT TO MAKE BETTER PRODUCTS AND MAKE
 17 MORE THEIR SALES SO THEY WANT TO INCREASE PROFITS, BUT IT'S
 18 ALWAYS ABOUT DRIVING BUSINESS OUTCOMES.
 19 Q. WHAT TYPES OF CUSTOMERS HAVE BOUGHT SAP'S PRODUCTS, IN YOUR
 20 EXPERIENCE?
 21 A. ALL KINDS OF CUSTOMERS. OUR CUSTOMERS WORK WITH US FROM 25
 22 DISTINCTLY DIFFERENT INDUSTRIES. SOMETIMES THAT COULD BE PUBLIC
 23 SECTOR OR GOVERNMENT, SCHOOLS, CHURCHES, RETAIL INDUSTRY,
 24 FINANCIAL SERVICES INDUSTRY, MANUFACTURING, LITERALLY ALL
 25 INDUSTRIES.

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1 HEATED BATTLE BETWEEN ORACLE AND SAP.
 2 Q. BASED ON YOUR DEALINGS WITH CUSTOMERS, HOW DID THAT
 3 CHANGE -- THE ACQUISITION OF PEOPLESFT CHANGE THE MARKET FROM A
 4 CUSTOMERS' PERSPECTIVE?
 5 A. THE CUSTOMER FELT THAT THEY HAD LESS OPTIONS, AND THEY
 6 OBVIOUSLY HAD INVESTED HEAVILY IN THESE SYSTEMS. THEY TRAINED
 7 THEIR PEOPLE HOW TO USE THESE SYSTEMS. THEY WERE OBTAINING
 8 VALUE FROM THESE SYSTEMS. AND BECAUSE THEY ARE COMPLEX, THEY
 9 ARE EXPENSIVE, AND THERE IS A LOT OF CHANGED MANAGEMENT AND
 10 TRAINING INVOLVED, CUSTOMERS DON'T REALLY LIKE TO CHANGE. SO IF
 11 THEY DO MAKE A CHANGE, IT'S BECAUSE THERE'S A SIGNIFICANT REASON
 12 FOR DOING SO, WHAT WE CALL IN THE INDUSTRY A COMPELLING EVENT.
 13 Q. SO WE'VE HEARD A BIT ABOUT THIS SAFE PASSAGE PROGRAM. I'M
 14 GOING TO ASK YOU ABOUT, ACTUALLY, SOMETHING ELSE, AND THEN WE'LL
 15 COME BACK TO SAFE PASSAGE.
 16 HAVE YOU HEARD THE TERM "SAFE HARBOR"?
 17 A. YES.
 18 Q. SO PUTTING ASIDE WHAT IT MAY HAVE TO DO WITH BOATS OR
 19 ANYTHING ELSE, WHAT'S SAFE HARBOR AS IT HAS SOMETHING TO DO WITH
 20 THIS CASE?
 21 A. YEAH, IN THE EARLY DAYS OF ORACLE ACQUIRING PEOPLESFT AND
 22 JDE, THE INITIAL PROGRAM WAS CALLED SAFE HARBOR, AND THE FOCUS
 23 WAS SIMPLY TO SELL MORE SOFTWARE AND TO CONVINC PEOPLESFT AND
 24 JDE CUSTOMERS THAT SAP SOFTWARE WAS BETTER THAN ORACLE'S AND,
 25 THEREFORE, THEY SHOULD CONSIDER CHANGING TO SAP.

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1 Q. SO BACK IN 2004, 2005, DID SAP HAVE COMPETITORS FOR THE
 2 TYPES OF SOFTWARE AND THE CUSTOMERS YOU JUST MENTIONED?
 3 A. YES, WE DID.
 4 Q. WHO WERE THOSE COMPETITORS PRINCIPALLY?
 5 A. PRINCIPALLY BACK THEN, PEOPLESFT WOULD HAVE BEEN A STRONG
 6 COMPETITOR; SIEBEL; ORACLE; JDE IN THE MID-MARKET; MICROSOFT AT
 7 THE VERY LOW END OF THE MARKET. SO THERE WAS, YOU KNOW, ABOUT A
 8 HANDFUL OF NAMES OUT THERE THAT WERE SIGNIFICANT PLAYERS IN THE
 9 MARKETPLACE.
 10 Q. DID SOMETHING HAPPEN IN 2004, 2005, THAT CHANGED THE
 11 COMPETITIVE LANDSCAPE?
 12 A. YES. AT THAT TIME, ORACLE MADE A DECISION TO ACQUIRE
 13 PEOPLESFT AND JDE. AND THAT WAS AN INFLECTION POINT IN THE
 14 INDUSTRY, CANDIDLY, WHEN THEY DECIDED TO CONSOLIDATE SOME OF
 15 THESE SOFTWARE COMPANIES UNDERNEATH THE ORACLE UMBRELLA.
 16 Q. YOU SAID "INFLECTION POINT." WHAT DID YOU MEAN BY THAT?
 17 A. AT THAT TIME, THERE REALLY WAS GOOD COMPETITION, BUT THERE
 18 WERE SEVERAL PARTICIPANTS LINED UP WHEN CUSTOMERS WERE MAKING
 19 DECISIONS. FOR EXAMPLE, IF A CUSTOMER WAS BUYING CRM SOFTWARE,
 20 SIEBEL WOULD BE AT THAT TABLE.
 21 IF THEY WERE BUYING HR OR ERP, PEOPLESFT WOULD BE AT
 22 THAT TABLE ALMOST EVERY TIME. AND SO, TOO, WOULD ORACLE BE AT
 23 THE TABLE COMPETING FOR THE BUSINESS.

24 ONCE THE DECISION WAS MADE BY ORACLE TO CONSOLIDATE
 25 THESE PLAYERS INTO ORACLE, THEN IT REALLY BECAME A MUCH MORE

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1 AND WE OFFERED A VERY ELABORATE TRADE-IN CREDIT FOR
 2 THE PEOPLESFT AND JDE LICENSES TO SWITCH. IN FACT, THE
 3 TRADE-IN WAS UP TO 75 PERCENT, SO THAT WAS A BIG TRADE-IN
 4 CREDIT.
 5 Q. SO LET'S FOCUS ON A TRADE-IN CREDIT -- HOW DOES A TRADE-IN
 6 CREDIT WORK?
 7 A. YEAH, SO IF OUR SOFTWARE WAS GOING TO BE PRICED AT A DOLLAR
 8 AND YOU HAD PEOPLESFT SOFTWARE AND YOU WERE TRADING IT IN, WE
 9 WOULD SELL YOU OUR SOFTWARE FOR 25 CENTS ON THE DOLLAR. AND TO
 10 A LOT OF CUSTOMERS, THAT WAS AN ATTRACTIVE OFFER.
 11 Q. WAS THE TRADE-IN CREDIT UNIQUE TO SAP?
 12 A. NO, THESE PRACTICES HAVE GONE ON IN OUR INDUSTRY FOR MANY
 13 YEARS. WHAT MADE IT UNIQUE AT THAT TIME IS SAP HAD POSITIONED
 14 ITSELF AS THE SAFE HARBOR, THE MARKETING LINGO, FOR CUSTOMERS
 15 BECAUSE WE WERE AN ESTABLISHED BRAND.
 16 WE WERE VERY GOOD IN THE BUSINESS SOFTWARE SPACE AND,
 17 THEREFORE, COULD LOWER THEIR RISK AND POTENTIALLY IMPROVE THEIR
 18 ABILITY TO EXECUTE THEIR BUSINESS ON SAP VERSUS ORACLE,
 19 PEOPLESFT, OR JDE.
 20 Q. IS IT FAIR TO THINK OF A TRADE-IN CREDIT AT A HIGH LEVEL AS
 21 A DISCOUNT?
 22 A. YES, IT IS.
 23 Q. IS THERE ANYTHING UNUSUAL ABOUT OFFERING DISCOUNTS TO SELL
 24 SOFTWARE?
 25 A. NOT AT ALL. THAT'S GOOD, COMPETITIVE BEHAVIOR. IT'S DONE

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1 EVERY DAY.

2 Q. DID TOMORROWNOW HAVE ANYTHING TO DO WITH SAFE HARBOR?

3 A. NO, TOMORROWNOW DID NOT HAVE ANYTHING TO DO WITH SAFE

4 HARBOR. THE TRANSITION TO SAFE PASSAGE CAME AT THE TIME SAP

5 ACQUIRED TOMORROWNOW. AND THE PROGRAM WAS REBRANDED SAFE

6 PASSAGE.

7 Q. WE'LL COME TO SAFE PASSAGE IN A MOMENT, BUT JUST A COUPLE

8 MORE QUESTIONS ABOUT SAFE HARBOR.

9 WAS SAFE HARBOR SUCCESSFUL?

10 A. YES, IT WAS. THE MOVE AT THAT TIME IN THE INDUSTRY IS VERY

11 INTERESTING, BECAUSE IF YOU GO BACK TO NORTH AMERICA AT THAT

12 TIME, WE WERE NOT THE NUMBER ONE BUSINESS SOFTWARE COMPANY IN

13 NORTH AMERICA BACK THEN. THERE WERE OTHER PLAYERS THAT WERE

14 DOING EVEN BETTER. BECAUSE IF YOU LOOK AT THE UNITED STATES

15 MARKET, PEOPLESFT, JDE, ORACLE, MICROSOFT, THEY WERE ALL

16 DOMICILED, IN TERMS OF THEIR CORPORATE HEADQUARTERS, IN THE

17 UNITED STATES.

18 SO SAP REALLY AT THAT TIME WAS COMING UP AND GETTING

19 STRONGER IN THE UNITED STATES WITH NEW MANAGEMENT, NEW FOCUS ON

20 THE CUSTOMER. SO TO COME OUT WITH A PROGRAM LIKE THIS AT A TIME

21 WHEN CUSTOMERS REALLY WERE CONCERNED WHAT ORACLE'S COMMITMENT

22 WOULD BE TO MAINTAINING THEIR LEGACY APPLICATIONS AND, FRANKLY,

23 ORACLE IS A VERY FINE COMPANY IN DATABASE, BUT THEY WEREN'T WELL

24 KNOWN IN APPLICATIONS. WE WERE.

25 AND THAT WAS AN IMPORTANT TIME TO TAKE ADVANTAGE OF A

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1 APPLICATIONS, NO MATTER HOW GOOD OUR NEW ONES ARE. SO WE WERE

2 TRYING TO PROVIDE THE CUSTOMER A CHOICE.

3 IF YOU WANT TO STAY ON THE LEGACY APPLICATION, WHY

4 NOT SAVE SOME MONEY WHILE YOU'RE AT IT? AND THE OBJECTIVE WAS

5 TO BUILD GOOD RELATIONS WITH THOSE CUSTOMERS, BE NICE TO THOSE

6 CUSTOMERS, AND MAYBE SOMEDAY THOSE CUSTOMERS WOULD WANT TO

7 CONSIDER THE NEW SAP PLATFORM AT THE RIGHT TIME.

8 Q. WERE YOU PERSONALLY PART OF THE DECISION TO BUY TOMORROWNOW?

9 A. NO, I WAS NOT.

10 Q. AND SO HOW DID YOU COME TO LEARN THE DECISION HAD BEEN MADE?

11 A. THE EXECUTIVE BOARD AT THAT TIME HAD MADE THE DECISION TO

12 BUY TOMORROWNOW. I WAS SIMPLY INFORMED THAT IT HAPPENED AND

13 THAT THIS WAS AN OFFERING THAT I WAS EXPECTED TO MAKE AVAILABLE

14 TO OUR CUSTOMERS. PLEASE EDUCATE OUR PEOPLE, AND LET'S MAKE

15 SURE OUR CUSTOMERS UNDERSTAND THEY NOW HAVE CHOICE.

16 Q. SO AS YOU CAME TO LEARN ABOUT TOMORROWNOW, DID YOU SIT BACK

17 AND THINK ABOUT, YOU KNOW, HOW USEFUL OF A TOOL THIS MIGHT BE?

18 A. I DID, OBVIOUSLY, THINK THROUGH, YOU KNOW, WHAT THE VALUE

19 PROPOSITION WOULD BE. AND, FRANKLY, I WAS NOT AS ENTHUSIASTIC

20 ABOUT IT AS THE -- THE HEADLINES OR THE MARKETING DEPARTMENT

21 SEEMED TO INDICATE, BECAUSE I KNOW THAT SELLING AN ERP SYSTEM IS

22 A COMPLEX EXECUTIVE-LEVEL SELL.

23 YOU DON'T WIN COMPLEX EXECUTIVE-LEVEL DECISIONS WHEN

24 MILLIONS OF DOLLARS ARE TIED UP AND SOMETIMES THOUSANDS OF

25 PEOPLE'S TIME WITH A DISCOUNT ON A MAINTENANCE PROGRAM.

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1 WINDOW OF OPPORTUNITY IN THE MARKET AND THE SAFE HARBOR PROGRAM

2 HELPED US DO THAT.

3 Q. WHAT WAS THE WINDOW OF OPPORTUNITY YOU JUST MENTIONED?

4 A. WELL, AT THAT TIME, CUSTOMERS REALLY WERE, YOU KNOW, QUITE

5 CONCERNED. WHAT DOES THIS MEAN TO ME? I, IN THE FIRST PLACE,

6 DIDN'T CHOOSE ORACLE. I CHOSE PEOPLESFT OR I CHOSE JDE BECAUSE

7 I DIDN'T WANT ORACLE. I WANTED THEM. WILL ORACLE CONTINUE TO

8 PROVIDE MAINTENANCE SUPPORT FOR THESE LEGACY APPLICATIONS? WILL

9 THERE BE A FORCED MARCH WHERE THEY'LL MAKE ME UPGRADE TO THEIR

10 NEW SOFTWARE? AND IF I DO UPGRADE TO THEIR NEW SOFTWARE IF

11 THERE IS SUCH A NEW SOFTWARE PROGRAM, WHAT ARE MY OPTIONS WITH

12 SAP?

13 SO AT THAT TIME, IT OPENED UP THE DIALOGUE IN A NEW

14 WAY.

15 Q. SO SAFE HARBOR EXISTS, IT GOES ON FOR A WHILE, AND DO YOU

16 HAPPEN TO REMEMBER WHEN SAP BOUGHT TOMORROWNOW?

17 A. BELIEVE IT WAS JANUARY OF 2005.

18 Q. GOT IT RIGHT.

19 SO THEN THERE BECAME SAFE PASSAGE. WOULD YOU JUST

20 BRIEFLY DESCRIBE TO THE JURY WHAT SAFE PASSAGE WAS?

21 A. SURE. WHEN SAP BOUGHT THIS TOMORROWNOW ENTITY, THE CUSTOMER

22 WAS PROVIDED A CHOICE. IF THEY DID NOT WANT TO UPGRADE TO SAP

23 SOFTWARE, WHICH WAS OUR NUMBER ONE SINGLE-MINDED AMBITION, BUT

24 THEY MAY NOT DO IT, BECAUSE IN SOME CASES, THEY'VE INVESTED

25 HEAVILY; THEIR PEOPLE KNOW HOW TO USE IT; THEY LIKE THE OLD

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1 Q. WHAT DO YOU MEAN BY A "COMPLEX EXECUTIVE-LEVEL SELL"?

2 A. COMPANIES HAVE A BUSINESS STRATEGY, AND WHAT WE DO UNIQUELY

3 IS LOCK ONTO THE BUSINESS STRATEGY. SOMETIMES, AGAIN, A COMPANY

4 IS TRYING TO OUTPACE THEIR COMPETITORS BY MAKING MORE BEAUTIFUL

5 PRODUCTS. SOMETIMES THEY'RE TRYING TO EXPAND THEIR ECOSYSTEM

6 AND REACH BEYOND THEIR OWN ENTERPRISE TO CREATE VALUE.

7 SOMETIMES THEY JUST WANT TO RETAIN MORE OF THEIR

8 CUSTOMERS. SOMETIMES THEY WANT TO GET MORE TALENT. SOMETIMES

9 THEY WANT TO LOWER THEIR COST WITH SUPPLIERS 'CAUSE THEY CAN

10 AGGREGATE THEIR SPEND AND BUY CHEAPER.

11 BUT ALL OF THIS IS TIED IN SOME SENSE TO MOVING THE

12 NEEDLE. SO WHEN THEY REPORT THEIR RESULTS, THEY GET BETTER

13 RESULTS. AND IF YOU CAN'T PROVE THAT YOU KNOW THEIR INDUSTRY,

14 YOU KNOW THEIR BUSINESS, AND THAT YOU SPECIFICALLY UNDERSTAND

15 HOW YOU WILL IMPROVE THEIR RESULTS, THEN THERE'S NO SALE.

16 AND TO BRING UP A DISCOUNT ON A MAINTENANCE PROGRAM

17 AT A C-LEVEL MEETING OR A C-LEVEL STRATEGY BETWEEN SAP AND A

18 CUSTOMER IS A COMPLETE WASTE OF TIME.

19 Q. LET'S GET SOME SENSE OF THE NUMBERS, IF WE COULD. AND I

20 KNOW THERE'S LOTS OF VARIABILITY. THERE'S MANY CUSTOMERS, BUT

21 WHAT'S THE SIZE OF A TYPICAL SALE OF SAP SOFTWARE?

22 A. WELL, IF YOU LOOK AT A TYPICAL AVERAGE SELLING PRICE, LET'S

23 SAY 750,000 FOR THE SOFTWARE. CERTAINLY THAT WAS THE AVERAGE

24 SELLING PRICE IN THAT ERA FOR SURE. YOU WOULD THEN PROBABLY

25 HAVE TO FACTOR IN PROBABLY ANOTHER FIVE TIMES THAT -- THE RATIO

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- 1 A. OH, NO, TOMORROWNOW WAS ONLY A SMALL PIECE. THE BIG PIECE,
 - 2 AGAIN, WAS THE FOCUS ON THE SOFTWARE AND THE TRADE-IN CREDITS
 - 3 FROM THE SAFE HARBOR COMPONENT OF THE SAFE PASSAGE PROGRAM. AND
 - 4 I REITERATE THAT CONSUMED ALL OF OUR TIME, AND TOMORROWNOW WAS
 - 5 KIND OF AN AFTERTHOUGHT, WELL, IF YOU DON'T WANT TO CHANGE, YOU
 - 6 HAVE TOMORROWNOW AS AN OPTION -- IT'S A CHOICE -- AND PERHAPS
 - 7 SOME DAY, IF TOMORROWNOW TAKES GOOD ENOUGH CARE OF YOU, YOU
 - 8 WOULD BE INCLINED TO LOOK MORE CLOSELY AT SAP. THAT WAS THE
 - 9 BOTTOM -- BOTTOM-LINE PROPOSITION.
 - 10 Q. THERE'S BEEN SOME DOCUMENTS AND SOME TESTIMONY ABOUT PEOPLE
 - 11 CALLING TOMORROWNOW A KEY OR A CORNERSTONE TO THE SAFE PASSAGE.
 - 12 BACK AT THE TIME WHEN ALL THIS WAS GOING ON, DID YOU BELIEVE
 - 13 THAT, THAT TOMORROWNOW WAS KEY OR A CORNERSTONE?
 - 14 A. NO, I DIDN'T.
 - 15 Q. WHY NOT?
 - 16 A. WELL, AT THE TIME, I READ INTO THE MARKETING BROCHURE WARE
 - 17 (SIC) AND MARKETING WORDS AS A PROGRAM. AND IN ITS OWN RIGHT,
 - 18 IT WAS A GOOD PROGRAM, AND I GOT BEHIND THE PROGRAM TO CREATE
 - 19 INTEREST, TO GET CUSTOMERS TO THINK ABOUT BUYING SAP SOFTWARE.
 - 20 AND IF TOMORROWNOW COULD HELP THE CUSTOMER THINK MORE ABOUT SAP
 - 21 SOFTWARE, THAT WOULD BE HELPFUL.
 - 22 Q. COULD A CUSTOMER BE A SAFE PASSAGE CUSTOMER AND NEVER TOUCH
 - 23 TOMORROWNOW?
 - 24 A. YES, OF COURSE. AND MOST -- MOST WERE.
 - 25 Q. COULD YOU GET TOMORROWNOW SERVICE AND NEVER BUY SAP SERVICE?
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- 1 AND THE SAFE HARBOR PROGRAM WAS, IN ADDITION TO
 - 2 PROVING THAT WE'RE BETTER, WE'LL ALSO GIVE YOU A VERY COMPELLING
 - 3 FINANCIAL OFFER TO TRADE IN YOUR OLD LICENSES FOR NEW ONES.
 - 4 Q. I'M GOING TO TAKE A RISK, AND I'M GOING TO CHALLENGE YOU ON
 - 5 SOMETHING HERE. YOU KNOW, WE SWITCHED FROM WINDOWS COMPUTER TO
 - 6 APPLE COMPUTERS NOT TOO LONG AGO AT OUR HOUSE.
 - 7 A. SURE.
 - 8 Q. AND WE SURVIVED THROUGH THAT. IS IT REALLY THAT BIG A DEAL
 - 9 TO SWITCH THE ERP SYSTEM AT A COMPANY?
 - 10 A. IT REALLY IS A BIG DEAL.
 - 11 Q. WHY?
 - 12 A. WELL, YOU -- IF YOU THINK OF IT AS A PLUMBING IN A HOUSE,
 - 13 YOU'RE ESSENTIALLY REWIRING ALL THE PLUMBING IN THE HOUSE, AND
 - 14 THAT'S A BIG DEAL. SHEETROCK HAS TO COME OFF. PEOPLE HAVE TO
 - 15 PUT NEW PIPES INTO TWO-BY-FOURS, AND THEY HAVE TO DO THAT
 - 16 THROUGHOUT THE WHOLE ENTERPRISE. IT'S A BIG COMMITMENT. AND
 - 17 CUSTOMERS WILL ONLY MAKE THAT COMMITMENT IF THEY SEE THE
 - 18 BUSINESS RATIONALE IS ROCK SOLID AND THE GAIN FAR OUTWEIGHS THE
 - 19 DIFFICULTY OF CHANGE, SO IT'S A BIG CONVERSATION.
 - 20 Q. IS MAINTENANCE AND SAVING MONEY ON MAINTENANCE A
 - 21 SUFFICIENTLY COMPELLING BUSINESS RATIONALE IN YOUR EXPERIENCE
 - 22 WITH CUSTOMERS?
 - 23 A. ABSOLUTELY NOT.
 - 24 Q. JUST A COUPLE MORE QUESTIONS, MR. MCDERMOTT.
 - 25 A. SURE.
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- 1 A. OF COURSE.
 - 2 Q. YOU MENTIONED A WINDOW OF OPPORTUNITY THAT WAS THERE FOR
 - 3 SAFE HARBOR. WAS THAT THE SAME WINDOW OF OPPORTUNITY FOR SAFE
 - 4 PASSAGE?
 - 5 A. YES, I THINK SO, BECAUSE, AGAIN, AT THAT TIME, YOU HAVE TO
 - 6 THINK LIKE THE CUSTOMER THINKS DURING THE SITUATION WHERE THEIR
 - 7 WORLD HAS BEEN TURNED UPSIDE-DOWN. AND WHEN THEIR WORLD'S
 - 8 TURNED UPSIDE-DOWN, THEY'RE THEN IN THE INVESTIGATION MODE ON
 - 9 WHAT THEIR OPTIONS ARE. AND TO THE EXTENT THAT WE COULD CREATE
 - 10 CONFIDENCE IN SAP AND DOUBT ABOUT THE COMPETITION, THAT WAS GOOD
 - 11 FOR SOFTWARE SALES.
 - 12 Q. YOU MENTIONED THE WORLD BEING TURNED UPSIDE-DOWN. I'M
 - 13 GUESSING I KNOW WHAT YOU MEAN, BUT WOULD YOU JUST CLARIFY FOR
 - 14 THE JURY WHAT THAT IS?
 - 15 A. SURE. IF A CUSTOMER INVESTED IN PEOPLESOFT AND JDE AND HAD
 - 16 THOSE SYSTEMS, LIKED THOSE SYSTEMS, LIKED THE PEOPLE THEY WERE
 - 17 DEALING WITH, WHEN THEY REALIZED THAT THEY WERE UNCERTAIN WHAT
 - 18 ORACLE'S INTENTIONS MIGHT BE, THEY THEN WERE IN A SITUATION OF
 - 19 EXPLORING THEIR OPTIONS, YOU KNOW, WHAT MIGHT ORACLE DO. WILL
 - 20 THEY CONTINUE THE MAINTENANCE? WILL THEY FORCE ME OFF OF
 - 21 MAINTENANCE AND FORCE ME TO UPGRADE TO A NEW SYSTEM?
 - 22 AND THEN SAP, SINCE SAP WAS A WELL-RESPECTED BRAND IN
 - 23 THE INDUSTRY, WAS RIGHT OUT THERE IN THE MEDIA SAYING, "WE HAVE
 - 24 A GREAT SYSTEM, WE THINK WE HAVE A BETTER SYSTEM THAN THEY DO.
 - 25 WHILE YOU'RE CONSIDERING YOUR OPTIONS, PLEASE CONSIDER THIS."
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- 1 Q. DIFFERENTLY TOPIC. AS C.E.O. OF SAP, ARE YOU GENERALLY
 - 2 FAMILIAR WITH THE -- THE FACT THAT SAP HAS LICENSES, AND
 - 3 DIFFERENT SORTS OF INTELLECTUAL PROPERTY AGREEMENTS WITH OTHER
 - 4 COMPANIES?
 - 5 A. YES.
 - 6 Q. DO SOME OF THOSE COMPANIES INCLUDE THROUGH COMPETITORS OF
 - 7 SAP?
 - 8 A. YES.
 - 9 Q. AS YOU UNDERSTAND IT, DOES SAP TYPICALLY ENTER INTO THOSE
 - 10 AGREEMENTS BASED ON AN UPFRONT, LUMP-SUM PAYMENT?
 - 11 A. NEVER.
 - 12 Q. TYPICALLY HOW ARE PAYMENT ARRANGEMENTS MADE IN GENERAL? I'M
 - 13 NOT ASKING YOU ABOUT ANY PARTICULAR ONE.
 - 14 A. WELL, TYPICALLY, IT'S A RUNNING ROYALTY. SO AS WE HAVE
 - 15 SUCCESS WITH CUSTOMERS IN THE MARKETPLACE, THERE IS A
 - 16 REVENUE-SHARING MODEL BETWEEN ONE COMPANY AND ANOTHER COMPANY.
 - 17 AND AS CUSTOMERS ARE CONVINCED THAT THE VALUE IS THERE, BOTH
 - 18 SIDES WIN.
 - 19 Q. DIFFERENT TOPIC.
 - 20 YOU KNOW, YOU COULD INFER FROM WHAT YOU WERE SAYING
 - 21 THAT IT MIGHT HAVE BEEN A MISTAKE TO BUY TOMORROWNOW. DO YOU
 - 22 THINK IT WAS?
 - 23 A. YES, I DO.
 - 24 Q. WHY?
 - 25 A. WELL, THE FACT THAT WE'RE ALL HERE IN THE FIRST PLACE MAKES
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MCDERMOTT - CROSS / BOIES

1 RECEIVED IN EVIDENCE)

2 (DEFENDANTS' EXHIBITS A148, A4024

3 RECEIVED IN EVIDENCE)

4 BY MR. BOIES:

5 Q. MR. MCDERMOTT, I WANT TO TURN TO SOMETHING THAT YOU SAID

6 DURING YOUR DIRECT EXAMINATION, WHICH WAS THAT YOU DID NOT

7 BELIEVE THAT TOMORROWNOW AND OFFERING OF MAINTENANCE WAS A KEY

8 COMPONENT OR A CORNERSTONE OF THE SAFE PASSAGE PROGRAM.

9 REMEMBER THAT?

10 **A. YES.**

11 Q. NOW, YOU HAVE SEEN BOARD PRESENTATIONS IN WHICH TOMORROWNOW

12 AND ITS MAINTENANCE OFFERING HAS BEEN DESCRIBED AS A KEY

13 COMPONENT OF THE SAFE PASSAGE, CORRECT?

14 **A. YES.**

15 Q. AND YOU HAVE SEEN BOARD PRESENTATIONS -- AND I MEAN TO THE

16 SAP BOARD WHERE TOMORROWNOW AND ITS MAINTENANCE OFFERING HAS

17 BEEN DESCRIBED AS A CORNERSTONE OF THE SAFE PASSAGE PROGRAM,

18 CORRECT?

19 **A. YES.**

20 Q. AND, INDEED, YOU YOURSELF HAD DISTRIBUTED DOCUMENTS

21 DESCRIBING TOMORROWNOW'S MAINTENANCE OFFERING AS A KEY COMPONENT

22 OF SAFE PASSAGE, CORRECT?

23 **A. YES.**

24 Q. YOU WERE THE PERSON WHO WAS THE SPOKESPERSON FOR THE

25 ANNOUNCEMENT OF THE TOMORROWNOW MAINTENANCE OFFERING AND THE

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1 WERE DESCRIBING THE TOMORROWNOW MAINTENANCE OFFERING AND YOU

2 WERE DESCRIBING THE SAFE PASSAGE PROGRAM, CORRECT, SIR?

3 **A. YES.**

4 Q. AND ONE OF THE THINGS THAT YOU DESCRIBED PAGE 15 -- OR ONE

5 OF THE THINGS THAT WAS DESCRIBED BY MR. AGASSI AT THAT TIME ON

6 PAGE 15 AT THE TOP IS ALL -- SOME OF THE THINGS THAT THE

7 TOMORROWNOW MAINTENANCE OFFERING INCLUDED.

8 DO YOU SEE THAT? WHERE IT TALKS ABOUT ALL OF THE

9 LEGAL FIXES AND COMPLIANCE REQUIREMENTS AS WELL AS THE BUG

10 FIXES?

11 **A. ON PAGE 15, RIGHT.**

12 Q. YES. THEY'RE NUMBERED DOWN AT THE --

13 (EXHIBIT PUBLISHED TO JURY.)

14 BY MR. BOIES:

15 Q. -- BOTTOM OF THE PAGE?

16 **A. I'M GOING TO STAY WITH THIS VERSION HERE ON THE COMPUTER, IF**

17 **THAT'S OKAY.**

18 Q. OKAY. YES, ABSOLUTELY.

19 **A. THANK YOU. YES, I CAN SEE THIS.**

20 Q. AND IT SAYS, THAT THE OFFERING ENTAILS NOT ONLY BUG FIXES

21 BUT ALSO ALL THE LEGAL FIXES AND COMPLIANCE REQUIREMENTS THAT

22 COME FROM LOCAL AND STATE AND FEDERAL REQUIREMENTS. DO YOU SEE

23 THAT?

24 **A. YES, I DO.**

25 Q. NOW, EVEN THOUGH YOU'RE IN SALES AND NOT IN ENGINEERING --

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1 SAFE PASSAGE PROGRAM IN JANUARY OF 2005, CORRECT?

2 **A. I WAS ONE OF THEM, YES.**

3 Q. YOU AND MR. AGASSI.

4 **A. YES.**

5 Q. AND IN THAT CONNECTION, YOU HAD -- IN ADDITION TO VARIOUS

6 PUBLIC STATEMENTS, YOU HAD A TELEPHONE CONFERENCE CALL.

7 DO YOU RECALL THAT?

8 **A. YES.**

9 Q. AND HAVE YOU HAD OPPORTUNITY RECENTLY TO REVIEW THAT -- THAT

10 DOCUMENT?

11 **A. I HAVE NOT.**

12 Q. LET ME -- LET ME TRY TO SHOW THAT TO YOU.

13 **A. OKAY.**

14 Q. AND LET ME ASK YOU TO LOOK AT TAB 5, WHICH IS PLAINTIFFS'

15 EXHIBIT 23.

16 **A. (REVIEWING DOCUMENTS.)**

17 **I'M ON PAGE 23; IS THAT RIGHT?**

18 Q. IT IS -- PLAINTIFFS' EXHIBIT 23, AND IT'S THE SAP AG PHONE

19 CONFERENCE ON JANUARY 19TH. SHOULD BE AT TAB 5 OF YOUR BINDER.

20 **A. YEP. I'M IN TAB 5.**

21 **OKAY.**

22 Q. AND YOU RECOGNIZE THIS AS A TRANSCRIPT OF THAT TELEPHONE

23 CONFERENCE -- CONFERENCE THAT YOU PARTICIPATED IN?

24 **A. YES.**

25 Q. AND IN THIS TELEPHONE CONVERSATION THAT YOU WERE HAVING, YOU

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1 **A. YES.**

2 Q. -- YOU UNDERSTOOD THAT IN ORDER TO COME UP LEGALLY WITH BUG

3 FIXES, LEGAL FIXES, COMPLIANCE REQUIREMENTS, THAT WOULD TAKE

4 R & D PERSONNEL AT TOMORROWNOW, CORRECT?

5 **A. YES.**

6 Q. AND IF YOU HAD KNOWN THAT TOMORROWNOW HAD NO R&D PEOPLE, YOU

7 WOULD HAVE KNOWN THAT TOMORROWNOW WAS NOT ABLE TO LEGALLY COME

8 UP WITH THESE THINGS, CORRECT?

9 **A. I -- I KNOW THAT NOW, YES.**

10 Q. NO, I UNDERSTAND YOU KNOW NOW THAT THEY DIDN'T HAVE ANY R&D

11 PEOPLE.

12 **A. RIGHT.**

13 Q. YOU DID NOT KNOW THAT THEN?

14 **A. CORRECT.**

15 Q. WHAT I'M SAYING, IF YOU HAD KNOWN IT THEN, YOU WOULD HAVE

16 KNOWN AT THAT TIME THAT THEY WERE OPERATING IMPROPERLY, FAIR?

17 **A. YOU HAVE TO HAVE PEOPLE, SO YES.**

18 Q. OKAY.

19 NOW, YOU YOURSELF WERE TOLD THAT THE ACQUISITION OF

20 TOMORROWNOW DID NOT INVOLVE THE ACQUISITION OF ANY INTELLECTUAL

21 PROPERTY, CORRECT?

22 **A. I WAS NOT INVOLVED IN THAT DISCUSSION ONE WAY OR THE OTHER.**

23 Q. LET ME ASK YOU TO -- LET ME ASK YOU TO LOOK AT TAB 3:

24 **A. OKAY.**

25 Q. THIS IS DEFENDANT'S EXHIBIT A4024.

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1 (EXHIBIT PUBLISHED TO JURY.)

2 BY MR. BOIES:

3 Q. THIS IS A EMAIL SENT ON JANUARY 13TH, 2005 TO A NUMBER OF

4 PEOPLE, INCLUDING YOURSELF. DO YOU SEE THAT?

5 **A. YES, I DO.**

6 Q. AND THIS IS ATTACHING THE LETTER OF INTENT FOR THE

7 ACQUISITION OF TOMORROWNOW, CORRECT?

8 **A. YES.**

9 Q. AND YOU RECEIVED A COPY OF THIS, CORRECT?

10 **A. YES.**

11 Q. AND DO YOU SEE IN THE SECOND PARAGRAPH WHERE IT SAYS "NO

12 INTELLECTUAL PROPERTY IS BEING ACQUIRED"?

13 **A. YES.**

14 (EXHIBIT PUBLISHED TO JURY.)

15 BY MR. BOIES:

16 Q. NOW, IF YOU HAD READ THIS AT THE TIME, THAT WOULD HAVE

17 ALERTED YOU TO THE FACT THAT TOMORROWNOW DID NOT HAVE ANY

18 INTELLECTUAL PROPERTY OF ITS OWN, CORRECT, SIR?

19 **A. I -- YOU KNOW, THE FACT OF THE MATTER IS I REALLY AM NOT**

20 **FAMILIAR ENOUGH WITH THE SCIENCE BEHIND HOW THEY WERE**

21 **PROVISIONING THE SERVICE TO MAKE A "YES" OR "NO" ANSWER. I**

22 **DON'T KNOW.**

23 Q. WELL, YOU WOULD HAVE KNOWN -- IF YOU HAD READ THIS, IF YOU

24 WOULD HAVE KNOWN THAT NO INTELLECTUAL PROPERTY WAS BEING

25 ACQUIRED, CORRECT?

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1 DECEMBER 23RD, 2004.

2 DO YOU SEE THAT?

3 **A. YES.**

4 Q. AND THIS IS THE PRESENTATION FOR WHAT IS REFERRED TO AS THE

5 PEOPLESOFT ATTACK PROGRAM. DO YOU SEE THAT?

6 **A. YES, I DO.**

7 Q. AND IF YOU LOOK AT THE EMAIL MESSAGE, THE FIRST ONE AT THE

8 TOP --

9 (EXHIBIT PUBLISHED TO JURY.)

10 BY MR. BOIES:

11 Q. -- IT REFERS TO --

12 YOU NEED TO GO DOWN LITTLE BIT FURTHER.

13 IT SHOWS -- IT SAYS, "I SUGGEST WE USE THE FKOM

14 MEETING TO DEFINE HOW WE BRING THIS INTO EXECUTION."

15 DO YOU SEE THAT?

16 **A. YES, I DO.**

17 Q. AND WOULD YOU EXPLAIN WHAT THE FKOM MEETING IS?

18 **A. SURE. IT STANDS FOR FIELD KICKOFF MEETING.**

19 Q. AND THAT WAS SOMETHING THAT YOU PARTICIPATED IN, CORRECT?

20 **A. YES.**

21 Q. THAT WAS ACTUALLY IN MIAMI; AM I RIGHT ABOUT THAT?

22 **A. I'LL TAKE YOUR WORD FOR IT, YES.**

23 Q. AND WAS THIS PRESENTATION DISCUSSED AT THE FIELD KICKOFF

24 MEETING THAT YOU ATTENDED?

25 **A. IT MAY VERY WELL HAVE BEEN DISCUSSED AT THE KICKOFF MEETING.**

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1 **A. YES.**

2 Q. AND YOU KNOW ENOUGH ABOUT THE BUSINESS TO KNOW THAT IN ORDER

3 TO HAVE BUG FIXES AND LEGAL REGULATORY UPDATES, YOU REQUIRE SOME

4 INTELLECTUAL PROPERTY, CORRECT?

5 **A. YES.**

6 Q. SO IF THEY DIDN'T -- IF TOMORROWNOW DID NOT HAVE ANY

7 INTELLECTUAL PROPERTY, AND THEY WERE NEVERTHELESS PERFORMING

8 THESE SERVICES, YOU WOULD HAVE KNOWN, IF YOU HAD READ THIS, THAT

9 THEY WERE USING SOMEBODY ELSE'S INTELLECTUAL PROPERTY, FAIR?

10 **A. PERHAPS.**

11 Q. OKAY.

12 NOW, DID YOU READ THIS AT THE TIME?

13 **A. I DON'T RECALL READING THIS, NO.**

14 Q. NOW, YOU HAD BEEN INFORMED PRIOR TO THIS TIME THAT THERE WAS

15 A ATTEMPT TO ACQUIRE A THIRD-PARTY MAINTENANCE COMPANY, HAD YOU

16 NOT, SIR?

17 **A. I DON'T RECALL THAT.**

18 Q. LET ME ASK YOU TO LOOK AT PLAINTIFFS' EXHIBIT -- THIS IS

19 BEHIND TAB 2 --

20 **A. OKAY.**

21 Q. -- PLAINTIFFS' EXHIBIT 4814.

22 (EXHIBIT PUBLISHED TO JURY.)

23 BY MR. BOIES:

24 Q. THIS IS AN EMAIL, AND THEN ATTACHED TO IT IS A

25 PRESENTATION -- BOTH THE EMAIL AND THE PRESENTATION ARE DATED

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1 **IT JUST WASN'T IN MY KEY NOTE THAT I CAN RECALL.**

2 Q. UM-HMM.

3 NOW, AT THE TIME THAT THE TOMORROWNOW PROGRAM WAS

4 ANNOUNCED, YOU EXPECTED AT THAT TIME -- NOT TALKING ABOUT HOW IT

5 WORKED OUT, BUT YOU EXPECTED AT THAT TIME THAT YOU WOULD HAVE

6 VERY FAVORABLE RECEPTION, CORRECT?

7 **A. THE GOAL WAS -- AS OPPOSED TO THE EXPECTATION -- THAT IT**

8 **WOULD BE FAVORABLE.**

9 Q. AND -- AND -- AND NOT ONLY WAS THAT THE GOAL, BUT YOU

10 BELIEVED THAT BASED ON EARLY INDICATIONS, THAT THE RECEPTION TO

11 THE OFFER WOULD BE ASTRONOMICAL.

12 REMEMBER SAYING THAT?

13 **A. I'M SURE I DID.**

14 Q. AND ONE OF -- ONE OF THE THINGS THAT YOU PARTICIPATED IN NOT

15 ONLY 2005 BUT 2006 WAS TO TRY TO AGGRESSIVELY POSITION

16 TOMORROWNOW IN THE MARKETPLACE IN ORDER TO ACHIEVE THESE

17 OBJECTIVES, CORRECT?

18 **A. MY POSITIONING OF TOMORROWNOW, AGAIN, WAS TO CREATE**

19 **EXCITEMENT FOR SAP SO PEOPLE WOULD CONSIDER SAP AND BUY OUR**

20 **SOFTWARE. IF TOMORROWNOW WAS HELPFUL IN DOING THAT, I WAS**

21 **ABSOLUTELY PUSHING IT, YES.**

22 Q. AND -- AND YOU BELIEVE THAT TOMORROWNOW WAS HELPFUL IN DOING

23 THAT, CORRECT?

24 **A. I BELIEVE THAT TOMORROWNOW WAS HELPFUL IN CREATING THE BUZZ**

25 **AND THE CONVERSATION. IT CERTAINLY WAS NOT HELPFUL IN ACTUALLY**

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MCDERMOTT - CROSS / BOIES

1 **A. I WAS NOT A VOTING MEMBER, NO.**
 2 Q. SO IS IT FAIR TO SAY THAT YOU WERE THERE TO GIVE YOUR VIEWS?
 3 **A. I PARTICIPATED IN THE MEETING.**
 4 Q. OKAY.
 5 AND ONE OF THE THINGS THAT HAPPENED AT THIS MEETING
 6 WAS A DISCUSSION OF TOMORROWNOW, CORRECT?
 7 **A. OKAY. I TAKE YOUR WORD FOR IT, SURE.**
 8 Q. WELL, WE CAN ACTUALLY GO TO THE SECOND PAGE.
 9 (EXHIBIT PUBLISHED TO JURY.)
 10 BY MR. BOIES:
 11 Q. AND YOU CAN SEE IT SAYS, "THE EXECUTIVE BOARD AGREED THAT WE
 12 HAVE A SET OF ASSETS THAT WE CAN ATTACK THEM," MEANING ORACLE,
 13 WITH, "AND NEED TO PUT MORE EMPHASIS ON THE GO-TO-MARKET OF
 14 THESE ASSETS."
 15 **A. UH-HUH.**
 16 Q. SEE THAT?
 17 **A. I DO.**
 18 Q. AND THEN THE FIRST ONE LISTED THERE IS TOMORROWNOW WHERE IT
 19 SAYS "AGGRESSIVE POSITIONING IN THE MARKET."
 20 DO YOU SEE THAT?
 21 **A. YES, I DO.**
 22 **(CONTINUED NEXT PAGE; NOTHING OMITTED.)**
 23
 24
 25
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MCDERMOTT - CROSS / MR. BOIES

1 CORRECT?
 2 **A. TRUE. TRUE.**
 3 Q. AND SAP BELIEVED ANYTHING THAT IT COULD DO TO DISRUPT
 4 ORACLE WOULD HELP SAP?
 5 **A. THAT'S FAIR.**
 6 Q. AND ONE OF THE WAYS THAT SAP BELIEVED THAT SAFE PASSAGE
 7 AND TOMORROWNOW WOULD HELP SAP WAS BY DIVERTING MAINTENANCE
 8 REVENUE AWAY FROM ORACLE, CORRECT?
 9 **A. YES.**
 10 Q. AND THAT WAS HELPFUL BECAUSE BY DIVERTING MAINTENANCE
 11 REVENUE AWAY FROM ORACLE THAT WOULD REDUCE THE RESOURCES THAT
 12 ORACLE HAD TO INVEST IN RESEARCH AND DEVELOPMENT, CORRECT?
 13 **A. THAT IS NOT THE PART THAT I WOULD AGREE WITH.**
 14 **IF I COULD GIVE YOU MY SIDE OF IT, I WOULD LIKE TO.**
 15 **IT WAS VIEWED AS AN ACCOUNT RELATIONSHIP STRATEGY**
 16 **BECAUSE EVEN IF THE CUSTOMER DIDN'T CHANGE TO THE NEW SOFTWARE**
 17 **BUT YOU GAVE THEM A BENEFIT OF HALF PRICE ON THE MAINTENANCE**
 18 **AND YOU TREATED THEM WELL, THEY MAY BE PREDISPOSED TO WHEN THE**
 19 **BUYING WINDOW FOR SOFTWARE CAME UP, TO BUY YOUR SOFTWARE VERSUS**
 20 **ORACLE SOFTWARE. THAT IS WHAT I BELIEVED THEN AND THAT IS WHAT**
 21 **I BELIEVE NOW.**
 22 Q. IN ADDITION TO DEVELOPING THE CUSTOMER RELATION, WHICH I
 23 AGREE IS AN IMPORTANT THING.
 24 **A. SURE.**
 25 Q. IN ADDITION TO THAT, WAS A PURPOSE OF THE SAFE PASSAGE
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MCDERMOTT - CROSS / MR. BOIES

1 BY MR. BOIES:
 2 Q. AND THE PERSON RESPONSIBLE FOR THIS WAS MR. APOTHEKER,
 3 CORRECT?
 4 **A. YES.**
 5 Q. AND DO YOU RECALL THAT NOW AS YOU --
 6 **A. SURE.**
 7 Q. -- SEE THIS?
 8 **A. AND ON THE GO-TO-MARKET SIDE, MY ROLE WOULD BE TO ACCEPT**
 9 **THE EXECUTIVE BOARD DECISION AS A GOOD EXECUTIVE AND GO AHEAD**
 10 **AND MAKE SOMETHING OUT OF IT IN THE MARKET, WHICH IS WHAT I**
 11 **DID.**
 12 Q. AND, IN FACT, ONE OF THE THINGS THAT YOU DID WAS THAT YOU
 13 SENT MEMOS OUT TO THE FIELD ENCOURAGING THEM TO MAKE FULL USE
 14 OF TOMORROWNOW, CORRECT, SIR?
 15 **A. OF COURSE.**
 16 Q. NOW, PART OF THE REASON THAT TOMORROWNOW AND SAFE PASSAGE
 17 WERE VIEWED AS IMPORTANT AS THEY WERE AT SAP WAS BECAUSE THEY
 18 WERE VIEWED AS A WAY OF DISRUPTING ORACLE?
 19 **A. YES.**
 20 Q. AND ORACLE AND SAP ARE FIERCE COMPETITORS?
 21 **A. YES, WE ARE.**
 22 Q. AND YOU WERE FIERCE COMPETITORS BEFORE ORACLE ACQUIRED
 23 PEOPLESOFT, CORRECT?
 24 **A. YES.**
 25 Q. AND YOU WERE EVEN MORE FIERCE COMPETITORS AFTERWARDS,
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MCDERMOTT - CROSS / MR. BOIES

1 PROGRAM AND TOMORROWNOW TO DIVERT THE MAINTENANCE REVENUE SO
 2 THAT YOU COULD DRAW RESOURCES AWAY THAT COULD OTHERWISE BE USED
 3 FOR RESEARCH AND DEVELOPMENT?
 4 **A. AS I HAVE SHARED PREVIOUSLY, MR. BOIES, IT MAY HAVE BEEN**
 5 **IN THE AMBITION OR THE GOAL OF THE BUSINESS PLAN THAT WAS**
 6 **PRESENTED AT THE EXECUTIVE BOARD LEVEL, WHICH I DID NOT**
 7 **PARTICIPATE IN. PRACTICALLY SPEAKING, ON AN OPERATING LEVEL,**
 8 **WHICH WAS MY JOB AT THE TIME, IT WAS ALL ABOUT SELLING THE**
 9 **SOFTWARE AND CREATING A CONVERSATION THAT POSITIONED SAP MORE**
 10 **FAVORABLY THAN ORACLE, PEOPLESOFT, OR J.D. EDWARDS TO SELL THE**
 11 **SOFTWARE.**
 12 **ALL THE KEY PERFORMANCE INDICATORS THAT I WAS**
 13 **RESPONSIBLE FOR WAS TIED TO SELLING THE SOFTWARE.**
 14 Q. LET ME ASK YOU TO LOOK AT PLAINTIFFS' EXHIBIT 171 THAT IS
 15 BEHIND TAB 10.
 16 (EXHIBIT DISPLAYED ON SCREEN.)
 17 AND THIS IS AN E-MAIL WITH AN ATTACHMENT THAT YOU
 18 RECEIVED ON FEBRUARY 3, 2005, CORRECT?
 19 **A. YES.**
 20 Q. AND THIS WAS REASONABLY EARLY IN THE SAFE
 21 PASSAGE/TOMORROWNOW PROGRAM, CORRECT?
 22 **A. YES.**
 23 Q. AND IF YOU WILL TURN TO PAGE 9 WHERE IT SAYS "CLEAR
 24 SAILING STRATEGY", AT THE TOP?
 25 DO YOU SEE THAT?
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MCDERMOTT - CROSS / MR. BOIES

1 **A. YES.**
 2 Q. YOU SEE WHERE IT SAYS "INTERRUPT ORACLE'S ACQUIRED
 3 MAINTENANCE INCOME STREAM, MAKING IT DIFFICULT FOR THEM TO
 4 INVEST IN DEVELOPMENT OF THEIR FUSION PLATFORM."
 5 DO YOU SEE THAT?
 6 **A. YES.**
 7 Q. AND FIRST POINT RIGHT UNDER THAT IS, "SAFE PASSAGE
 8 OFFERING TO MAINTAIN PEOPLESFT AND J.D. EDWARDS SYSTEMS AND
 9 UPGRADE LICENSES."
 10 **A. I SEE THAT.**
 11 Q. AND THE MAINTENANCE OF THE PEOPLESFT AND J.D. EDWARDS
 12 SYSTEMS IS WHAT TOMORROWNOW WAS DOING, CORRECT?
 13 **A. YES.**
 14 Q. AND DID YOU UNDERSTAND IN FEBRUARY OF 2005 THAT SAP'S
 15 STRATEGY OF USING TOMORROWNOW AND THE SAFE PASSAGE PROGRAM WAS
 16 TO INTERRUPT ORACLE'S ACQUIRED MAINTENANCE INCOME STREAM MAKING
 17 IT DIFFICULT FOR THEM TO INVEST IN THE DEVELOPMENT OF THEIR
 18 FUSION PLATFORM?
 19 **A. I UNDERSTAND THAT THIS IS WHAT THIS MARKETING MEMO SAYS,**
 20 **YES.**
 21 Q. AND YOU ARE NOT AWARE OF ANYONE TAKING ISSUE WITH THAT IN
 22 WRITING, ARE YOU, SIR?
 23 **A. I AM NOT.**
 24 Q. AND ALTHOUGH IT MAY HAVE JUST BEEN BECAUSE YOU WERE BEING
 25 A GOOD SOLDIER, YOU TOLD PEOPLE TO LAUNCH A MASSIVE TOMORROWNOW
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MCDERMOTT - RE-CROSS / MR. BOIES

1 HAVE TO MAKE DECISIONS ABOUT WHERE TO APPLY THE COMPANY'S
 2 RESOURCES TO HELP SELL MORE SOFTWARE?
 3 **A. YES.**
 4 Q. AS YOU UNDERSTOOD THE BUSINESS ENVIRONMENT AND THE
 5 OPPORTUNITY PRESENTED BY TOMORROWNOW, WOULD IT HAVE MADE SENSE
 6 TO PAY MORE THAN A BILLION DOLLARS FOR THE CHANCE TO RUN
 7 TOMORROWNOW?
 8 **A. NO.**
 9 Q. WHY NOT?
 10 **A. TOMORROWNOW WAS NOT A KEY CONTRIBUTOR TO MY GOAL. AND MY**
 11 **GOAL AND SAP'S GOAL WAS TO SELL MORE SOFTWARE.**
 12 MR. LANIER: THANK YOU, SIR.
 13 NO MORE QUESTIONS, YOUR HONOR.
 14 THE COURT: ANYTHING ELSE, MR. BOIES?
 15 MR. BOIES: JUST BRIEFLY.
 16 RE-CROSS-EXAMINATION
 17 BY MR. BOIES:
 18 Q. YOU UNDERSTAND THAT THE ISSUE IN THIS CASE IS DAMAGES AND
 19 ONE OF THE ISSUES THERE IS WHAT THE FAIR MARKET VALUE OF A
 20 LICENSE WOULD BE THAT WOULD HAVE PERMITTED SAP AND TOMORROWNOW
 21 TO DO LEGALLY WHAT THEY DID, CORRECT?
 22 **A. YES.**
 23 Q. HOW MUCH WOULD SAP ASK FOR A LICENSE TO LICENSE ORACLE TO
 24 USE YOUR OWN SOFTWARE TO COMPETE FOR MAINTENANCE OF YOUR
 25 CUSTOMERS?
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MCDERMOTT - REDIRECT / MR. LANIER

1 CAMPAIGN. FAIR?
 2 **A. YES.**
 3 Q. AND YOU SAID THAT YOU WERE EXCITED TO EXECUTE THE PLAN,
 4 RIGHT?
 5 **A. OF COURSE.**
 6 Q. MR. APOTHEKER CONGRATULATED YOU ON HAVING AN EXCELLENT
 7 PLAN TO IMPLEMENT TOMORROWNOW, CORRECT?
 8 **A. I ASSUME THAT HE DID.**
 9 Q. AND YOU BELIEVED THAT THERE WERE -- WAS A LOT AT STAKE IN
 10 THIS PROGRAM, CORRECT?
 11 **A. YES.**
 12 Q. BOTH FOR ORACLE AND FOR SAP, CORRECT?
 13 **A. IN THE BATTLE FOR THE SOFTWARE, YES.**
 14 Q. YES.
 15 MR. BOIES: YOUR HONOR, I HAVE NO MORE QUESTIONS.
 16 THE COURT: ANY REDIRECT?
 17 MR. LANIER: THANK YOU, YOUR HONOR.
 18 THE COURT: ALL RIGHT.
 19 REDIRECT EXAMINATION
 20 BY MR. LANIER:
 21 Q. VERY BRIEFLY, MR. MCDERMOTT.
 22 COUNSEL ASKED YOU ABOUT GOALS, HOPES, STRATEGIES
 23 AROUND TOMORROWNOW, JUST THAT'S THE TOPIC.
 24 **A. SURE.**
 25 Q. IN YOUR JOB BACK AT THE TIME 2004, 2005, DID YOU SOMETIMES
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MCDERMOTT - RE-CROSS / MR. BOIES

1 **A. FIRST OF ALL, I, YOU KNOW, THINK THAT REQUIRES A LOT OF**
 2 **THOUGHT. IT IS AN INTERESTING QUESTION. BUT CERTAINLY IT**
 3 **WOULD BE BASED UPON OUR MUTUAL SUCCESS IN THE MARKETPLACE.**
 4 **FOR EXAMPLE, TODAY WE ACTUALLY RESELL ORACLE'S**
 5 **DATABASE. AND WE DO THAT ON A RUNNING BASIS. SO AS WE ACHIEVE**
 6 **SUCCESS, BOTH PARTIES WIN AND MAKE MONEY. SO THAT'S THE ONLY**
 7 **KIND OF CONSTRUCT I HAVE SEEN IN THIS INDUSTRY WORK.**
 8 Q. SIR, ACTUALLY, THERE ARE SOME OTHER CONSTRUCTS IN THE
 9 INDUSTRY THAT YOU ARE FAMILIAR WITH INCLUDING, FOR EXAMPLE, THE
 10 WAY THAT YOU PAY FOR LICENSES FOR SUN'S JAVA, CORRECT?
 11 **A. I KNOW THAT WE HAVE SOME KIND OF ARRANGEMENT. I DON'T**
 12 **KNOW SPECIFICALLY WHAT IT IS.**
 13 Q. YOU KNOW THAT IS NOT BASED ON USAGE, CORRECT?
 14 **A. IT'S BASED ON A LICENSE, YES.**
 15 Q. IT IS BASED ON A LICENSE BUT IT IS A LUMP SUM PER YEAR,
 16 CORRECT?
 17 **A. IT WOULD BE AT A MUCH SMALLER FACTOR.**
 18 Q. LUMP SUM PER YEAR, CORRECT?
 19 **A. YES, I THINK IT IS.**
 20 Q. AND THE DATABASE LICENSE THAT YOU REFER TO IS SOMETHING
 21 THAT DOES NOT INVOLVE YOU TRYING TO USE THAT SOFTWARE TO TAKE
 22 AWAY ORACLE'S CUSTOMERS, CORRECT, SIR?
 23 **A. OF COURSE NOT.**
 24 Q. OKAY.
 25 NOW, YOU SEE A DISTINCTION BETWEEN A WIN-WIN
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1501

MCDERMOTT - RECROSS / MR. BOIES

1 SITUATION LIKE THE DATABASE SITUATION AND -- WHERE YOU'RE
 2 ACTUALLY TRYING TO TAKE AWAY ORACLE'S CUSTOMERS WITH ITS OWN
 3 SOFTWARE, CORRECT?
 4 **A. YES.**
 5 Q. NOW, FOCUSING ON THE SITUATION WHERE YOU'RE ACTUALLY USING
 6 A COMPETITOR'S SOFTWARE TO TRY TO TAKE AWAY THEIR CUSTOMERS, DO
 7 YOU HAVE ANY LICENSES LIKE THAT?
 8 **A. I DON'T.**
 9 Q. OKAY.
 10 **A. NOT THAT I AM AWARE OF ANYWAY.**
 11 Q. IF YOU WERE GOING TO LICENSE ORACLE TO USE YOUR SOFTWARE
 12 TO TRY TO TAKE AWAY YOUR CUSTOMERS, YOU WOULD CHARGE A LOT OF
 13 MONEY FOR THAT, WOULDN'T YOU, SIR?
 14 **A. I WOULD ASSUME WE'D HAVE SOME KIND OF RUNNING ROYALTY, BUT**
 15 **IT WOULD BE AN ODD ARRANGEMENT.**
 16 Q. IT WOULD BE A VERY ODD ARRANGEMENT.
 17 AND YOU WOULD REQUIRE A LOT OF MONEY, WOULDN'T YOU,
 18 SIR?
 19 **A. WE WOULD HAVE TO HAVE AN UNDERSTANDING THAT MADE SENSE AND**
 20 **IT WOULD HAVE TO GET A LOT MORE CUSTOMERS THAN TOMORROWNOW EVER**
 21 **DID, THAT'S FOR SURE.**
 22 Q. LET ME ASK YOU MAYBE ONE QUESTION THAT WILL END THIS.
 23 ARE YOU FAMILIAR WITH THE EXPERT WITNESS THAT YOUR
 24 COMPANY HAS HIRED IN THIS CASE?
 25 **A. I AM NOT.**
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1503

MCDERMOTT - FURTHER REDIRECT / MR. LANIER

1 MR. BOIES: OKAY. THANK YOU.
 2 THE WITNESS: THANK YOU.
 3 THE COURT: ANYTHING ELSE?
 4 MR. LANIER: TWO QUESTIONS.
 5 FURTHER REDIRECT EXAMINATION
 6 BY MR. LANIER:
 7 Q. THERE WERE SOME QUESTIONS ABOUT THIS RESELL ARRANGEMENT
 8 WITH ORACLE. THAT'S THE TOPIC.
 9 WHAT'S THE PURPOSE OF SAP RESELLING ORACLE DATABASE
 10 TO VARIOUS CUSTOMERS?
 11 **A. BASICALLY TO HAVE AN ACCOUNT RELATIONSHIP WITH THE**
 12 **CUSTOMER WHERE THEY PREFER TO DEAL WITH SAP EVEN THOUGH THEY**
 13 **TAKE ADVANTAGE OF GOOD DATABASE TECHNOLOGY FROM ORACLE.**
 14 Q. WHY WOULD YOU DO THAT?
 15 **A. WE WOULD DO THAT BECAUSE IT'S IN THE CUSTOMER'S INTEREST.**
 16 **AND IF THE CUSTOMER WANTS ORACLE'S DATABASE, WE PROVIDE CHOICE.**
 17 **AND THEIR DATABASE IS A GOOD DATABASE AND IT WORKS WELL WITH**
 18 **OUR APPLICATIONS. WHY NOT.**
 19 Q. ARE YOU TRYING TO SELL YOUR APPLICATIONS IN THAT
 20 RELATIONSHIP?
 21 **A. ABSOLUTELY.**
 22 Q. ARE YOU IN THAT RELATIONSHIP EVEN THOUGH YOU MAY BE
 23 RESELLING THE DATABASE SOFTWARE, ARE YOU COMPETING WITH ORACLE
 24 AND OTHERS FOR THE APPLICATION SALE?
 25 **A. ABSOLUTELY. IN FACT, HAVING THE RESELL ARRANGEMENT ON THE**
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1502

MCDERMOTT - RECROSS / MR. BOIES

1 Q. YOU DON'T KNOW WHAT KIND OF LICENSE HE HAS SAID IS THE
 2 KIND OF LICENSE HE THINKS OUGHT TO HAVE BEEN ESTABLISHED?
 3 **A. I HAVE SPENT NO TIME WITH HIM.**
 4 Q. AND I GUESS IT WOULD BE ASKING YOU TO BUY A PIG IN A POKE,
 5 BUT WOULD YOU BE PREPARED TO GIVE ORACLE THOSE TERMS?
 6 **A. WHICH TERMS?**
 7 Q. THE TERMS THAT YOUR EXPERT IN THIS CASE SAYS THAT ORACLE
 8 SHOULD ACCEPT FROM SAP?
 9 **A. I WOULD BE PREPARED TO ACCEPT HIS TERMS, SURE.**
 10 Q. WE WILL GET SOMETHING WRITTEN UP, SIR.
 11 **A. EXCUSE ME, THAT SAP'S EXPERT SAID ORACLE SHOULD ACCEPT IN**
 12 **THIS CASE; IS THAT WHAT THE QUESTION WAS?**
 13 Q. YES. NOW WILL YOU NOW GIVE ORACLE THOSE SAME TERMS?
 14 **A. OH, I MISUNDERSTOOD YOUR QUESTION, MR. BOIES. I AM SORRY.**
 15 Q. OKAY.
 16 **A. I DID NOT UNDERSTAND WHAT YOU WERE ASKING ME.**
 17 Q. RIGHT.
 18 **A. I WOULD SIMPLY SAY THAT THE SAP EXPERT LOOKED AT THE**
 19 **NUMBER OF CUSTOMERS THAT CAUSED -- THAT TOMORROWNOW POTENTIALLY**
 20 **COULD HAVE CAUSED ORACLE TO SWITCH, AND SAP'S PREPARED TO**
 21 **REMEDY THAT SITUATION AND COME TO RESOLUTION. THAT'S MY**
 22 **UNDERSTANDING.**
 23 Q. SO YOU DON'T KNOW ANYTHING ABOUT YOUR EXPERT COMING UP
 24 WITH A FAIR VALUE -- FAIR MARKET VALUE LICENSE?
 25 **A. I HAVE NO AWARENESS FOR THAT.**
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1504

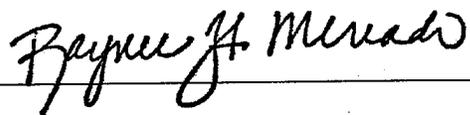
MCDERMOTT - FURTHER REDIRECT / MR. LANIER

1 **DATABASE IN A CERTAIN SENSE NOT ONLY HELPS THE CUSTOMERS, BUT**
 2 **IT HELPS US IN THE ACCOUNT RELATIONSHIP PLAN AND, THEREFORE,**
 3 **YOU ARE IN A BETTER POSITION TO UPSELL OR CROSS-SELL THE**
 4 **LICENSES.**
 5 MR. LANIER: THANK YOU, SIR.
 6 NO MORE, YOUR HONOR.
 7 MR. BOIES: NOTHING FURTHER, YOUR HONOR.
 8 THE COURT: OKAY. THANK YOU.
 9 THE WITNESS: THANK YOU, YOUR HONOR.
 10 THE COURT: PLEASE STEP DOWN.
 11 NEXT WITNESS, MR. LANIER.
 12 MR. LANIER: YOUR HONOR, MS. LEE IS GOING TO
 13 INTRODUCE OUR NEXT WITNESS AND IT WILL APPEAR ON THE SCREEN.
 14 MS. LEE: GOOD MORNING, YOUR HONOR.
 15 JACQUELINE LEE FOR THE DEFENDANTS.
 16 THE DEFENDANTS CALL THEIR NEXT WITNESS DOUGLAS
 17 KEHRING, WHO IS AN EMPLOYEE FOR ORACLE. AT THE TIME OF HIS
 18 DEPOSITION, HE WAS A STRATEGIC ADVISER IN THE CORPORATE
 19 DEVELOPMENT GROUP WORKING DIRECTLY FOR SAFRA CATZ.
 20 DURING THIS VIDEO, THE FOLLOWING EXHIBITS WILL BE
 21 DISPLAYED THAT HAVE PREVIOUSLY BEEN ADMITTED INTO EVIDENCE.
 22 THAT'S A229. AND DURING THE VIDEO, THE FOLLOWING ARE BEING
 23 DISPLAYED FOR THE FIRST TIME AND ARE STIPULATED AS ADMITTED BY
 24 AGREEMENT OF THE PARTIES. THAT'S A230 AND A596.
 25 AND THE RUNNING TIME OF THE VIDEO IS ABOUT EIGHT
 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 15, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

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



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



DIANE E. SKILLMAN, CSR, RPR, FCRR

TUESDAY, NOVEMBER 16, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL.	)	JURY TRIAL
)	
PLAINTIFFS,	)	NO. C 07-01658 PJH
)	
VS.	)	VOLUME 9
)	
SAP AG, ET AL.,)	PAGES 1512 - 1695
)	
DEFENDANTS.)	OAKLAND, CALIFORNIA
)	TUESDAY, NOVEMBER 16, 2010

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TRANSCRIPT OF PROCEEDINGS

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CLARKE - DIRECT / MITTELSTAEDT

1 WHICH WAS THE -- THE SAP COMPONENT OF THAT IS BASED UPON FOUR
2 CUSTOMERS, SO NOT 86, JUST FOUR.

3 Q. OKAY. AGAIN, IN THE OPENING STATEMENT I THINK I SAID "TWO
4 CUSTOMERS." WHY THE DIFFERENCE?

5 A. WE WORK SO HARD TO DO THIS ANALYSIS, BUT IN THE -- THE
6 RUN-UP TO THE TRIAL, YOU CAN IMAGINE THAT THE INTENSITY OF WORK
7 GETS EVEN GREATER. AND I'VE BEEN OVER ALL OF THESE CUSTOMERS
8 AGAIN TO SEE WHETHER I FELT GOOD ABOUT BRINGING WHAT I HAD
9 LEARNED TO YOU.

10 AND IN DOING THAT, I FOUND TWO CUSTOMERS THAT I
11 DIDN'T THINK REALLY SHOULD BE EXCLUDED FROM THE DAMAGES. SO
12 WHEN MR. MITTELSTAEDT SAID, IT'S "TWO CUSTOMERS," BACK THEN, IT
13 STILL WAS TWO CUSTOMERS. BUT SINCE THEN, I'VE -- I'VE PUT THESE
14 TWO OTHERS IN. SO IT'S NOW FOUR CUSTOMERS THAT WE ARE
15 CALCULATING THE DAMAGES ON.

16 Q. AND THAT INCREASED THE AMOUNT OF COMPENSATION OWED TO
17 ORACLE?

18 A. IT DOES.

19 Q. NOW, WE'RE GOING TO GET INTO THIS IN MORE DETAIL, BUT IN A
20 NUTSHELL, CAN YOU TELL US HOW YOU THINK MR. MEYER WENT WRONG IN
21 THE HYPOTHETICAL NEGOTIATION REASONABLE ROYALTY CALCULATION THAT
22 HE DID?

23 A. WELL, I BELIEVE HE WENT WRONG IN MANY AREAS. BUT THE --
24 THEY FALL INTO MAJOR CATEGORIES. THE FIRST IS THAT I THINK THE
25 DOCUMENTS HE RELIED UPON TO CALCULATE HIS NUMBER DON'T SAY WHAT
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CLARKE - DIRECT / MITTELSTAEDT

1 SO THAT'S THE FIRST DIFFERENCE BETWEEN WHAT HAPPENS
2 IN THE HYPOTHETICAL NEGOTIATION AND WHAT HAPPENS IN REAL LIFE.
3 IN REAL LIFE, THESE PARTIES WOULD NEVER -- HAVE AGREED. BUT IN
4 THE HYPOTHETICAL NEGOTIATION, THEY HAVE TO AGREE.
5 AND THE WAY WE DO THAT IS I GATHER UP ALL OF THE
6 INFORMATION AND, IN EFFECT, HAVE THIS ROLE OF SOLOMON OF
7 BALANCING THESE -- THESE PIECES OF INFORMATION TO TRY AND
8 DETERMINE WHAT WOULD BE REASONABLE FOR THESE TWO PARTIES IN THAT
9 NEGOTIATION. WHAT WOULD THEY COME TO IF THEY WERE FORCED TO
10 AGREE. AND SO THAT'S THE FIRST THING THAT HAPPENS IN THE
11 HYPOTHETICAL NEGOTIATION.

12 THE NEXT THING THAT HAPPENS IS THAT WE HAVE TO TAKE
13 THE PERSONALITIES OUT OF THIS. SO THERE'S NO ANGER ALLOWED,
14 THERE'S NO PUNISHMENT ALLOWED. THE PARTIES JUST HAVE TO DO AN
15 APPROPRIATE BUSINESS DEAL. AND AGAIN, THAT'S MY ROLE, IS TO
16 TAKE THE PERSONALITIES OFF THE TABLE.

17 I'M SURE YOU'VE -- YOU'VE SEEN PEOPLE COME AND SIT IN
18 THE CHAIR AND TELL YOU THAT, YOU KNOW, THEY WERE DISAPPOINTED OR
19 ANGRY OR WHATEVER. THAT DOESN'T PLAY ANY ROLE IN THE
20 HYPOTHETICAL NEGOTIATION.

21 Q. IN THIS HYPOTHETICAL NEGOTIATION, WHY DON'T YOU JUST ASK THE
22 ONE SIDE HOW MUCH THEY WANT TO PAY AND THE OTHER SIDE HOW MUCH
23 THEY'RE DEMANDING?

24 A. BECAUSE YOU WOULDN'T GET VERY GOOD ANSWERS TO THOSE
25 QUESTIONS. YOU -- YOU CANNOT RELY ON THE PARTIES WHO MIGHT WELL
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CLARKE - DIRECT / MITTELSTAEDT

1 HE THINKS THEY SAY AND CERTAINLY DON'T SAY WHAT HE TOLD YOU THEY
2 SAY.

3 SO IT'S -- THE INFORMATION HE USED IS THE -- IS A
4 CRITICAL PIECE OF THE DIFFERENCE. AND THEN HE ALSO FOCUSED
5 SOLELY ON A LUMP-SUM ROYALTY. AND, YOU KNOW, HE -- HE SAID THIS
6 NUMBER HAS TO BE LARGE TO COMPENSATE ORACLE BECAUSE THEY JUST
7 BOUGHT PEOPLESOFT. AND THAT LUMP-SUM IDEA, THE -- THE
8 APPLICATION OF THAT LUMP-SUM APPROACH TO THE REASONABLE ROYALTY,
9 I THINK, LED HIM TO COME TO A FAULTY CONCLUSION.

10 AND WE'LL GO INTO THE DIFFERENCES BETWEEN HE AND I AS
11 WE CONTINUE.

12 Q. OKAY. I WANT TO BREAK THIS EXAMINATION INTO THREE -- THREE
13 PARTS. WE'LL FIRST TALK ABOUT THE HYPOTHETICAL NEGOTIATION.
14 AND THEN WE'LL TALK ABOUT THE LOST-SUPPORT PROFITS AND, AND THEN
15 WE'LL FINISH UP ON THE INFRINGER'S PROFITS.

16 SO LET'S START WITH HYPOTHETICAL NEGOTIATION, AND
17 LET'S TAKE A STEP BACK. WOULD YOU EXPLAIN TO US YOUR VIEW OF
18 HOW A HYPOTHETICAL NEGOTIATION IS SUPPOSED TO WORK. WHAT'S THE
19 CONCEPT?

20 A. THE IDEA IS THAT WE GET THE PLAINTIFF AND THE DEFENDANT IN
21 ROOM AND FORCE THEM TO COME TO AN AGREEMENT. WE STARVE THEM TO
22 DEATH, WE DON'T LET THEM OUT OF THE ROOM UNTIL THEY AGREE. AND
23 OF COURSE, AS YOU MIGHT IMAGINE, THE ACTUAL PLAINTIFF AND THE
24 ACTUAL DEFENDANT, IF THEY WERE THE REAL PEOPLE GOING INTO THAT
25 ROOM IN THIS CASE, THEY WOULD NEVER HAVE MADE AN AGREEMENT.

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1 BE ANGRY OR DISAPPOINTED TO GIVE YOU A FAIR ESTIMATE FROM THEIR
2 POINT OF VIEW. AND I CAN TELL YOU THAT IN MANY, MANY OF THESE
3 CASES, THE PLAINTIFF SAYS, "WELL, WE WANT A LOT OF MONEY. WE
4 WOULD NEVER HAVE SETTLED FOR THE HYPOTHETICAL REASONABLE
5 ROYALTY."

6 SO THE ROYALTY I COME UP WITH, THE PLAINTIFF SAYS,
7 "WELL THAT'S NOT ENOUGH." ON THE OTHER HAND, THE DEFENDANTS
8 ALWAYS SAY, "THAT'S WAY TOO MUCH." AND, OF COURSE, THAT'S GOING
9 TO BE THEIR POSITION. THOSE -- THOSE VIEWS DON'T GET TO RULE IN
10 THE HYPOTHETICAL NEGOTIATION. I GET TO DO THAT. I THINK I DO A
11 GOOD JOB OF BALANCING ALL OF THOSE IMPORTANT ELEMENTS. I COME
12 TO YOU AND DESCRIBE THOSE THINGS TO YOU, AND IF YOU THINK I DID
13 IT CORRECTLY, THEN THAT'S WHAT -- YOU MAKE YOUR DECISION
14 ACCORDINGLY.

15 Q. WHETHER YOU SAY PUNISHMENT DOESN'T PLAY ANY ROLE IN THIS,
16 WHY NOT?

17 IF -- IF THE DEFENDANT HAS INFRINGED THE PLAINTIFF'S
18 COPYRIGHT, WHY DOESN'T PUNISHMENT PLAY SOME ROLE?

19 A. THAT'S A -- THAT'S ACTUALLY THE THIRD PIECE OF THE
20 HYPOTHETICAL NEGOTIATION WHICH I DIDN'T GET TO. IN THE -- THE
21 TIMING OF THE HYPOTHETICAL NEGOTIATION, WE'RE LOOKING AT A
22 PERIOD RIGHT BEFORE THE INFRINGEMENT BEGINS. SO IN THAT
23 NEGOTIATION, THERE IS NO INFRINGEMENT. THERE'S NO PUNISHMENT,
24 THERE'S NO ANGER. THIS IS TWO BUSINESS PEOPLE TRYING TO REACH A
25 DEAL.

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1 **TOMORROWNOW COMPONENT THAT WAS UNTESTED. THEY HAD, AT THE TIME**
 2 **OF THE TRANSACTION, 52 CUSTOMERS. SO THEY WERE NOT VERY**
 3 **SUCCESSFUL. THEY ONLY HAD 52 CUSTOMERS. IN ALL TIME. THEY**
 4 **DIDN'T STILL HAVE 52 AT THAT MOMENT. SO THEY WERE -- THEY WERE**
 5 **TESTED BUT NOT VERY SUCCESSFUL.**
 6 **THE CHANGER WAS WHEN SAP BOUGHT THEM. AND, OF**
 7 **COURSE, THAT WAS A COMPLETELY NEW APPROACH TO THIS BUSINESS. NO**
 8 **ONE HAD EVER DONE THAT BEFORE, AND MR. ELLISON EVEN CALLED IT A**
 9 **BRILLIANT STRATEGIC MOVE, OR SOMETHING LIKE THAT.**
 10 **SO WITH A BRAND-NEW THING LIKE THAT, NEITHER SIDE,**
 11 **NOT ORACLE, NOT SAP WOULD WANT A LUMP SUM. THE RISK WOULD BE**
 12 **WAY TOO HIGH FOR BOTH OF THEM. YOU WOULD DO A RUNNING ROYALTY.**
 13 Q. OKAY. NOW, WITH THE RUNNING ROYALTY, YOU NEED TO FIGURE OUT
 14 WHAT THE ROYALTY RATE IS GOING TO BE AND WHAT THE BASE IS GOING
 15 TO BE, RIGHT?
 16 A. CORRECT.
 17 Q. AND HOW DID YOU GO ABOUT DETERMINING WHAT THE ROYALTY RATE
 18 WOULD BE, THE RATE?
 19 A. THE WAY I DID THIS RATE WAS DIFFERENT FOR TOMORROWNOW AND
 20 SAP. BUT IN BOTH CASES, I SET THE RATE AS HIGH AS I POSSIBLY
 21 COULD AND STILL BE ABLE TO SAY IT WAS REASONABLE.
 22 MY RATIONALE FOR DOING THAT WAS THESE TWO COMPANIES
 23 ARE LOCKED IN MORTAL COMBAT. THEY WANT TO FIGHT TO THE DEATH.
 24 AND THAT MEANS -- THAT WOULD -- THAT WOULD MEAN A VERY HIGH
 25 LICENSE RATE. AND I CALCULATED -- THE HIGHEST RATE I'VE EVER
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1 Q. FOR TOMORROWNOW?
 2 A. -- THAT'S CORRECT, YES.
 3 Q. AND WHY IS THAT?
 4 A. WITH TOMORROWNOW, THEY SET THEIR PRICING AT HALF OF ORACLE'S
 5 PRICE. SO IF ORACLE HAD \$100,000 CUSTOMER FOR MAINTENANCE,
 6 TOMORROWNOW'S PRICE WAS ABOUT 50,000. IT WASN'T A HARD-AND-FAST
 7 RULE, BUT IT WAS ABOUT HALF OF THAT. SO 50,000.
 8 THE -- THE -- THEY NEVER REALLY MADE ANY MONEY. THEY
 9 LOST A LOT OF MONEY OVER THE YEARS. SO EVEN PUTTING ANY ROYALTY
 10 IN THERE WOULD JUST MEAN THEY LOST MORE MONEY. AND, YOU KNOW,
 11 I -- I THINK THAT'S OKAY. THERE'S NOTHING UNDER THE LAW THAT
 12 SAYS THEY HAVE TO MAKE MONEY, BUT STILL THE ROYALTY HAS TO BE
 13 REASONABLE.
 14 SO IF YOU LOOK AT THE HUNDRED THOUSAND THAT ORACLE
 15 WOULD HAVE CHARGED AND THE \$50,000 THAT TOMORROWNOW CHARGED, I
 16 SAID WE'LL TAKE THE HALFWAY POINT ON THERE, WHICH WILL BE
 17 25 PERCENT OF ORACLE'S PRICE. AND THAT WILL BE 50 PERCENT OF
 18 TOMORROWNOW'S PRICE. SO THAT'S HOW I DID IT.
 19 Q. OKAY. WE'VE HEARD ABOUT THE GEORGIA PACIFIC FACTORS.
 20 MR. MEYER MENTIONED THOSE. I THINK HE HAD A SLIDE ON THEM AS
 21 WELL.
 22 DID YOU CONSIDER THE GEORGIA PACIFIC FACTORS IN
 23 REACHING YOUR OPINION?
 24 A. I DID.
 25 Q. OKAY. WE HAVE A SLIDE ON THOSE FACTORS, AND I THINK IT WILL
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1 **CALCULATED IN ANY CASE IS IN THIS CASE, SO THAT WAS MY**
 2 **RATIONALE.**
 3 **I USED AN ANALYSIS OF MANY FACTORS TO COME UP WITH**
 4 **THAT. BUT AT THE END OF THE DAY, TAKING ALL OF THOSE FACTORS**
 5 **INTO ACCOUNT, I SET THE RATE AS HIGH AS I POSSIBLY COULD AND**
 6 **STILL BE ABLE TO SAY IT WAS REASONABLE.**
 7 Q. AND WHAT RATE DID YOU DETERMINE?
 8 A. FOR TOMORROWNOW, I SET THE ROYALTY AT 50 PERCENT OF THEIR
 9 REVENUES. SO IF THEY HAD A \$50,000 CUSTOMER, THEY WOULD PAY
 10 25,000 OF THAT AND PAY IT TO -- PAY IT TO ORACLE. THAT IS
 11 ASTRONOMICALLY HIGH ROYALTY RATE. AND I -- I'M PREPARED TO BET
 12 ANYTHING THAT NO ONE COULD COME INTO THIS COURTROOM AND PROVE
 13 THAT THERE WAS SOME HIGHER RATE. THAT IS VERY HIGH.
 14 ON THE SAP SIDE, WHAT I DID THERE WAS I SAID, SAP'S
 15 DOING A LOT OF WORK. THEY HAVE THIS OTHER PROGRAM. THERE'S A
 16 HIGH PROBABILITY THEY WOULD GET THE SALES ANYWAY. BUT I'M GOING
 17 TO REFLECT THAT IN A RATE THAT'S STILL 50/50, STILL SHARING THE
 18 SPOILS BETWEEN THE TWO PARTIES. BUT THIS TIME, I WOULD NOT BASE
 19 IT ON SAP'S REVENUES, I'D BASE IT ON THEIR PROFITS. SO I
 20 CALCULATED THE PROFITS SAP MADE, AND I TOOK HALF OF THAT AND
 21 CALLED THAT A -- A REASONABLE ROYALTY FOR -- FOR THEM TO PAY TO
 22 ORACLE.
 23 Q. LET ME GO BACK A STEP TO -- TO TOMORROWNOW. YOU SAID
 24 50 PERCENT OF REVENUE INSTEAD OF 50 PERCENT OF PROFIT.
 25 A. ON TOMORROWNOW --
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1 HELP US JUST WALK THROUGH THEM.
 2 SLIDE 3, PLEASE.
 3 (DEMONSTRATIVE PUBLISHED TO THE JURY.)
 4 BY MR. MITTELSTAEDT:
 5 Q. OKAY. LET'S NOT GO OVER ALL 15, BUT GROUP THEM TOGETHER.
 6 AND I'D LIKE TO ASK YOU TO START WITH NO. 1, NO. 2, NO. 4, AND
 7 NO. 12, WHICH HAVE TO DO WITH NORMAL ROYALTIES RECEIVED AND PAID
 8 BY THESE PARTIES AND THEIR NORMAL POLICIES AND PROFITSHARING.
 9 HOW DID YOU -- WHAT IS THAT -- WHAT DO THOSE FACTORS
 10 MEAN, AND HOW DID YOU APPLY THEM?
 11 A. THE -- THE IDEAL THING THAT WE ARE LOOKING FOR WHEN WE'RE
 12 DOING THIS ANALYSIS IS AN ESTABLISHED ROYALTY. IF YOU CAN GO
 13 OUT INTO THE MARKETPLACE AND FIND AN ESTABLISHED ROYALTY, THEN
 14 YOU JUST USED THAT.
 15 I DIDN'T FIND THAT IN THIS CASE AS IT HAPPENS, BUT
 16 THESE FACTORS THAT WE'RE LOOKING AT HERE ALL HAVE TO DO WITH, IS
 17 THERE AN ESTABLISHED ROYALTY IN THE MARKETPLACE. DO THE
 18 COMPANIES HAVE AN ESTABLISHED WAY OF CHARGING FOR THIS TIME TYPE
 19 OF SERVICE? SO THAT'S WHAT THOSE FACTORS ARE RELATED TO.
 20 Q. DID YOU LOOK AT THE RESELLER AGREEMENT FOR ORACLE'S
 21 DATABASE, THE RESELLER AGREEMENT WHERE SAP LICENSES ORACLE'S
 22 DATABASE FOR USE IN SELLING ALONG WITH SAP'S APPLICATIONS?
 23 A. I DID.
 24 Q. AND COULD YOU DESCRIBE TO US YOUR UNDERSTANDING OF HOW THAT
 25 WORKS AND WHETHER THAT -- WHAT SIGNIFICANCE THAT HAS HERE, IF
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1 ANY?

2 **A. WELL, I DON'T -- IT'S A VERY SIGNIFICANT DOCUMENT. I DON'T**

3 **THINK IT PROVES A PARTICULAR NUMBER, BUT IT DOES PROVE AN IDEA.**

4 **AND ORACLE AND SAP ARE ARCH COMPETITORS IN THE MARKETPLACE.**

5 **BUT SAP'S PRODUCT FOR MANY COMPANIES, FOR MANY OF**

6 **SAP'S CUSTOMERS, THEY RUN IT ON AN ORACLE DATABASE. SO**

7 **ORACLE -- I BELIEVE SAP'S ORACLE'S BIGGEST CUSTOMER, WHICH IS**

8 **REALLY KIND OF INTERESTING. BUT ORACLE CHARGES SAP A LICENSE**

9 **FEE FOR SELLING THAT SOFTWARE. AND IT'S A RUNNING ROYALTY. SO**

10 **WE'VE GOT ALMOST IDENTICAL SITUATIONS TO WHAT WE HAVE IN THIS**

11 **CASE. WE HAVE A -- AN AGREEMENT BETWEEN TWO RIVALS AND A**

12 **RUNNING ROYALTY.**

13 **AND I -- I THINK THAT IS -- IT'S THE CLOSEST THING**

14 **WE'VE GOT TO HAVING SOME INDICATION THAT A RUNNING ROYALTY**

15 **BETWEEN THESE PARTICULAR PARTIES WOULD HAVE BEEN THE WAY THEY**

16 **WOULD GO. THEY WOULD FIND THAT AN ACCEPTABLE WAY TO GO.**

17 Q. FACTOR 5 IS RELATIONSHIPS. TELL US WHAT THAT IS AND WHAT

18 EFFECT THAT HAS HERE.

19 **A. I HINTED AT THIS A LITTLE EARLIER. THE RELATIONSHIP BETWEEN**

20 **THESE -- THESE PARTIES IS MORTAL ENEMIES, SO I -- I USE THAT TO**

21 **INCREASE THE ROYALTY RATE. I WANTED TO REFLECT A VERY HIGH RATE**

22 **BECAUSE OF THAT RELATIONSHIP.**

23 Q. FACTORS 6 IS RELATED SALES. WHAT DOES THAT MEAN AND, AND

24 HOW DID THAT WORK HERE?

25 **A. RELATED SALES ARE SOMETIMES CALLED CONVOYED SALES WHERE YOU**

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1 DID YOU EVALUATE THAT?

2 **A. I DID.**

3 Q. AND WE HAVE A SLIDE ON THAT, WHICH IS SLIDE 4, PLEASE.

4 (DEMONSTRATIVE PUBLISHED TO THE JURY.)

5 BY MR. MITTELSTAEDT:

6 Q. THIS SLIDE NEEDS SOME EXPLANATION, SO IF YOU WOULD WALK US

7 THROUGH IT, PLEASE.

8 **A. THIS IS ONE UGLY SLIDE, BUT --**

9 MR. BOIES: YOUR HONOR, WE HAVE AN OBJECTION TO THE

10 SLIDE, AND WE OUGHT TO TAKE IT DOWN.

11 BEYOND THE WITNESS'S EXPERTISE. THIS DOES NOT RELATE

12 TO THE AREAS IN WHICH HE'S QUALIFIED AS AN EXPERT.

13 THE COURT: RESPONSE?

14 MR. MITTELSTAEDT: THIS GOES TO THE HYPOTHETICAL

15 LICENSE. IT'S ONE OF THE GEORGIA PACIFIC FACTORS, AND THIS

16 INFORMATION HAS BEEN COMPILED BY THE WITNESS FROM THE TYPE OF

17 MATERIALS EXPERTS RELY ON. IT'S A DEMONSTRATIVE AS WELL.

18 MR. BOIES: IT DOES GO TO THE GEORGIA PACIFIC

19 FACTORS. BUT THE WAY HE COMPILED IT WAS BY ASSESSING THESE

20 THIRD-PARTY PROVIDERS, AND THAT IS BEYOND HIS EXPERTISE. ALL HE

21 IS DOING IS WHAT THE LAW PRECLUDES HIM FROM DOING, WHICH IS

22 SUMMARIZING A VARIETY OF INFORMATION THAT'S BEYOND HIS

23 EXPERTISE, AND IT'S HEARSAY.

24 THE COURT: I'M GOING TO ALLOW IT. OVERRULED.

25 (DEMONSTRATIVE PUBLISHED TO THE JURY.)

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1 **SELL ONE PRODUCT AND BECAUSE YOU'VE SOLD THAT, YOU SELL ANOTHER**

2 **PRODUCT. AND SELLING A PIECE OF SOFTWARE, SUCH AS AT ISSUE IN**

3 **THIS CASE, HAS A RELATED SALE TO IT. IF YOU SELL THE SOFTWARE,**

4 **YOU USUALLY GET THE SUPPORT AND MAINTENANCE AGREEMENT TO GO**

5 **ALONG WITH IT, SO THE MAINTENANCE AGREEMENT IS -- IS A RELATED**

6 **SALE.**

7 Q. NOW, AS YOU LOOKED AT THIS AND ANALYZED IT, WERE THERE ANY

8 INDIRECT BENEFITS TO SAP FROM THIS LICENSE?

9 **A. THERE WERE SOME BENEFITS, AT LEAST THEY THOUGHT THERE WERE**

10 **GOING TO BE SOME. I'M NOT SURE THERE WERE ACTUALLY ANY AS A**

11 **MATTER OF FACT. BUT THEY THOUGHT THERE WERE GOING TO BE**

12 **BENEFITS BECAUSE TOMORROWNOW WOULD ALLOW THESE COMPANIES TO**

13 **ESTABLISH A RELATIONSHIP WITH AN SAP OPERATION, AND THEN THEY**

14 **WOULD BE ABLE, THEY THOUGHT, TO GO IN AND STRENGTHEN THAT**

15 **RELATIONSHIP AND SUBSEQUENTLY SELL THEM SOME SOFTWARE AND MAYBE**

16 **GET THEM TO SWITCH FROM ORACLE TO SAP.**

17 Q. AND IF IT WORKED OUT LIKE THAT FOR ANY PARTICULAR CUSTOMER,

18 HOW DOES YOUR RUNNING ROYALTY ACCOUNT FOR THAT?

19 **A. WE -- WE CALCULATE THE RUNNING ROYALTY BASED UPON THE**

20 **CUSTOMERS THAT -- THAT MIGRATED THEIR SYSTEMS TO SAP AS A RESULT**

21 **OF OR ATTRIBUTABLE TO THE -- THE COPYRIGHT INFRINGEMENT. I**

22 **CALCULATE THE ROYALTY ON THOSE.**

23 Q. SO PUTTING ALL THOSE --

24 ACTUALLY, LET ME ASK YOU ABOUT ONE MORE. LET'S GO TO

25 NO. 9, THE BENEFIT OF THE SUBJECT IP AND ALTERNATIVES.

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1 BY MR. MITTELSTAEDT:

2 Q. NOW, COULD YOU JUST WALK US THROUGH IT, PLEASE. AND I

3 SHOULD SAY THE -- THE PORTION THAT IS DIFFICULT TO SEE IS

4 JD EDWARDS. WE'VE PERHAPS SHOULD HAVE PICKED A DIFFERENT COLOR.

5 **A. YES, WE SHOULD HAVE. WE TRIED ABOUT TEN DIFFERENT COLORS,**

6 **BUT THESE ARE PROBABLY THE WORST.**

7 **THE GREEN BITS, THE GREENY, KHAKI-COLORED STUFF IS**

8 **JD EDWARDS; THE PURPLE IS PEOPLESOFT. AND WHAT THIS IS TRYING**

9 **TO SHOW IS A TIME LINE OF THE COMPANIES THAT WERE OFFERING**

10 **THIRD-PARTY SUPPORT IN ANY PARTICULAR YEAR.**

11 **SO IF YOU LOOK ON THE LEFT-HAND SIDE OF ANY OF THOSE**

12 **ROWS, THAT IS WHEN THAT CUSTOMER -- OH, BEG YOUR PARDON -- THAT**

13 **VENDOR CAME INTO THE MARKETPLACE. AND SO WE HAVE THE**

14 **TOMORROWNOW TRANSACTION THERE AT THE BEGINNING OF '05. SO YOU**

15 **CAN SEE AT THE BEGINNING OF '05, THERE REALLY WEREN'T THAT MANY**

16 **ALTERNATIVES IN THIRD-PARTY VENDORS.**

17 Q. THANK YOU.

18 **A. RIGHT HERE (INDICATING). THERE WERE NOT VERY MANY**

19 **ALTERNATIVES IN THE THIRD-PARTY MARKET, BUT OVER TIME, MANY**

20 **OTHER COMPANIES JOINED IN. AND THEY OFFERED SERVICE FOR**

21 **JD EDWARDS -- THAT'S WHAT THESE GREEN ONES ARE HERE.**

22 **AND THE REASON KLEE STOPS RIGHT THERE IS THEY WENT**

23 **OUT OF BUSINESS AT THAT POINT.**

24 **THE OTHERS ARE ALL STILL IN BUSINESS.**

25 **BUT THE IMPORTANT THING IS THIS PIECE DOWN HERE, AND**

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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

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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

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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

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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

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1 Q. DO YOU HAVE A VIEW, BASED ON YOUR REVIEW OF THIS RECORD AND
 2 YOUR ANALYSIS, OF WHETHER DOING THE LUMP-SUM APPROACH AND TRYING
 3 TO FIGURE OUT WHAT THESE PARTIES OR REASONABLE PARTIES IN THIS
 4 SITUATION WOULD AGREE TO ON A LUMP-SUM BASIS, WHETHER THAT WOULD
 5 REQUIRE A LOT OF SPECULATION?
 6 **A. WELL, THEY -- BOTH PARTIES, IF THEY DID A LUMP SUM, WOULD BE**
 7 **SPECULATING ON WHAT WAS GOING TO HAPPEN LATER. IF WHAT WAS**
 8 **GOING TO HAPPEN LATER WAS TINY, THEN THEY MIGHT HAVE DONE A**
 9 **LUMP-SUM. BUT IT WOULD HAVE BEEN FOR A FEW HUNDRED DOLLARS OR A**
 10 **FEW THOUSAND DOLLARS.**
 11 **BUT AS YOU HEARD, ORACLE MAY WELL HAVE THOUGHT THAT**
 12 **THIS WOULD BE A SUBSTANTIAL PROBLEM FOR THEM. THEY DIDN'T KNOW**
 13 **HOW MANY CUSTOMERS THEY MIGHT LOSE, AND THEY WOULDN'T WANT TO**
 14 **GET THAT WRONG.**
 15 **SAP, ON THE OTHER HAND, IS A NEW OPERATION. THEY'VE**
 16 **JUST TAKEN OVER THIS COMPANY. IT'S REALLY AN APPROACH THAT'S**
 17 **NEVER BEEN DONE BEFORE. THEY WOULDN'T WANT TO MAKE A MISTAKE**
 18 **EITHER. THE ONLY WAY TO GET THAT RISK OUT OF THERE IS A RUNNING**
 19 **ROYALTY.**
 20 Q. HOW WOULD YOU COMPARE THE AMOUNT OF SPECULATION THAT WOULD
 21 BE REQUIRED TO COME TO SOME LUMP-SUM APPROACH HERE WITH THE
 22 OTHER CASES THAT YOU HAVE SEEN WHERE THERE ARE COMPARABLE
 23 LICENSES THAT CAN BE USED AS A BASIS FOR AN UPFRONT PAYMENT?
 24 **A. WELL, IF WE HAVE COMPARABLE LICENSES, THIS IS, LIKE YOU MAY**
 25 **HAVE HEARD, AN APPRAISER -- IF YOU'VE EVER BOUGHT AND SOLD A**
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1582

CLARKE - DIRECT / MITTELSTAEDT

1 **THE ONLY THING THAT MIGHT BE INVOLVED HERE WOULD BE**
 2 **SOME CD'S, BUT THE CD'S ARE WORTH A BUCK. IT'S WHAT'S ON THE CD**
 3 **THAT MATTERS. AND A LOT OF THIS IS DOWNLOADED OVER THE**
 4 **INTERNET, SO YOU DON'T EVEN GET A CD. IT'S THAT INTELLECTUAL**
 5 **PROPERTY WHICH IS AS -- ALMOST AS INTANGIBLE AS YOU CAN GET THAT**
 6 **WE'RE TRYING TO VALUE, SO THAT STATEMENT WAS JUST COMPLETELY**
 7 **BAFFLING TO ME.**
 8 Q. OKAY. LET'S MOVE ON NOW TO THE DATABASE ROYALTY, AND
 9 THIS -- THIS IS MORE COMPLICATED, AT LEAST FOR ME.
 10 SO CAN WE START OFF WITH YOU DESCRIBING -- WHICH WAY
 11 IS EASIER? TO DESCRIBE HOW YOU DID IT OR DESCRIBE HOW MR. MEYER
 12 DID IT. WHERE WOULD YOU LIKE TO START?
 13 **A. LET'S START WITH HOW HE DID IT.**
 14 Q. OKAY. HOW DID HE DO IT?
 15 **A. I KNEW YOU WERE GOING TO ASK ME THAT. THE WAY HE DID IT WAS**
 16 **HE CALCULATED A NUMBER OF --**
 17 Q. ACTUALLY, LET ME -- LET ME JUST TAKE US BACK A STEP. THE
 18 DATABASE ROYALTY, WHAT ARE WE TALKING ABOUT?
 19 **A. THE ORACLE DATABASE IS A -- IS A -- IT'S A DATABASE -- IT'S**
 20 **A PROGRAM THAT COMPANIES USE TO MANAGE INFORMATION. IT -- IT'S**
 21 **ABLE TO STORE INFORMATION AND THEN GIVE ACCESS TO THAT**
 22 **INFORMATION AND ALLOWS IT TO BE MANIPULATED IN CERTAIN WAYS.**
 23 **SO IT'S -- I THINK SOMEONE IN THE CASE SAID IT WAS**
 24 **GROUNDBREAKING AT THE TIME IT CAME UP. SO IT'S A SIGNIFICANT**
 25 **PIECE OF WORK. THERE ARE MANY OTHER DATABASES OUT THERE. IBM**
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1581

CLARKE - DIRECT / MITTELSTAEDT

1 **HOUSE. THE APPRAISER COMES OUT AND SAYS, WELL, WE'VE LOOKED AT**
 2 **THE COMPS IN YOUR NEIGHBORHOOD, AND THE WAY THEY VALUE YOUR**
 3 **HOUSE IS THEY LOOK AT THE OTHERS THAT ARE LIKE IT, AND THEY SAY**
 4 **WE THINK BASED ON THAT, YOUR HOUSE WILL SELL FOR THIS MUCH.**
 5 **IF THERE WERE COMPARABLE LICENSES HERE, WE WOULD HAVE**
 6 **USED THEM. I DIDN'T FIND ANY COMPARABLE LICENSES TO THIS**
 7 **PARTICULAR SCOPE OF INFRINGEMENT. SO THE LICENSE WE'RE TALKING**
 8 **ABOUT WITH LIMITED DURATION, LIMITED GEOGRAPHY, LIMITED ABILITY**
 9 **TO SELL AND BUY AND AMEND THE SOFTWARE, IS THAT -- THAT WOULD BE**
 10 **SOMETHING THAT THEY WOULD NOT WANT TO DEAL WITH. THEY WOULD --**
 11 **THEY'D WANT THE RUNNING ROYALTY TO DO THAT.**
 12 **AND I THINK WE'VE GONE OVER RUNNING ROYALTY TO DEATH**
 13 **NOW.**
 14 Q. OKAY. THEN ONE LAST QUESTION, AND WE'LL MOVE ON. WE'RE
 15 GOING TO MOVE ON TO DATABASE, THOUGH, SO BE CAREFUL WHAT YOU ASK
 16 FOR.
 17 **BUT LAST THING, PAGE 1331, MR. MEYER SAYS,**
 18 **"THAT'S THE REAL PROPERTY THAT I'M VALUING. IT'S**
 19 **NOT SOMETHING -- IT'S NOT EVEN INTANGIBLE. IT'S REAL**
 20 **PROPERTY THAT WAS TAKEN."**
 21 **WHAT'S YOUR VIEW OF THAT?**
 22 **A. REAL PROPERTY IS THINGS LIKE BRICKS AND MORTAR, SO MAYBE HE**
 23 **WAS JUST MEANING IT WAS A THING INSTEAD OF BRICKS AND MORTAR.**
 24 **SO HE'S USING THE TERM INAPPROPRIATELY, BUT LET'S ASSUME HE JUST**
 25 **MEANS IT'S A THING. IT WASN'T A THING.**
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1583

CLARKE - DIRECT / MITTELSTAEDT

1 **HAS ITS OWN. MICROSOFT HAS ITS OWN.**
 2 Q. HOW -- LET ME INTERRUPT. HOW DID TOMORROWNOW USE THE ORACLE
 3 DATABASE?
 4 **A. THEY USED IT FOR SOME OF THE CUSTOMERS. SO NOT ALL OF**
 5 **THE -- OF THE TOMORROWNOW CUSTOMERS RAN ON COMPLETELY DATABASES.**
 6 **SOME RAN ON THESE OTHER DATABASES THAT THEY HAD BOUGHT. SO THE**
 7 **LICENSE THAT WE'RE TALKING ABOUT WITH DATABASE SHOULD ONLY APPLY**
 8 **TO THE ACTUAL USE THAT TOMORROWNOW MADE OF -- OF THE ORACLE**
 9 **DATABASE.**
 10 Q. OKAY. AND TOMORROWNOW BASICALLY USED THE ORACLE DATABASE TO
 11 HELP PROVIDE SERVICE TO CUSTOMERS THAT HAD PEOPLESOFT SOFTWARE
 12 RUNNING ON AN ORACLE DATABASE?
 13 **A. CORRECT.**
 14 Q. OKAY. AND HOW DID MR. MEYER CALCULATE HOW MUCH TOMORROWNOW
 15 WOULD OWE FOR THE LICENSE FOR THE DATABASE TO USE IT THE WAY IT
 16 USED IT IF IT HADN'T INFRINGED?
 17 **A. WELL, HE -- HE RECOGNIZED I THINK IT'S 71 ENVIRONMENTS,**
 18 **CUSTOMERS -- AN ENVIRONMENT IS JUST SOME SOFTWARE AND THE**
 19 **INFORMATION THAT THAT CUSTOMER IS -- IS MANAGING. AND THERE**
 20 **WERE 71 OF THOSE THAT WERE ORACLE DATABASES.**
 21 **AND THEN HE ADDED THINGS FOR CROSS-USE AND OTHER**
 22 **PURPOSES TO GET UP TO 172. SO WHATEVER HE WAS GOING TO DO, HE**
 23 **WAS GOING TO MULTIPLY BY 172.**
 24 **THEN HE LOOKED AT THE NUMBER OF PROCESSES AND CORES**
 25 **THAT TOMORROWNOW HAD AND DID SOME MATH ON THAT. AND HE SAID,**
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1584

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.

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1586

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.

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1585

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

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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.

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1628

CLARKE - DIRECT / MR. MITTELSTAEDT

1 **SAW AND IT PROMPTED A LOT OF OTHER THINKING WHEN I SAW IT.**
 2 Q. LET'S GO TO SLIDE 43.
 3 (SLIDE DISPLAYED ON SCREEN.)
 4 IS THIS A LIST OF THE CUSTOMERS YOU EXCLUDED BASED
 5 ON EVALUATING COMPETITORS LIKE LEXMARK?
 6 **A. YES.**
 7 Q. LET'S GO TO SLIDE 44.
 8 (SLIDE DISPLAYED ON SCREEN.)
 9 THIS IS ALSO BASED ON A CUMMINS' E-MAIL.
 10 MR. MITTELSTAEDT: I MOVE THE UNDERLYING DOCUMENT
 11 A5193 INTO EVIDENCE.
 12 THE COURT: ANY OBJECTION?
 13 MR. BOIES: MAY I HAVE ONE MOMENT, YOUR HONOR?
 14 (PAUSE IN THE PROCEEDINGS.)
 15 MR. BOIES: NO OBJECTION, YOUR HONOR.
 16 THE COURT: ALL RIGHT. ADMITTED.
 17 (DEFENDANTS' EXHIBIT A5193 RECEIVED IN
 18 EVIDENCE)
 19 BY MR. MITTELSTAEDT:
 20 Q. IS THIS AN EXAMPLE OF YOUR STANDARDIZATION BUCKET?
 21 **A. YES. EXACTLY.**
 22 Q. COULD YOU JUST EXPLAIN IT QUICKLY?
 23 **A. YES.**
 24 **THIS HONEYWELL HAD BEEN A SAP USER FOR A WHILE AND**
 25 **HAD ORACLE SYSTEMS IN HALF THE COMPANY, AND HAD MADE A DECISION**
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1630

CLARKE - DIRECT / MR. MITTELSTAEDT

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**
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1629

CLARKE - DIRECT / MR. MITTELSTAEDT

1 **TO STANDARDIZE, THIS PROCESS WHERE THEY GO ALL ON TO ONE TYPE**
 2 **OF SOFTWARE.**
 3 **SO, AGAIN, THAT DECISION IS INCREDIBLY EXPENSIVE FOR**
 4 **THE COMPANY. VERY DIFFICULT, TIME-CONSUMING, DISRUPTIVE. AND**
 5 **THEY WOULDN'T MAKE THAT DECISION WITHOUT -- SIMPLY BECAUSE OF**
 6 **TOMORROWNOW AND THE INFRINGING ACTS.**
 7 Q. LET'S GO TO SLIDE 44.
 8 (SLIDE DISPLAYED ON SCREEN.)
 9 IS THIS A LIST OF THE CUSTOMERS THAT YOU EXCLUDED
 10 FOR A SIMILAR REASON, THE STANDARDIZATION?
 11 **A. IT IS.**
 12 Q. OKAY.
 13 SPECIFIC FUNCTIONALITY WAS ANOTHER ONE OF YOUR
 14 BUCKETS. AND THIS NEXT ONE, SLIDE 46, IS BASED ON AN ORACLE
 15 E-MAIL A6028.
 16 MR. MITTELSTAEDT: AND I MOVE THAT INTO EVIDENCE.
 17 THE COURT: ANY OBJECTION?
 18 (COUNSEL CONFER.)
 19 MR. BOIES: NO OBJECTION, YOUR HONOR.
 20 THE COURT: ADMITTED.
 21 (DEFENDANTS' EXHIBIT A6028 RECEIVED IN
 22 EVIDENCE)
 23 BY MR. MITTELSTAEDT:
 24 Q. WILL YOU EXPLAIN TO US --
 25 THE COURT: I DON'T KNOW WHERE THE NOISE IS COMING?
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1631

CLARKE - DIRECT / MR. MITTELSTAEDT

1 WOULD WALK US THROUGH HOW YOU ACTUALLY DID THE CALCULATION ONCE
 2 YOU DETERMINED THE NUMBER OF CUSTOMERS?
 3 **A. YES.**
 4 **WHEN I LOOKED AT THE CUSTOMERS, I FOUND THAT THE**
 5 **TOTAL REVENUE WAS THE 703 MILLION, THE NUMBER RIGHT AT THE TOP**
 6 **THERE. THAT'S 703 MILLION IS THAT TOTAL. SO THIS IS REVENUE**
 7 **OF SAP AFTER THE TOMORROWNOW START DATE. SO THAT'S IMPORTANT.**
 8 **WE ARE ONLY LOOKING AT THE REVENUE THAT THEY GENERATED AFTER**
 9 **THE TOMORROWNOW START DATE.**
 10 **AND IF THAT WAS A CONTINUATION, IF THERE WAS SOME**
 11 **CONTINUATION OF WHAT THEY WERE DOING BEFORE THEN, SO THEY WERE**
 12 **ALREADY ON MAINTENANCE FOR A NUMBER OF PRODUCTS AND PAYING**
 13 **LET'S SAY HALF A MILLION DOLLARS A YEAR IN MAINTENANCE, AND**
 14 **THAT WOULD JUST CONTINUING, THAT SHOULDN'T BE ATTRIBUTED TO**
 15 **THIS BECAUSE THE SALE WAS MADE PRIOR. SO IT WOULD NOT BE**
 16 **AFFECTED BY WHAT WE ARE DOING HERE.**
 17 **SO, THAT 703 MILLION REFLECTS THE ADJUSTMENT FOR**
 18 **AFTER THE TOMORROWNOW START DATE AND NOT INCLUDING ANY OF THAT**
 19 **ONGOING REVENUE.**
 20 Q. MR. CLARKE, LET ME JUST STOP YOU FOR A MINUTE.
 21 THE END DATE FOR THIS CALCULATION IS, I AM NOT SURE
 22 IF YOU SAID IT, IT'S THE SAME END DATE THAT MR. MEYER USES?
 23 **A. ACTUALLY, I THINK THIS IS MORE LIKE 12/31/08. I AM PRETTY**
 24 **SURE THAT'S THE DATE WE USED.**
 25 Q. IN ANY EVENT, THE TWO OF YOU, YOU AND MR. MEYER, HAVE
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CLARKE - DIRECT / MR. MITTELSTAEDT

- 1 CALCULATED THE INFRINGERS' PROFITS FOR THE SAME TIME PERIOD?
 2 **A. YES. WE BOTH USE THE SAME TIME PERIOD. IT'S JUST THREE**
 3 **MONTHS LONGER, THAT'S ALL.**
 4 Q. GO AHEAD.
 5 **A. THE UNRELATED REVENUES, THAT WAS AN ACQUISITION THAT SAP**
 6 **MADE THAT'S NOT INCLUDED IN THIS CASE, SO I TOOK THAT OUT.**
 7 **AND SO THE REVENUES FOR THE EXCLUDED CUSTOMERS,**
 8 **THESE ARE ALL THE PEOPLE, ALL THE CUSTOMERS I EXCLUDED WERE**
 9 **675 MILLION. SO I SUBTRACT THAT BECAUSE THEY ARE NO LONGER**
 10 **INCLUDED. SO THE SUBTOTAL IS 13.7 MILLION.**
 11 **AND I GET TO DEDUCT THE EXPENSE; THAT'S THE**
 12 **APPROPRIATE THING TO DO. SO THAT'S THE REVENUE. YOU TAKE AWAY**
 13 **THE EXPENSE. THAT WILL BE THE PROFIT THAT THE INFRINGERS MADE.**
 14 **THE EXPENSES WERE 6 MILLION. THAT LEAVES SAP**
 15 **PROFITS TO BE DISGORGED OF 7.6 MILLION. AND TOMORROWNOW**
 16 **PROFITS WERE \$1 MILLION. YOU ADD THE 7.6 AND THE 1 MILLION AND**
 17 **YOU GET \$8.6 MILLION AS THE INFRINGERS' PROFITS.**
 18 Q. AND FINALLY, LET'S END WHERE WE STARTED, SLIDE 54. AND IF
 19 YOU WOULD WALK US THROUGH THIS, PLEASE.
 20 (SLIDE DISPLAYED ON SCREEN.)
 21 **A. THIS IS SIMPLY A SUMMARY OF EVERYTHING WE HAVE TALKED**
 22 **ABOUT SO FAR.**
 23 **SO IF YOU LOOK AT THE TOP, THIS IS -- IF YOU**
 24 **REMEMBER THE FIRST SLIDE THAT I SHOWED YOU, HAD TWO WAYS OF**
 25 **DOING IT AT THE TOP OR THE REASONABLE ROYALTY AT THE BOTTOM.**

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CLARKE - CROSS / MR. BOIES

- 1 **A. I REALLY HAVE NO IDEA. THERE'S A SPECIFIC CALCULATION**
 2 **THAT WOULD ALLOW THAT, BUT IT JUST COMES IN A LUMP SUM MIXED IN**
 3 **WITH ALL MY OTHER COMPENSATION, SO I REALLY HAVE NO IDEA.**
 4 Q. WELL, YOU KNOW THAT YOU GET A SPECIFIC PERCENTAGE OF YOUR
 5 TIME, CORRECT?
 6 **A. CORRECT.**
 7 Q. AND YOU KNOW THAT YOU GET A SPECIFIC PERCENTAGE OF
 8 EVERYBODY ELSE'S TIME THAT WORKS ON IT?
 9 **A. THAT'S CORRECT.**
 10 Q. AND YOU KNOW WHAT THOSE PERCENTAGES ARE, RIGHT?
 11 **A. I DO.**
 12 Q. WHAT ARE THOSE PERCENTAGES?
 13 **A. 85 PERCENT OF MY TIME COMES TO ME AND 14 PERCENT OF**
 14 **EVERYONE ELSE'S TIME.**
 15 Q. WHAT YOU ARE SAYING IS YOU HAVEN'T BOTHERED TO DO THE
 16 ARITHMETIC TO FIGURE OUT HOW MUCH THAT IS?
 17 **A. I HAVE NEVER DONE THAT.**
 18 Q. YOU SAID THAT YOU TESTIFIED IN A NUMBER OF CASES INVOLVING
 19 THE VALUATION OF INTELLECTUAL PROPERTY; IS THAT CORRECT?
 20 **A. YES.**
 21 Q. HAVE YOU EVER TESTIFIED BEFORE IN A COPYRIGHT INFRINGEMENT
 22 CASE THAT INVOLVED A HYPOTHETICAL ROYALTY?
 23 **A. YES.**
 24 Q. HOW MANY TIMES?
 25 **A. I COULDN'T SAY.**

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CLARKE - CROSS / MR. BOIES

- 1 **SO AT THE TOP HERE, WE HAVE ORACLE'S LOST SUPPORT**
 2 **PROFITS OF 19.3 MILLION. THE INFRINGERS' SAP PROFITS OF 7.6,**
 3 **AND TOMORROWNOW INFRINGERS' PROFITS OF 1 MILLION. SO THE TOTAL**
 4 **LOST PROFITS AND INFRINGERS' PROFITS OF \$28 MILLION.**
 5 **OR YOU COULD LOOK AT THE REASONABLE ROYALTY. FOR**
 6 **TOMORROWNOW THAT WAS 34.8 MILLION, SAP, 3.8 MILLION, AND FOR**
 7 **THE ORACLE DATABASE 1.9 MILLION. IF YOU ADD THAT ONE UP, IT'S**
 8 **40.6 MILLION.**
 9 MR. MITTELSTAEDT: THANK YOU. NO FURTHER QUESTIONS.

THE COURT: ALL RIGHT.

CROSS-EXAMINATION?

MR. BOIES: THANK YOU, YOUR HONOR.

CROSS-EXAMINATION

BY MR. BOIES:

Q. GOOD MORNING, MR. CLARKE.

A. GOOD MORNING.

Q. AS YOU KNOW, I AM DAVID BOIES AND WE MET IN THE ELEVATOR?

A. WE DID.

Q. LET ME JUST BEGIN WITH SOME BACKGROUND QUESTIONS.

COUNSEL FOR SAP INDICATED THAT YOU HAD BEEN PAID

\$14 MILLION FOR YOUR WORK IN THIS CASE?

A. CORRECT.

Q. NOW, THAT DID NOT ALL GO TO YOU, CORRECT?

A. I WISH.

Q. HOW MUCH OF THAT WENT TO YOU?

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CLARKE - CROSS / MR. BOIES

- 1 Q. WELL, APPROXIMATELY.
 2 **A. LESS THAN TEN.**
 3 Q. LESS THAN TEN.
 4 LESS THAN FIVE?
 5 **A. I COULDN'T TELL YOU.**
 6 Q. LESS THAN FOUR?
 7 **A. I DON'T KNOW. I DON'T KEEP TRACK OF CASES THAT WAY.**
 8 **THE ONLY WAY I COULD DO THAT WILL BE IF YOU GAVE ME**
 9 **A LIST OF ALL THE CASES I HAVE TESTIFIED IN. I COULD PROBABLY**
 10 **COUNT THEM UP.**
 11 Q. LET ME ASK YOU THIS: WHAT ARE THE CASES THAT YOU CAN
 12 REMEMBER IN WHICH YOU TESTIFIED ABOUT A HYPOTHETICAL ROYALTY IN
 13 A COPYRIGHT INFRINGEMENT CASE?
 14 **A. THE COREL CASE WAS IN FEDERAL COURT IN SACRAMENTO. I**
 15 **WOULD HAVE TO LOOK AT -- I HAVE A LIST IF YOU WANTED TO GO**
 16 **BEYOND THAT.**
 17 Q. THE COREL CASE IS THE ONE THAT YOU CAN REMEMBER NOW?
 18 **A. YES.**
 19 Q. AND WHAT DID YOU ESTIMATE THE FAIR MARKET VALUE OF THAT
 20 ROYALTY TO BE IN THE COREL CASE?
 21 **A. NOT VERY MUCH. \$20,000 I THINK.**
 22 Q. \$20,000.
 23 IS IT FAIR TO SAY THAT THIS IS THE LARGEST COPYRIGHT
 24 INFRINGEMENT CASE THAT YOU HAVE EVER HAD TO TRY TO ESTIMATE THE
 25 VALUE OF A FAIR MARKET VALUE LICENSE?
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CLARKE - CROSS (RESUMED) / BOIES

1 A. YES.

2 Q. AND YOU SEE ONE OF THE GOALS IS TO DISRUPT ORACLE'S ABILITY
3 TO PAY FOR THE ACQUISITION OUT OF CASH FLOW?

4 A. YES.

5 Q. AND YOU UNDERSTAND WHY THAT WOULD BENEFIT SAP, CORRECT?

6 A. THAT'S THE BIT I'M NOT AS CLEAR ON AS TO IF ORACLE DIDN'T --
7 DIDN'T HAVE THE MONEY TO PAY FOR THEIR SYSTEM ACQUISITION, I'M
8 NOT SURE HOW THAT WOULD BENEFIT SAP. IT MAY WELL, THOUGH.

9 Q. FOR EXAMPLE IF --

10 A. I JUST DON'T KNOW.

11 Q. FOR EXAMPLE, IF THEY HAD TO TAKE MONEY AND PAY FOR THE
12 ACQUISITION AS OPPOSED TO PUTTING IT IN RESEARCH AND
13 DEVELOPMENT, THAT WOULD HELP SAP, CORRECT?

14 A. IT -- AS I SAY, THAT REQUIRES SOME ANALYSIS, BUT I HAVEN'T
15 DONE THAT ANALYSIS, SO I'M NOT SURE, BUT IT'S LIKELY.

16 Q. OKAY.

17 A. IT'S REASONABLE TO ASSUME THAT.

18 Q. OKAY.

19 AND IT ALSO SAYS, ONE OF THE GOALS IS TO DISCREDIT
20 ORACLE'S EFFORTS TO CREATE A NEXT-GENERATION APPLICATION
21 PLATFORM. DO YOU SEE THAT?

22 A. I DO.

23 Q. AND THAT WOULD ALSO BENEFIT SAP, CORRECT?

24 A. YES, THAT WOULD BE A MUCH MORE DIRECT BENEFIT TO THEM.

25 Q. AND -- AND THAT BENEFIT IS NOT MEASURED SIMPLY IN THE

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CLARKE - CROSS (RESUMED) / BOIES

1 LET ME ASK YOU TO TURN NEXT TO TAB 46 WITH -- WHICH
2 IS PLAINTIFFS' EXHIBIT 171.

3 A. (REVIEWING DOCUMENTS.)

4 (EXHIBIT PUBLISHED TO JURY.)

5 BY MR. BOISE:

6 Q. AND THIS IS A DOCUMENT THAT YOU'VE ALSO REVIEWED, CORRECT,
7 SIR?

8 A. (REVIEWING DOCUMENTS.)

9 YES.

10 Q. AND IF YOU'D TURN TO PAGE 9 OF THIS EXHIBIT, WHERE IT SAYS,
11 "CLEAR SAILING STRATEGY." YOU SEE THAT?

12 A. I DO.

13 Q. AND THE FIRST ONE, THE ONLY BOLD-FACED STRATEGY, IS
14 "INTERRUPT ORACLE'S ACQUIRED MAINTENANCE INCOME STREAM, MAKING
15 IT DIFFICULT FOR THEM TO INVEST IN DEVELOPMENT OF THEIR FUSION
16 PLATFORM."

17 DO YOU SEE THAT?

18 A. I DO.

19 Q. AND YOU UNDERSTAND THAT THAT ALSO WOULD BE A BENEFIT TO SAP,
20 CORRECT?

21 A. YES. IT'S LIKELY.

22 Q. AND THAT IS A BENEFIT THAT WOULD NOT BE CAPTURED IN EITHER
23 OF YOUR TWO COMPONENTS OF YOUR FAIR MARKET VALUE LICENSE,
24 CORRECT?

25 A. WELL, NO, AT LEAST PART OF THE FAIR MARKET VALUE LICENSE
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CLARKE - CROSS (RESUMED) / BOIES

1 SHORT-TERM REVENUES THAT SAP RECEIVES, CORRECT, SIR?

2 A. DO YOU MEAN THAT TN RECEIVES?

3 Q. YES.

4 A. TN, YES, I THINK THAT'S CORRECT.

5 Q. AND, INDEED, IT'S NOT -- IT'S NOT EVEN MEASURED JUST IN THE
6 REVENUES THAT SAP RECEIVES FROM THE FOUR CUSTOMERS THAT YOU
7 IDENTIFIED AS TAKING SAP PRODUCTS IN CONNECTION WITH TOMORROWNOW
8 SERVICE, CORRECT?

9 A. I DON'T REALLY UNDERSTAND THAT QUESTION.

10 Q. SURE.

11 YOU HAVE, IN YOUR FAIR MARKET VALUE ROYALTY, TWO
12 COMPONENTS. ONE IS A TOMORROWNOW REVENUE COMPONENT, AND THE
13 OTHER IS A PROFIT COMPONENT FOR FOUR CUSTOMERS THAT YOU SAY TOOK
14 SAP PRODUCTS IN SOME RELATIONSHIP TO TOMORROWNOW, CORRECT?

15 A. CORRECT.

16 Q. AND NEITHER OF THOSE TWO WOULD REFLECT THE BENEFIT TO SAP OF
17 DISCREDITING ORACLE'S EFFORTS TO CREATE A NEXT-GENERATION
18 APPLICATION PLATFORM, FAIR?

19 A. WELL, I THINK ONE OF THE REASONS CUSTOMERS MAY HAVE GONE TO
20 SAP WAS BECAUSE OF THAT CONCERN. SO I THINK I PICK UP THAT
21 ELEMENT IN MY ANALYSIS. SO THERE -- THERE MIGHT BE OTHER
22 EFFECTS FOR CUSTOMERS WHO HAVE NOT YET GONE TO SAP WHO MAY GO IN
23 THE FUTURE, BUT I -- I WOULDN'T HAVE ANY INFORMATION ABOUT ANY
24 OF THOSE.

25 Q. OKAY. THAT WAS REALLY MY POINT. THAT WAS REALLY MY POINT.

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CLARKE - CROSS (RESUMED) / BOIES

1 ACTUALLY DEALS DIRECTLY WITH THE MAINTENANCE INCOME. THAT'S THE
2 TOMORROWNOW SIDE. SO I HAVE CAPTURED WHAT ACTUALLY HAPPENED.

3 SAP MAY HAVE THOUGHT AT SOME POINT THAT IT WOULD BE
4 BIGGER AND MORE SUCCESSFUL THAN IT WAS, BUT I THINK FOR THE 358
5 TOMORROWNOW CUSTOMERS, I'VE CERTAINLY CAPTURED THE EFFECT OF
6 THAT INTERRUPTION IN THE ORACLE MAINTENANCE INCOME STREAM.

7 Q. YOU'VE CAPTURED IN TERMS OF GIVING A 50 PERCENT ROYALTY FOR
8 THOSE -- THAT LOST MAINTENANCE REVENUE -- 50 PERCENT OF ROYALTY
9 BASED ON WHAT TOMORROWNOW RECEIVED OR, IN YOUR VIEW, SHOULD HAVE
10 RECEIVED, CORRECT?

11 A. YES.

12 Q. BUT YOU'VE NOT GIVEN ANY VALUE TO THE EFFECT OF INTERRUPTING
13 ORACLE'S INCOME STREAM, MAKING IT DIFFICULT FOR THEM TO INVEST
14 IN FUTURE R & D, CORRECT?

15 YOU HAVEN'T TAKEN INTO ACCOUNT ANY EFFECT ON ORACLE'S
16 FUTURE R & D IN YOUR FAIR MARKET VALUE ANALYSIS, CORRECT?

17 A. WELL, TO THE EXTENT I'VE CAPTURED SOME OF THEIR LOST REVENUE
18 IN THE MAINTENANCE ROYALTY, THEN I THINK I HAVE. I'VE CAPTURED
19 THE EFFECT OF THAT.

20 I DON'T KNOW WHAT THEY WOULD DO WITH THE MONEY WHEN
21 THEY GOT IT, IF THAT'S WHAT HAPPENS IN THIS CASE. THEY MAY
22 CHOOSE TO SPEND IT ON R & D, WHICH MAY MEAN THAT THE R & D
23 EXPENDITURE'S A LITTLE LATER.

24 Q. YOU AT LEAST KNOW WHAT SAP THOUGHT BACK IN 2005 BECAUSE WE
25 SEE THE DOCUMENTS, CORRECT?

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CLARKE - RECROSS / MR. BOIES

- 1 BY MR. BOIES:
 2 Q. AND THE FIRST PAGE IS THE E-MAIL AND THE SECOND PAGE IS
 3 THE PRESENTATION ITSELF.
 4 IT HAS "TOMORROWNOW AND SAFE PASSAGE TOGETHER
 5 AGAINST ORACLE."
 6 AND ONE OF THE PEOPLE THAT IS LISTED HERE IS LESLEY
 7 LOFTUS. LET ME TAKE YOU THROUGH THE OTHERS AND ASK YOU IF YOU
 8 KNOW WHO THEY ARE.
 9 NIGEL PULLAN?
 10 **A. YES. I THINK HE WAS ALSO BASED IN THE UK AND VICE**
 11 **PRESIDENT WITH THE COMPANY.**
 12 Q. VICE PRESIDENT OF WHAT COMPANY?
 13 **A. TOMORROWNOW.**
 14 Q. AND BOB GEIB?
 15 **A. HE WAS A U.S. BASED SALESPERSON. HEADED UP THAT GROUP,**
 16 **THAT DEPARTMENT.**
 17 Q. AND, AGAIN, FOR TOMORROWNOW?
 18 **A. FOR TOMORROWNOW.**
 19 Q. AND ERIC BRUNELLE?
 20 **A. YOU KNOW, I DON'T RECALL HIM, BUT ACCORDING TO THAT SLIDE**
 21 **THERE, IT SAYS HE WAS GLOBAL LIAISON FOR TOMORROWNOW AT SAP.**
 22 Q. IS THIS A DOCUMENT YOU REMEMBER SUFFICIENTLY TO BE ABLE TO
 23 ANSWER, I GUESS, A COUPLE OF QUESTIONS ABOUT IT?
 24 **A. YOU KNOW, I DON'T REMEMBER THIS DOCUMENT PARTICULARLY**
 25 **WELL, BUT I WILL DO MY BEST TO ANSWER YOUR QUESTIONS.**
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1862

CLARKE - RECROSS / MR. BOIES

- 1 **CALCULATED THAT, SO I DON'T KNOW.**
 2 Q. LET ME ASK YOU TO GO TWO MORE PAGES INTO THIS DOCUMENT
 3 WHERE IT TALKS ABOUT THE USE OF TOMORROWNOW AS A PIPELINE
 4 GENERATOR.
 5 (PAGE DISPLAYED ON SCREEN.)
 6 DO YOU SEE THAT?
 7 **A. YES.**
 8 Q. IT SAYS:
 9 "\$1 OF TOMORROWNOW STANDALONE REVENUE EQUALS \$10
 10 OF SAP LICENSE REVENUE PIPELINE."
 11 DO YOU SEE THAT?
 12 **A. I DO.**
 13 Q. AND DO YOU RECALL REVIEWING THIS PAGE IN CONNECTION WITH
 14 YOUR WORK?
 15 **A. I'VE SEEN PAGES LIKE THIS. I COULDN'T TELL YOU WHETHER IT**
 16 **WAS THIS PARTICULAR PAGE OR NOT.**
 17 Q. AND ONE OF THE THINGS THEY DO IS THEY THEN EXTEND THAT
 18 CONCEPT OF \$10 FOR \$1 TAKING \$11 MILLION FISCAL YEAR '06 YEAR
 19 TO DATE TOMORROWNOW REVENUE AND SAY THAT IS THE EQUIVALENT OF
 20 \$110 MILLION OF SAP LICENSE REVENUE PIPELINE.
 21 DO YOU SEE THAT?
 22 **A. YES.**
 23 Q. HAVE YOU SEEN CALCULATIONS LIKE THAT BEFORE?
 24 **A. YES, I HAVE.**
 25 Q. LET ME TURN NOW TO THE QUESTION OF SCOPE OF USE.
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1861

CLARKE - RECROSS / MR. BOIES

- 1 Q. OKAY.
 2 LET ME ASK YOU TO LOOK AT THE 11TH PAGE OF THE
 3 PRESENTATION. IT'S THE 12TH PAGE OF THE DOCUMENT, BUT IT'S THE
 4 11TH PAGE OF THE PRESENTATION.
 5 (EXHIBIT DISPLAYED ON SCREEN.)
 6 DO YOU SEE THAT?
 7 **A. YES.**
 8 Q. AND IS THAT A DOCUMENT THAT -- IS THAT A PART OF THE
 9 DOCUMENT YOU NOW RECALL?
 10 **A. YOU KNOW, I REALLY DON'T RECALL THIS TERRIBLY WELL.**
 11 Q. DO YOU RECALL THAT TOMORROWNOW HAD BOTH STANDALONE
 12 BUSINESS AND SAFE PASSAGE BUSINESS?
 13 **A. YES.**
 14 Q. AND DO YOU RECALL WHAT PERCENTAGE OF TOMORROWNOW'S
 15 BUSINESS WAS STANDALONE BUSINESS AS OPPOSED TO SAFE PASSAGE
 16 BUSINESS?
 17 **A. WE DID HAVE A SLIDE UP THERE ON THIS. I THINK THERE WERE**
 18 **228 STANDALONES AND 66. SO THAT WILL BE MAYBE JUST UNDER A**
 19 **THIRD.**
 20 Q. AND IN TERMS OF THE SIZE OF THE CUSTOMERS INVOLVED, WERE
 21 THE SAFE PASSAGE CUSTOMERS LARGER THAN THE STANDALONE
 22 CUSTOMERS?
 23 **A. YOU MEAN ON AN AVERAGE BASIS?**
 24 Q. YES.
 25 **A. THAT WILL BE A REASONABLE ASSUMPTION, BUT I NEVER**
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1863

CLARKE - RECROSS / MR. BOIES

- 1 AND IN THAT CONNECTION, I WOULD LIKE YOU TO LOOK AT
 2 PLAINTIFFS' EXHIBIT 7028, WHICH IS NOT IN YOUR BINDER, BUT I
 3 WILL HAND UP.
 4 (COUNSEL HANDS OUT EXHIBIT.)
 5 AND YOU RECOGNIZE THIS AS A DOCUMENT THAT WAS
 6 PREPARED BY MR. MEYER SETTING FORTH THE SCOPE OF USE OF THE
 7 FAIR MARKET VALUE LICENSE, CORRECT?
 8 **A. CORRECT.**
 9 Q. AND YOU ESSENTIALLY AGREE THAT THIS IS THE APPROPRIATE
 10 SCOPE OF USE, CORRECT?
 11 **A. I NEED TO TAKE A MOMENT TO READ IT. I KNOW BACK IN THE**
 12 **DAY WHEN I WAS DOING MY WORK, HE AND I HAD SIGNIFICANT**
 13 **DISAGREEMENT OVER WHAT THE SCOPE WAS. SO LET ME REVIEW THIS IN**
 14 **LIGHT OF THE ADMISSIONS THAT WE HAVE NOW.**
 15 Q. ABSOLUTELY.
 16 (PAUSE IN THE PROCEEDINGS.)
 17 **A. I ACCEPT THE SCOPE OF LICENSE.**
 18 Q. SAY AGAIN?
 19 **A. I THINK THIS IS AN APPROPRIATE SCOPE OF LICENSE.**
 20 MR. BOIES: YOUR HONOR, I WOULD OFFER PLAINTIFFS'
 21 EXHIBIT 7028.
 22 THE COURT: ANY OBJECTION?
 23 MR. MITTELSTAEDT: OBJECTION, HEARSAY.
 24 THE COURT: I AM GOING TO ALLOW IT IN.
 25 ///
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CLARKE - RECROSS / MR. BOIES

1 (PLAINTIFFS' EXHIBIT 7028 RECEIVED IN
 2 EVIDENCE)
 3 BY MR. BOIES:
 4 Q. NOW, I WOULD LIKE TO JUST TAKE YOU THROUGH THESE AND HAVE
 5 YOU EXPLAIN A LITTLE BIT WHAT THESE TERMS MEAN.
 6 (EXHIBIT DISPLAYED ON SCREEN.)
 7 THE FIRST TERM, WHICH IS "VOLUME", AND IT SAYS:
 8 "TO MAKE VIRTUALLY UNLIMITED COPIES OF ORACLE
 9 SOFTWARE WHENEVER IT NEEDED THOUSANDS OF COPIES
 10 FOR SOME PRODUCTS."
 11 THAT, I THINK, IS SELF-EXPLANATORY. DO YOU AGREE?
 12 A. YES.
 13 Q. THE SECOND ONE THOUGH SAYS "INTERNAL USE":
 14 "TO KEEP ITS OWN COPIES OF ENVIRONMENTS, FIXES,
 15 PATCHES, AND UPDATES."
 16 CAN YOU EXPLAIN WHAT THAT MEANS, PARTICULARLY WHEN
 17 IT REFERS TO ENVIRONMENTS?
 18 A. YES.
 19 A LOT OF WHAT TOMORROWNOW WAS DOING, IT COULD HAVE
 20 DONE LEGITIMATELY AT THE CLIENT'S SITE, BUT THEY DIDN'T FEEL
 21 LIKE THEIR BUSINESS WOULD WORK IF THEY DID THAT. SO THEY
 22 CREATED THESE ENVIRONMENTS WHICH WERE REALLY COPIES OF THE
 23 CUSTOMER'S SYSTEM ON THEIR OWN COMPUTERS.
 24 AND THAT'S WHAT MEANS -- WHAT IT MEANS WHEN IT SAYS
 25 "KEEPS ITS OWN COPIES OF ENVIRONMENTS." SO THEY HAD THE
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CLARKE - RECROSS / MR. BOIES

1 Q. LET ME STEP BACK FOR THAT JUST ONE SECOND.
 2 YOU RECOGNIZE THAT IT WOULD HAVE BEEN IMPOSSIBLE OR
 3 VIRTUALLY IMPOSSIBLE FOR SAP TO DEVELOP SOFTWARE ON ITS OWN
 4 THAT WOULD REPLICATE ORACLE SOFTWARE ENOUGH TO ALLOW THE
 5 PROVISION OF SUPPORT TO ORACLE CUSTOMERS, CORRECT?
 6 MR. MITTELSTAEDT: YOUR HONOR, I OBJECT. WE HAVE
 7 BEEN TALKING ABOUT TOMORROWNOW. NOW HE'S ASKING ABOUT SAP. I
 8 AM NOT SURE THAT IS DELIBERATE OR IF HE IS REFERRING TO
 9 TOMORROWNOW.
 10 MR. BOIES: I AM REFERRING TO SAP.
 11 THE COURT: AND YOUR OBJECTION IS THERE WAS SOME
 12 LACK OF CLARITY?
 13 MR. MITTELSTAEDT: YES.
 14 THE COURT: IN HIS QUESTION?
 15 MR. MITTELSTAEDT: YES. VAGUE AND AMBIGUOUS.
 16 THE COURT: ALL RIGHT. YOU ARE REFERRING TO SAP NOT
 17 TOMORROWNOW AS YOU PREVIOUSLY WERE?
 18 MR. BOIES: YES, YOUR HONOR.
 19 THE COURT: ALL RIGHT. I THINK THE QUESTION IS
 20 CLEAR ENOUGH.
 21 THE WITNESS: I APOLOGIZE. I HAVE NOW FORGOTTEN THE
 22 QUESTION.
 23 BY MR. BOIES:
 24 Q. SURE. AND LET ME TRY TO RESTATE IT.
 25 DO YOU AGREE THAT IT WOULD HAVE BEEN IMPOSSIBLE FOR
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CLARKE - RECROSS / MR. BOIES

1 CUSTOMER'S REPLICA OF THE CUSTOMER'S SYSTEMS AT THEIR OFFICE.
 2 WHAT THAT ALLOWED THEM TO DO WAS CREATE FIXES, TEST
 3 THEM IN THE OFFICE. AND IF THEY WORKED, THEN PUSH THEM OUT TO
 4 THE CUSTOMER. AND THAT MEANT THEY DIDN'T NEED TO TRAVEL TO THE
 5 CUSTOMER SITE OR DIAL IN REMOTELY. THEY COULD DO ALL OF THIS,
 6 AGAIN, WITHOUT THIS PIECE OF THE LICENSE, IF THEY WERE ABLE TO
 7 DIAL IN REMOTELY AND RUN THE CUSTOMER'S SITE, ACTUAL
 8 ENVIRONMENT AT THE CUSTOMER'S PLACE OF WORK, BUT FROM THEIR
 9 OFFICE IN TEXAS.
 10 BY HAVING THESE SYSTEMS IN THEIR OFFICE IN TEXAS,
 11 THEY DIDN'T NEED TO DO THAT. REMOTE ACCESS IS VERY SLOW. SO
 12 IT ENABLED THEM TO DO THINGS MUCH QUICKER.
 13 Q. THE NEXT ITEM THERE IS "FIXES, PATCHES AND UPDATES."
 14 DO YOU SEE THAT?
 15 A. I AM WAITING FOR IT TO COME UP ON THE SCREEN.
 16 Q. OKAY.
 17 A. THAT WAY I DON'T HAVE TO KEEP PUTTING MY GLASSES ON AND
 18 OFF. I AM SORRY.
 19 Q. OKAY.
 20 NOW THOSE WERE FIXES, PATCHES AND UPDATES THAT WERE
 21 REQUIRED TO DO SERVICE FOR CUSTOMERS, CORRECT?
 22 A. WELL, YES. SOME OF THESE MAY HAVE COME FROM CUSTOMER
 23 CONNECTION, BUT TOMORROWNOW MADE ITS OWN PATCHES AND FIXES.
 24 AND SO THERE IS A SLIGHT DIFFERENCE HERE BETWEEN WHAT THEY GOT
 25 FROM ORACLE AND WHAT THEY CREATED THEMSELVES.
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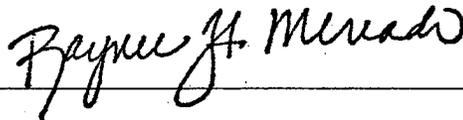
CLARKE - RECROSS / MR. BOIES

1 SAP, AND I AM REFERRING EXPLICITLY TO SAP NOW, TO DEVELOP
 2 SOFTWARE ON ITS OWN THAT WOULD REPLICATE ORACLE SOFTWARE ENOUGH
 3 TO PERMIT THE PROVISION OF SUPPORT TO ORACLE CUSTOMERS?
 4 A. YES.
 5 Q. AND I ASSUME YOU WOULD NECESSARILY AGREE THAT IF IT WAS
 6 IMPOSSIBLE FOR SAP, IT WOULD HAVE BEEN IMPOSSIBLE FOR
 7 TOMORROWNOW. FAIR?
 8 A. YES.
 9 Q. OKAY. ONE MORE QUESTION.
 10 AND I WANT TO GO BACK TO CEDARCRESTONE.
 11 DO YOU RECALL THAT?
 12 A. I DO.
 13 Q. AND CEDARCRESTONE WAS ONE OF THE PEOPLE YOU HAD UP ON YOUR
 14 CHART THAT WAS A THIRD PARTY MAINTENANCE AND SUPPORT PROVIDER?
 15 A. YES, AN ALTERNATIVE TO ORACLE.
 16 Q. AN ALTERNATIVE?
 17 A. YES.
 18 Q. CEDARCRESTONE ITSELF HAS PEOPLESOFT OR J.D. EDWARDS
 19 SOFTWARE INSTALLED FOR ITS OWN USE, CORRECT?
 20 A. I HAVE A VAGUE RECOLLECTION OF THAT, BUT I CAN'T BE SURE.
 21 Q. DO YOU KNOW WHO PROVIDES THE MAINTENANCE AND SUPPORT FOR
 22 CEDARCRESTONE'S OWN INSTALLATIONS OF PEOPLESOFT SOFTWARE?
 23 A. NO.
 24 Q. WOULD IT SURPRISE YOU THAT IT'S NOT CEDARCRESTONE?
 25 A. WOULDN'T SURPRISE ME ONE WAY OR THE OTHER.
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CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, TUESDAY, NOVEMBER 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

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1896

CATZ - DIRECT / HOUSE

1 **MILLIONS UPFRONT.**
 2 Q. AND THE SAME IS TRUE FOR SAP, TO YOUR KNOWLEDGE?
 3 **A. YES.**
 4 Q. OKAY.
 5 NOW, LET'S TALK A BIT ABOUT PROJECTIONS. YOU WERE
 6 INVOLVED IN PREPARING PROJECTIONS AT ORACLE, AS YOU TOLD THE
 7 JURY LAST WEEK, CORRECT?
 8 **A. YEAH. OBVIOUSLY, I'VE BEEN INVOLVED AT ORACLE FOR -- FOR**
 9 **QUITE A LONG TIME AND BEFORE THAT, AS AN INVESTMENT BANKER FOR**
 10 **MANY YEARS.**
 11 MS. HOUSE: COULD YOU PLEASE PUT UP ON THE SCREEN THE
 12 SAP PROJECTION FROM PLAINTIFFS' EXHIBIT 4814. THAT'S THE
 13 THREE-YEAR PROJECTION OF 897 MILLION.
 14 (EXHIBIT PUBLISHED TO JURY.)
 15 BY MS. HOUSE:
 16 Q. OKAY. YOU'VE SEEN THAT A FEW TIMES THIS -- LAST COUPLE
 17 WEEKS. IS THIS THE SORT OF DOCUMENT THAT ORACLE TYPICALLY
 18 GENERATES IN DEVELOPING A BUSINESS CASE?
 19 **A. YES. SOMETHING JUST LIKE THAT, ACTUALLY.**
 20 Q. AND DO YOU RECALL TESTIMONY IN THIS CASE -- IF YOU CAN TURN
 21 BACK TO THE FRONT PAGE OF THIS DOCUMENT.
 22 (EXHIBIT PUBLISHED TO JURY.)
 23 MS. HOUSE: AND THE -- PULL UP THE FIRST PARAGRAPH.
 24 Q. DO YOU RECALL THE TESTIMONY IN THIS CASE THAT THE MEMBERS OF
 25 THE EXECUTIVE COMMITTEE OF SAP PROVIDED EXTENSIVE INPUT AND
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1898

CATZ - DIRECT / HOUSE

1 **AWAY FROM THIS PLAN.**
 2 Q. ALL RIGHT.
 3 WE'RE DONE WITH THAT. THANK YOU.
 4 NOW, DO YOU RECALL THAT MR. CLARKE TESTIFIED THAT
 5 SAP'S PROJECTIONS FOR TOMORROWNOW SHOULD BE IGNORED BECAUSE SAP
 6 HAD NEVER PROVIDED SUPPORT FOR ORACLE APPLICATIONS BEFORE?
 7 DOES THAT MAKE SENSE TO YOU?
 8 **A. SAP HAS BEEN IN THE BUSINESS OF PROVIDING SUPPORT FOR**
 9 **ENTERPRISE SOFTWARE, ESPECIALLY ERP SOFTWARE, FOR LONGER THAN**
 10 **ORACLE WAS IN THE BUSINESS OF ERP SOFTWARE. THEY ARE THE**
 11 **EXPERTS IN PROVIDING SUPPORT FOR ERP SOFTWARE.**
 12 Q. NOW, ARE ALL MATERIALS SUBMITTED TO THE BOARD OR EXECUTIVE
 13 MANAGEMENT CONSIDERED -- OR ARE ANY -- MARKETING HYPE?
 14 **A. MARKETING TO YOUR BOARD IS -- JUST DOESN'T MAKE ANY SENSE.**
 15 **OKAY? YOU DO NOT TAKE THESE THINGS LIGHTLY. YOU DO NOT MAKE**
 16 **THEM UP. YOU DO NOT HAVE, YOU KNOW -- YOU DO NOT PUT IN THINGS**
 17 **THAT YOU DON'T BELIEVE IN IN FRONT OF YOUR SENIOR MANAGEMENT**
 18 **TEAM AND IN FRONT OF YOUR BOARD.**
 19 **THAT JUST DOESN'T MAKE SENSE.**
 20 Q. NOW, BASED ON YOUR EXPERIENCE, IS IT UNREASONABLE TO RELY ON
 21 A FINANCIAL FORECAST OR PROJECTION JUST BECAUSE IT'S BASED ON
 22 ASSUMPTIONS, THE WORD "ASSUMPTIONS"?
 23 **A. YEAH, OKAY. SO ASSUMPTIONS ARE THE MOST IMPORTANT THINGS,**
 24 **ACTUALLY. THE ASSUMPTIONS ARE REALLY WHAT YOU BELIEVE ARE THE**
 25 **IMPORTANT DRIVERS AND WHAT YOU BELIEVE IS GOING TO HAPPEN.**
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CATZ - DIRECT / HOUSE

1 GUIDANCE TO THIS DOCUMENT?
 2 **A. ABSOLUTELY.**
 3 Q. DOES ORACLE'S EXECUTIVE MANAGEMENT EVER PROVIDE EXTENSIVE
 4 INPUT AND GUIDANCE INTO ITS ACQUISITION PROJECTIONS?
 5 **A. SURE. I MEAN, WE ALL GET INVOLVED. THESE ARE VERY SERIOUS**
 6 **MATTERS SO WE ALL, YOU KNOW, GET TOGETHER AND -- AND PROVIDE OUR**
 7 **THOUGHTS.**
 8 Q. AND WHEN ORACLE'S HIGHEST EXECUTIVES PROVIDE EXTENSIVE INPUT
 9 AND GUIDANCE INTO ORACLE'S PROJECTIONS, WHAT DOES THAT MEAN
 10 ABOUT THOSE PROJECTIONS WITHIN ORACLE?
 11 **A. IT MEANS THEY'RE SERIOUS. IT MEANS WE'VE COME TOGETHER.**
 12 **THIS IS WHAT WE REALLY THINK IS GOING TO HAPPEN, AND THIS IS**
 13 **WHAT WE WANT TO BACK.**
 14 Q. AND IN YOUR EXPERIENCE AT ORACLE, WHEN A BUSINESS PLAN OR
 15 PROJECTION IS REJECTED BY THE BOARD OR DEEMED UNRELIABLE, IS
 16 THERE SOME SORT OF EVIDENCE OF THAT?
 17 **A. WELL, YOU KNOW, OBVIOUSLY MOST OBVIOUS, YOU DON'T ACTUALLY**
 18 **GO AHEAD AND DO THE DEAL. SO THAT'S THE FIRST THING. YOU DON'T**
 19 **GO FORWARD WITH YOUR PROGRAM. AND ALSO TO BE HONEST, THERE'S**
 20 **USUALLY A PAPER TRAIL OF PEOPLE ARGUING AND, YOU KNOW, PAPER**
 21 **WHERE THEY SEND YOU AN EMAIL, THIS IS THAT, THIS IS TOO HIGH,**
 22 **THIS IS TOO LOW, WHICH WE DIDN'T SEE AT ALL IN THIS CASE.**
 23 **BUT, OBVIOUSLY, THE MOST OBVIOUS IS THAT YOU DON'T DO**
 24 **THE DEAL, AND -- YOU KNOW, IN THIS CASE, FRANKLY, I -- IN THE**
 25 **ENTIRE THREE WEEKS, I DIDN'T SEE A SINGLE SAP EXECUTIVE WALK**
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1899

CATZ - DIRECT / HOUSE

1 **THE WHOLE JOB OF A MANAGEMENT TEAM, WHEN YOU'RE**
 2 **LOOKING INTO THE FUTURE, WHICH OF COURSE, YOU CAN'T SEE**
 3 **PERFECTLY, IS TO MAKE ASSUMPTIONS. I -- I HAVE WHOLE**
 4 **PRESENTATIONS WHERE THE MOST IMPORTANT PAGE IS THE ASSUMPTIONS**
 5 **BECAUSE THOSE ARE THE INPUTS INTO YOUR BUSINESS CASE.**
 6 **WHAT COMES OUT AT THE OTHER END IS THE OUTCOME, IS**
 7 **YOUR PROJECTIONS, YOUR FORECAST, YOUR TARGETS. BUT THE**
 8 **ASSUMPTIONS IS WHERE THE REAL MANAGEMENT WORK IS DONE. AND YOU**
 9 **AS A MANAGEMENT TEAM, THAT'S YOUR JOB, IS TO MAKE REASONABLE**
 10 **ASSUMPTIONS.**
 11 Q. AND IF -- IN THE REAL WORLD, IF YOU DON'T ACHIEVE THE
 12 PROJECTIONS, DOES THAT MEAN THAT THE ASSUMPTIONS WERE
 13 UNREASONABLE GOING IN?
 14 **A. NO. THE ASSUMPTIONS ARE THE BEST INFORMATION YOU HAVE AT**
 15 **THE TIME YOU MAKE IT. THAT'S WHAT THIS IS ABOUT. YOU'RE**
 16 **LOOKING INTO THE FUTURE. YOU DON'T HAVE PERFECT CLARITY. YOUR**
 17 **ASSUMPTIONS ARE, YOU KNOW -- ARE REASONABLE. THEY'RE WHAT YOU**
 18 **BELIEVE THEY ARE.**
 19 **IF IT DOESN'T TURN OUT THAT WAY, WELL, DIDN'T TURN**
 20 **OUT THERE. CAN BE A LOT OF FACTORS. YOU DIDN'T EXECUTE WELL,**
 21 **THE ECONOMY -- I MEAN, THERE CAN BE A LOT OF THINGS. DOESN'T**
 22 **MEAN YOUR ASSUMPTIONS WERE REASONABLE AT THE START.**
 23 Q. AND IN THE REAL WORLD, MS. CATZ, IF YOU DON'T EXECUTE ON
 24 YOUR PLANS, CAN YOU GO BACK AND SAY LET'S PRETEND I NEVER MADE
 25 THOSE PROJECTIONS?
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1900

CATZ - DIRECT / HOUSE

1 **A. NOT -- NOT AND KEEP YOUR JOB WHERE I WORK, BUT THE -- THE**
 2 **REALITY IS THOSE -- THOSE ARE WHAT YOU'RE MEASURED AGAINST. YOU**
 3 **DON'T -- YOU CAN'T JUST SAY, OH, YEAH, LET'S PRETEND THAT NEVER**
 4 **HAPPENED.**

5 Q. NOW, BASED ON YOUR EXPERIENCE AT ORACLE, WOULD IT APPEAR TO
 6 YOU THAT SAP'S PROJECTIONS WERE REASONABLE?

7 **A. ACTUALLY, I THINK THEY WERE REASONABLE AT -- THEY WERE BOTH**
 8 **REASONABLE AT THE TIME AND, YOU KNOW, IN LOOKING AT THE NUMBERS**
 9 **AS THINGS PLAYED OUT, THEY ACTUALLY MADE THE DOLLARS THEY**
 10 **THOUGHT THEY WOULD. I THINK THEY ACTUALLY DID BETTER.**

11 Q. WE HAVE A SLIDE ON THIS THAT YOU'VE HELPED US PREPARE.
 12 COULD YOU PUT THAT UP, PLEASE. IT'S -- LET'S SEE
 13 IT'S --
 14 (DEMONSTRATIVE PUBLISHED TO JURY.)
 15 THE WITNESS: YEAH. I CAN EXPLAIN THIS. THIS WAS
 16 SOMETHING MR. CLARKE PUT UP, AND IT'S A NUMBER THAT IF YOU LOOK
 17 AT THE TOP NUMBER ON THERE, THIS IS SAP'S REVENUE FROM
 18 TOMORROWNOW CUSTOMERS FROM, LIKE, 86 OF THOSE CUSTOMERS ALONE
 19 IN -- I DON'T KNOW -- UNDER THREE YEARS, I THINK.
 20 SO THEY MADE \$703 MILLION FROM 86 OF THE CUSTOMERS,
 21 WHICH IS JUST AN INCREDIBLE AMOUNT. AND BY THE WAY, THEY
 22 ALSO -- NO DOUBT WHEN YOU SELL LICENSES OF, YOU KNOW, THIS MUCH,
 23 YOU -- YOU HAVE SUPPORT COMING IN FOR MULTIPLE YEARS. BUT EVEN
 24 IF IT'S ONE YEAR OF SUPPORT, IT'S, LIKE, ANOTHER 130 MILLION --
 25 LET'S SAY THEY CHARGE, LIKE, 19. SO THEY -- SO THEY'D GET LIKE
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1902

CATZ - DIRECT / HOUSE

1 REVENUE, YOUR HONOR, IS THE WITNESS'S TESTIMONY INDICATED WAS IF
 2 THEY DID THIS, IF IT'S A CERTAIN NUMBER OF YEARS, ET CETERA.
 3 THAT IS NOT THE CALCULATION MR. CLARKE BUILT. I'LL
 4 CROSS-EXAMINE HER ON THE APPLES AND ORANGES, BUT THAT IS
 5 SPECULATION.
 6 THE COURT: ALL RIGHT. YOU CAN MAKE ARGUMENT. I'M
 7 GOING TO ALLOW IT TO STAND.
 8 BY MS. HOUSE:
 9 Q. SO, AGAIN, JUST SO IT'S A LITTLE CLEARER, COULD YOU TAKE THE
 10 JURY THROUGH WHY IT IS THAT THE PROJECTION NUMBER THAT WE'VE
 11 SEEN IN THE EXHIBIT FROM SAP WHEN THEY WERE PROJECTING HOW THE
 12 NUMBERS ALIGN WITH WHAT THEY PUT IN FOR WHAT THEY ACTUALLY
 13 ACHIEVED.
 14 **A. WELL, MR. CLARKE TESTIFIED IT WAS 700 -- YESTERDAY HE**
 15 **TESTIFIED SOME OTHER NUMBER, BUT THE DEMONSTRATIVE HE HAD THE**
 16 **PREVIOUS DAY WAS \$703 MILLION. 40 MILLION IS THE TN REVENUE,**
 17 **TOMORROWNOW REVENUE THAT I THINK ALSO HE TALKED ABOUT.**
 18 **AND THEN THEY HAD SAID THEY CHARGE 19 PERCENT FOR**
 19 **SUPPORT. I THINK THE NUMBER SOMETIMES -- SOMETIMES I HEARD**
 20 **20 PERCENT, BUT I USED 19 PERCENT. THAT WOULD BE ABOUT 130**
 21 **MILLION ON THE 703, AND THAT'S JUST FOR ONE YEAR. EVEN IF IT**
 22 **WAS FIVE YEARS, I MEAN, THE TRUTH IS ONCE YOU HAVE A CUSTOMER,**
 23 **THEY'RE YOUR CUSTOMER FOREVER. SO IF IT WAS ACTUALLY 10 YEARS,**
 24 **IT WOULD BE A BILLION THREE.**
 25 **I MEAN, IT'S WAY OVER ANY KIND OF NUMBER THAT -- THAT**
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1901

CATZ - DIRECT / HOUSE

1 ANOTHER 130 MILLION A YEAR FOR MANY YEARS TO COME.
 2 BUT LET'S JUST CALL IT ONE YEAR, AND I THINK THEY
 3 ALSO MADE ABOUT 40 -- 30, 40 MILLION FROM TOMORROWNOW.
 4 Q. SO WE ACTUALLY HAVE A SLIDE THAT MIGHT MAKE IT EASIER FOR
 5 THE JURY ON THAT.
 6 **A. OH, OKAY.**
 7 (DEMONSTRATIVE PUBLISHED TO JURY.)
 8 MR. LANIER: YOUR HONOR, OBJECTION TO THIS SLIDE.
 9 THIS IS SPECULATION ABOUT WHAT SAP DID OR DIDN'T MAKE, AS THE
 10 WITNESS'S LAST TESTIMONY CLEARLY INDICATES.
 11 THE COURT: YES, IT CERTAINLY SOUNDS LIKE IT TO ME,
 12 THIS LAST ONE.
 13 MS. HOUSE: THIS IS BASED ON EXACTLY WHAT MR. CLARKE
 14 TOLD THE JURY WERE THE NUMBERS THAT HE CAME UP WITH.
 15 THE COURT: THOSE NUMBERS COME FROM SLIDE 53?
 16 MS. HOUSE: YEAH. SO IF YOU LOOK AT THE 703, THAT
 17 COMES FROM SLIDE 53. THE 19 PERCENT SUPPORT REVENUE WAS THE
 18 NUMBER THAT WE HEARD HIM TESTIFY IS THE SAP NUMBER ON SUPPORT.
 19 WE GOT THE 40 MILLION OFF OF ANOTHER ONE OF HIS
 20 SLIDES THAT HE SAID WAS THE ACTUAL TOMORROWNOW REVENUE, SO THIS
 21 IS ALL COMING IN EXACTLY FROM MR. CLARKE. THIS IS NOT SOMETHING
 22 THAT SHE'S CREATED.
 23 THE COURT: ALL RIGHT.
 24 WHAT'S YOUR OBJECTION?
 25 MR. LANIER: THE OBJECTION, ESPECIALLY TO THE SUPPORT
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1903

CATZ - DIRECT / HOUSE

1 **THEY WERE PROJECTING. I THINK WHAT THEY DID, INTERESTINGLY, IS**
 2 **THEY BASICALLY APPEAR TO HAVE GOTTEN TO AT LEAST THE DOLLARS.**
 3 **WHAT THEY UNDERVALUED WAS HOW VALUABLE THESE CUSTOMERS WERE,**
 4 **MEANING HOW MUCH THEY WOULD BUY OF SOFTWARE FROM SAP ONCE THEY**
 5 **PUT IN A WEDGE BETWEEN US AND THOSE CUSTOMERS.**
 6 Q. THANK YOU.
 7 ALL RIGHT. LET'S TALK ABOUT A DIFFERENT PROJECTION
 8 THAT WE'VE HEARD ABOUT IN THIS CASE, IN FACT, THE ONLY ONE THAT
 9 WE'VE HEARD ABOUT FROM MR. CLARKE. IT'S THE SAP'S JANUARY 7,
 10 2005 BUSINESS CASE, THE SLIDE THAT SAID -- THAT HAD THE -- THE
 11 PART IN IT THAT SAID FROM TOMORROWNOW MANAGEMENT FINANCIALS.
 12 CAN YOU EXPLAIN WHAT THAT STAND-ALONE PROJECTION WAS?
 13 **A. SURE. I MEAN, THAT'S TOMORROWNOW AS A --**
 14 THE COURT: JUST A MOMENT.
 15 MR. LANIER: OBJECTION, YOUR HONOR. SHE'S ASKING THE
 16 WITNESS TO EXPLAIN WHAT WAS MEANT BY AN SAP DOCUMENT. SHE COULD
 17 GIVE HER UNDERSTANDING OF IT, BUT EXPLAINING WHAT WAS INTENDED
 18 BY THE AUTHORS IS CLEARLY SPECULATION.
 19 THE COURT: I AGREE.
 20 MS. HOUSE: I DIDN'T MEAN TO ASK THAT. LET'S TRY IT
 21 THIS WAY.
 22 THE COURT: JUST REPHRASE.
 23 BY MS. HOUSE:
 24 Q. COULD YOU EXPLAIN TO THE JURY WHAT A STAND-ALONE PROJECTION
 25 IS, JUST GENERALLY.
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1904

CATZ - DIRECT / HOUSE

1 **A. SURE. A STAND-ALONE PROJECTION IS WHAT A COMPANY -- LET'S**
 2 **SAY A LITTLE COMPANY BUILDS ON -- BUILDS OF THEIR OWN BUSINESS**
 3 **IF THEY ARE NOT ACQUIRED. IT'S ACTUALLY IN THIS CASE THE ONLY**
 4 **PROJECTION THAT WE KNOW FOR SURE WON'T HAPPEN BECAUSE**
 5 **TOMORROWNOW WON'T BE A STAND-ALONE.**
 6 **SO EVEN WHEN IT WAS PRESENTED OR PUT TOGETHER, YOU**
 7 **KNOW, IN THAT PACKAGE, IT'S ACTUALLY WHAT THE LITTLE COMPANY**
 8 **WILL DO ALL BY THEMSELVES WITHOUT THE SAP BRAND NAME AND THE SAP**
 9 **JUST MASSIVE DISTRIBUTION CHANNEL. IT'S WHAT THEY WOULD DO IF**
 10 **THEY STAYED AN INDEPENDENT LITTLE COMPANY.**
 11 Q. AND IN NEGOTIATING A LICENSE WITH SAP FOR THE PEOPLESOFT AND
 12 JD EDWARDS AND SIEBEL MATERIALS THAT WERE INFRINGED HERE, IS THE
 13 STAND-ALONE PROJECTIONS OF TOMORROWNOW AT ALL RELEVANT?
 14 **A. NO, BECAUSE THEY'RE NOT STANDING ALONE. TOMORROWNOW IS A**
 15 **PART OF SAP. THE SAP DISTRIBUTION CHANNEL GOT BEHIND IT. THEY**
 16 **HAD THE SAP BRAND NAME, SO JUST THIS COMPANY BEFORE THEY GOT**
 17 **ACQUIRED, IT'S COMPLETELY IRRELEVANT IN THIS CASE.**
 18 Q. AND IS WHAT SAP PAID FOR TOMORROWNOW RELEVANT TO EVALUATING
 19 THE LICENSE?
 20 **A. IT'S COMPLETELY IRRELEVANT. I MEAN, WHEN I HEARD THAT, I**
 21 **THOUGHT, YOU KNOW, I HAVE 15-DOLLAR CROWBAR. I BREAK INTO A**
 22 **10 MILLION-DOLLAR HOUSE. I CLEAN IT OUT. WHAT I PAID FOR THE**
 23 **CROWBAR IS COMPLETELY IRRELEVANT. I MEAN, IT'S JUST SILLY.**
 24 Q. NOW, DOES ORACLE CREATE PROJECTIONS THAT VALUE AN ACQUIRED
 25 COMPANY AT MULTIPLES OF WHAT THE ACQUIRED COMPANY'S STAND-ALONE
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1906

CATZ - DIRECT / HOUSE

1 **JUST THE MONEY THAT WE WOULD HAVE OTHERWISE USED TO MAYBE BUY**
 2 **ADDITIONAL TECHNOLOGY OR BUILD ADDITIONAL TECHNOLOGY.**
 3 Q. DO YOU RECALL MR. CLARKE SAY THAT -- AND ON -- WHEN HE WAS
 4 ON THE STAND THAT SOFTWARE COMPANIES LIKE ORACLE AND SAP DON'T
 5 MANAGE THEIR COMPANIES TO TAKE ADVANTAGE OF ECONOMIES OF SCALE?
 6 **A. WELL, I'LL SPEAK FOR ORACLE BECAUSE WE ACTUALLY TALK ABOUT**
 7 **THE ECONOMIES OF SCALE. I'VE TALKED ABOUT IT IN -- IN -- I**
 8 **TALKED ABOUT IT IN MY CLASS THAT I'M MISSING RIGHT NOW. I --**
 9 **THE THING IS, IS THE THING THAT DRIVES A LOT OF MERGERS AND**
 10 **ACQUISITIONS, IN FACT, IN THE SOFTWARE INDUSTRY ARE ECONOMIES OF**
 11 **SCALE AND INCREASING PROFITABILITY PER UNIT AS YOU GET BIGGER.**
 12 Q. SO MR. CLARKE ALSO SAID THAT THERE WERE LOTS OF OTHER
 13 THIRD-PARTY SUPPORT OPTIONS FOR ORACLE'S PEOPLESOFT AND
 14 JD EDWARDS SOFTWARE BESIDES TOMORROWNOW AFTER SAP TOOK
 15 TOMORROWNOW UNDER ITS UMBRELLA.
 16 IS HE RIGHT, IN YOUR EXPERIENCE?
 17 **A. WELL, FIRST OF ALL, YOU KNOW, I WAS THERE. I LIVED IT.**
 18 **THERE WAS ONLY ONE THAT WAS BACKED BY SAP. THERE WAS ONLY ONE**
 19 **THAT WE WERE -- WE HAD A SWAT TEAM FOR. THERE WAS ONLY ONE WE**
 20 **HAD A WIN-BACK PROGRAM. THERE WAS ONLY -- I MEAN, IT WAS ALL**
 21 **TOMORROWNOW MORNING, NOON, AND NIGHT. YOU KNOW, IT WAS**
 22 **TOMORROWNOW, AND THAT'S WHAT WE WERE FOCUSED ON.**
 23 Q. THERE'S ALSO BEEN A SUGGESTION THAT ORACLE WASN'T REALLY
 24 WORRIED ABOUT SAP USING TOMORROWNOW NOW TO TAKE ORACLE'S
 25 PEOPLESOFT AND JD EDWARDS AND THEN SIEBEL CUSTOMERS. WAS ORACLE
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1905

CATZ - DIRECT / HOUSE

1 PROJECTIONS WERE ORIGINALLY?
 2 **A. SURE. I MEAN, WE DO EXACTLY WHAT YOU WOULD EXPECT. IF WE**
 3 **BUY A TECHNOLOGY, A COMPANY, WE FIGURE WE'RE GOING TO BRING THAT**
 4 **INTO THE -- FIRST OF ALL, WE'RE GOING TO PUT THE ORACLE**
 5 **DISTRIBUTION CHANNEL BEHIND IT. AND ORACLE WILL BE STANDING**
 6 **THERE WITH OUR SUPPORT SYSTEMS AND OUR MARKETING AND ALL THAT.**
 7 **AND SO WE EXPECT TO SELL MULTIPLES -- MULTIPLES OF**
 8 **THE PRODUCT OR THE SERVICE, WHATEVER IT IS. I MEAN, SOMETIMES**
 9 **WE'VE SOLD MORE THAN TEN TIMES THE AMOUNT THE LITTLE COMPANY**
 10 **WOULD HAVE SOLD ON THEIR OWN IN THE FIRST YEAR.**
 11 Q. ALL RIGHT. NOW, LET'S TALK BRIEFLY ABOUT ECONOMIES OF
 12 SCALE. DOES A SMALLER COMPANY BECOME MORE VALUABLE WHEN IT'S
 13 ACQUIRED BY A LARGER COMPANY?
 14 **A. WELL, SURE. I MEAN, YOU SEE, WE ALREADY HAVE THESE**
 15 **INVESTMENTS IN OUR INFRASTRUCTURE, SO TO DISTRIBUTE AN**
 16 **ADDITIONAL PRODUCT DOESN'T COST VERY MUCH.**
 17 **LET'S SAY THE SALESPERSON GOES AND SELLS FIVE OF OUR**
 18 **PRODUCTS AND NOW HAS A SIXTH PRODUCT OR SERVICE TO SELL. WE**
 19 **ARE -- THAT SALESPERSON ALREADY HAS AN OFFICE. WE'VE ALREADY**
 20 **BUILT AND SUPPORT THE PRODUCT. IF YOU SELL AN (SIC) MARGINAL,**
 21 **AN EXTRA PRODUCT, IT DOESN'T COST US MUCH MORE THAN GENERALLY**
 22 **THE SALESPERSON'S COMMISSION.**
 23 **AND BY THE WAY, THE OPPOSITE IS TRUE, TOO. IF WE**
 24 **THOUGHT WE'D SELL SIX AND THEN WE END UP SELLING ONLY FOUR OR**
 25 **FIVE OR, WHAT, THREE, A LOT OF WHAT'S LOST IS ALSO JUST PROFIT,**
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1907

CATZ - DIRECT / HOUSE

1 CONCERNED ABOUT SAP'S TOMORROWNOW SUPPORT OFFERING?
 2 **A. YEAH, WE WERE VERY CONCERNED. I JUST LISTED HALF A DOZEN**
 3 **THINGS WE DID TO TRY TO, YOU KNOW, WORK VERY, VERY HARD. I**
 4 **MEAN, WE REALLY SPENT EXTRA TIME WITH ALL THE CUSTOMERS. WE**
 5 **REALLY WORKED VERY, VERY HARD, AND I THINK IT WAS OBVIOUS IN THE**
 6 **DOCUMENTS SHOWN.**
 7 Q. OKAY.
 8 AND WAS TOMORROWNOW SUCCEEDING IN TAKING AWAY
 9 ORACLE'S CUSTOMERS OVER TIME?
 10 **A. THEY ACTUALLY WERE. I MEAN, THEY WERE REALLY GAINING**
 11 **TRACTION. I THINK THE ONLY THING THAT, YOU KNOW, STOPPED THEM**
 12 **WAS THEM FINALLY SHUTTING DOWN MONTHS AFTER WE CAUGHT THEM AND**
 13 **AFTER WE SUED. I MEAN, THEY WERE REALLY GAINING TRACTION WITH**
 14 **SOME OF THE BIGGEST CUSTOMERS WE HAD.**
 15 Q. OKAY.
 16 NOW, THERE HAS ALSO BEEN A SUGGESTION THAT ALL THE
 17 CUSTOMERS THAT TOMORROWNOW TOOK AWAY FROM ORACLE WERE SMALL OR
 18 UNDESIRABLE OR UNPROFITABLE. IS THAT TRUE?
 19 **A. NO, I MEAN, ON ITS FACE, IT'S OBVIOUSLY NOT TRUE. IT WASN'T**
 20 **TRUE IN MOST OF THE EXAMPLES USED BY SAP EVEN.**
 21 Q. OKAY. DOES THE AMOUNT THAT SAP PROPOSES TO PAY ORACLE IN
 22 THIS LAWSUIT FAIRLY COMPENSATE ORACLE FOR THE VALUE OF THE
 23 SUPPORT MATERIALS AND THE SOFTWARE THAT TOMORROWNOW AND SAP
 24 TOOK?
 25 **A. WELL, ACTUALLY, IT DOESN'T VALUE THE INTELLECTUAL PROPERTY**
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1908

CATZ - DIRECT / HOUSE

1 **AT ALL, BY THE WAY. AND THOSE MATERIALS -- I KEEP HEARING**
 2 **"MATERIALS." OKAY. AND I JUST WANT TO MAKE SURE YOU**
 3 **UNDERSTAND. IT IS, IN FACT, ALL THE SOFTWARE.**
 4 **NOW, YES, THERE ARE DOCUMENTS AND HELP GUIDES AND**
 5 **THINGS LIKE THAT, BUT IT'S ALSO THE SOFTWARE ITSELF. IT'S**
 6 **PROBABLY MILLIONS OF LINES OF SOFTWARE CODE, WHICH IS WHAT THE**
 7 **PRODUCTS REALLY ARE. IT'S WHAT YOU NEED TO RUN THE PRODUCTS.**
 8 **IT'S WHAT YOU NEED TO NOT ONLY USE THE PRODUCTS, BUT,**
 9 **ULTIMATELY, IT IS WHAT YOU NEED TO SUPPORT THE PRODUCTS, WHICH**
 10 **IS WHY WHEN THEY COULDN'T HAVE IT ANYMORE, THEY HAD TO SHUT DOWN**
 11 **TOMORROWNOW.**
 12 Q. WELL, ORACLE'S DAMAGES CLAIM IS OVER A BILLION DOLLARS. WHY
 13 IS THE DAMAGES AMOUNT IN THE EXCESS OF A BILLION DOLLARS MORE
 14 APPROPRIATE?
 15 **A. THIS WHOLE BUSINESS IS A BUSINESS ABOUT BILLIONS. WE**
 16 **SPENT -- YOU KNOW, I KNOW EVERYBODY'S HEARD IT NOW A HUNDRED**
 17 **TIMES. WE SPENT OVER 17 BILLION ON THE PRODUCTS, BUT WE ALSO**
 18 **SPEND OVER \$4 BILLION A YEAR IN R & D IN THE BUSINESS.**
 19 **CUSTOMERS SPEND BILLIONS ON THESE PRODUCTS, HAVE MADE**
 20 **COMMITMENTS. THE -- THIS IS A BUSINESS WHERE THE INTELLECTUAL**
 21 **PROPERTY IS WORTH BILLIONS. IT IS WHAT OUR COMPANIES ARE. IT'S**
 22 **A BILL- -- MULTI-BILLION-DOLLAR BUSINESS.**
 23 Q. CAN YOU REMIND THE JURY WHAT IS THE VALUE ON JUST AN AT --
 24 ANNUAL, ONCE-A-YEAR BASIS -- WHAT'S THE VALUE OF THE MAINTENANCE
 25 STREAM THAT WAS UNDER ATTACK?

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1910

CATZ - CROSS / LANIER

1 DAMAGES AMOUNTS WERE FAIR, REASONABLE, ET CETERA. YOU'D AGREE
 2 WITH ME, WOULDN'T YOU, THAT WHATEVER THE JURY NEEDS TO DECIDE IS
 3 GOING TO BE BASED ON THE LAW AS GIVEN TO THEM BY JUDGE HAMILTON
 4 OVER THERE, RIGHT?
 5 **A. YES, OF COURSE.**
 6 Q. OKAY. YOU TALKED A LOT ABOUT THE VALUE OF IP. THERE WERE
 7 VALUATIONS OF THE INTELLECTUAL PROPERTY ACQUIRED THROUGH
 8 PEOPLESOFT AND JD EDWARDS AND SIEBEL DONE IN THOSE ACQUISITIONS,
 9 RIGHT?
 10 **A. YES, BY THIRD PARTIES FOR ACCOUNTING PURPOSES.**
 11 Q. AND THOSE THIRD-PARTY VALUATIONS OF THE IP FROM PEOPLESOFT
 12 AND JDE AND SIEBEL, ALL TOGETHER ADDED UP ARE LESS THAN THE
 13 DAMAGES YOU'RE CLAIMING IN THIS CASE, RIGHT?
 14 **A. WELL, THEY DON'T VALUE THE WHOLE -- I MEAN, THAT**
 15 **INTELLECTUAL PROPERTY LEADS TO -- IS TIED TO A REVENUE STREAM.**
 16 **AND THEY ARE TRYING TO ALLOCATE FOR ACCOUNTING PURPOSES WHAT'S**
 17 **CALLED EXCESS PURCHASE PRICE. SO --**
 18 Q. AND IT LEADS TO REVENUE, AND REVENUE COMES FROM CUSTOMERS,
 19 RIGHT?
 20 **A. YES.**
 21 Q. SO IN THE END, WHAT YOU JUST TOLD THE JURY IS THAT REALLY
 22 WHERE THE ACTION IS HERE, IS THE CUSTOMERS, RIGHT?
 23 **A. IT'S THE INTELLECTUAL PROPERTY THAT'S LICENSED.**
 24 Q. NOT THE CUSTOMERS AT ALL?
 25 **A. THE CUSTOMERS PAY FOR IT OVER TIME.**

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1909

CATZ - DIRECT / HOUSE

1 **A. JUST BETWEEN PEOPLESOFT, JD EDWARDS, AND SIEBEL, WE'RE**
 2 **TALKING ABOUT OVER A BILLION SEVEN A YEAR OF JUST MAINTENANCE,**
 3 **JUST SUPPORT. AND THAT'S WHAT -- THAT BASE, THAT -- AND THAT'S**
 4 **ANNUALLY EVERY YEAR. THAT'S WHAT WAS EXPOSED.**
 5 Q. IS THE \$1.655 BILLION NUMBER THAT ORACLE SEEKS IN DAMAGES
 6 FAIR TO ORACLE AND TO SAP, IN YOUR OPINION?
 7 **A. YOU KNOW, THE WAY I THINK OF IT IS IT'S -- IT'S AROUND**
 8 **10 PERCENT OF WHAT WE ACTUALLY PAID FOR THE -- FOR INTELLECTUAL**
 9 **PROPERTY. IT'S -- I THINK IT'S CONSERVATIVE PERSONALLY,**
 10 **CONSIDERING THE REAL VALUE OF THE INTELLECTUAL PROPERTY.**
 11 **BUT I THINK IT'S REASONABLE. I THINK IT'S A**
 12 **REASONABLE NUMBER.**
 13 MS. HOUSE: THANK YOU, MS. CATZ.
 14 THE COURT: ALL RIGHT.
 15 CROSS?
 16 MR. LANIER: THANK YOU, YOUR HONOR.
 17 (PAUSE IN THE PROCEEDINGS.)
 18 THE COURT: ALL RIGHT.
 19 MR. LANIER: THANK YOU.
 20 CROSS-EXAMINATION
 21 BY MR. LANIER:
 22 Q. MS. CATZ, I APOLOGIZE IN ADVANCE. I'M GETTING OVER A COLD
 23 SO IF I HACK AND COUGH, PLEASE FORGIVE ME. I'M SORRY YOU HAD TO
 24 MISS YOUR CLASS.
 25 WE HEARD A BIT ABOUT YOUR PERSPECTIVE ABOUT WHAT

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1911

CATZ - CROSS / LANIER

1 Q. AND THE VALUE THAT ORACLE ULTIMATELY GETS FOR THIS
 2 INTELLECTUAL PROPERTY IT ACQUIRES IS WHAT IT GETS FROM SELLING
 3 IT TO CUSTOMERS, MAINTENANCE STREAMS, ET CETERA, RIGHT?
 4 **A. YES.**
 5 Q. OKAY. NOW, LET'S TALK A LITTLE ABOUT THIS LUMP SUM. WE
 6 HEARD ABOUT WHY YOUR PERSPECTIVE ON WHY A LUMP SUM WOULDN'T
 7 (SIC) MAKE SENSE, ET CETERA. I JUST WANT TO MAKE SURE I
 8 UNDERSTAND A LITTLE ABOUT THIS LUMP SUM.
 9 **A. EXCUSE ME. I SAID A LUMP SUM UPFRONT PAYMENT WOULD MAKE**
 10 **SENSE.**
 11 Q. I'M SORRY. I MISSPOKE. YOU COULD TELL I HAVE A COLD.
 12 YOU'RE RIGHT. YOU'VE ARGUED THAT A LUMP SUM MAKES SENSE. I
 13 WANT TO MAKE SURE THAT WE UNDERSTAND THAT. I DID NOT MEAN TO
 14 MISSPEAK, MS. CATZ. I'M SORRY.
 15 SO WE COMPARED -- FOR EXAMPLE, YOU GAVE YOUR
 16 PERSPECTIVE ON THE SUN LICENSE AGREEMENT WHICH YOU CHARACTERIZED
 17 AS A LUMP SUM, CORRECT?
 18 **A. YES.**
 19 Q. ALL RIGHT. SO LET'S JUST MAKE SURE WE HAVE THEM IN BALANCE
 20 HERE. THE LUMP SUM PAYMENT THAT ORACLE IS SEEKING IN THIS CASE
 21 IS AT LEAST 1.6 BILLION WITH A "B," RIGHT?
 22 **A. YES.**
 23 Q. THE LUMP SUM AS YOU CHARACTERIZED IT IN THE SUN LICENSE
 24 AGREEMENT IS 1.5 MILLION WITH AN "M," CORRECT?
 25 **A. YES.**

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1920

CATZ - CROSS / LANIER

1 **ABOUT THIS AFTER WE FOUND OUT WHAT HAPPENED, THE FACT IS THAT WE**
 2 **ACTUALLY THOUGHT THAT, YOU KNOW, SAP COULD MAKE A LOT OF MONEY**
 3 **TAKING HUNDREDS, THOUSANDS OF CUSTOMERS, AND, FRANKLY, EVEN --**
 4 **AND THEY DID. THEY DID.**
 5 Q. ALL RIGHT. SO LET'S -- I JUST WANT TO GET BACK TO THE
 6 QUESTION I ASKED YOU, THOUGH, MS. CATZ.
 7 WHAT WOULD THE NUMBER BE IF IT WAS 2,000 CUSTOMERS,
 8 IF THAT WAS THE ASSUMPTION?
 9 **A. I THINK YOU HAVE TO ASK MR. MEYER ABOUT HIS MODEL AND**
 10 **WHETHER IT MATTERS. IT -- TO ME, IT'S REALLY ABOUT DOLLARS AND**
 11 **CENTS 'CAUSE THAT'S WHAT THIS BUSINESS IS ABOUT.**
 12 Q. DOLLARS AND CENTS THAT COME FROM CUSTOMERS, RIGHT?
 13 **A. YEAH, AND THE QUESTION IS HOW MUCH DOES EACH CUSTOMER GIVE**
 14 **YOU. I'D RATHER HAVE 2,000 CUSTOMERS WHO GIVE ME \$10 MILLION**
 15 **EACH THAN 3,000 CUSTOMERS WHO GIVE ME 5 MILLION EACH.**
 16 Q. WHAT ABOUT 358 CUSTOMERS? DOES THAT CHANGE THE NUMBER, THE
 17 DAMAGES NUMBER HERE?
 18 **A. WELL, IN THIS CASE, IT DOESN'T, BECAUSE THE FACT IS THE**
 19 **INTELLECTUAL PROPERTY, STILL INCREDIBLY VALUE TO SAP. THAT'S**
 20 **WHY THEY TOOK IT.**
 21 Q. OKAY. YOU'RE ON THIS SAP TOOK IT AGAIN. AND I JUST WANT TO
 22 BE CLEAR --
 23 **A. YOU KNOW --**
 24 Q. -- 'CAUSE THIS IS SERIOUS AGAIN, MS. CATZ. TOMORROWNOW USED
 25 THE INTELLECTUAL PROPERTY, RIGHT? WE'RE CLEAR ABOUT THAT?
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1922

CATZ - CROSS / LANIER

1 **\$2 A COPY, AND THEY GOT CAUGHT AND WANTED TO GIVE DISNEY BACK**
 2 **HALF OF WHAT THEY MADE, IS DISNEY'S LIBRARY ONLY WORTH \$50?**
 3 **I MEAN, IT -- REALLY. I'M REALLY NOT SURE WHAT**
 4 **YOU'RE ASKING. THE FACT THAT IT WAS COPIED? IT WAS COPIED.**
 5 **IT'S VALUABLE. IT DOESN'T CHANGE THAT IT WAS VALUABLE, SIR.**
 6 Q. BUT, MS. CATZ, AGAIN, THIS IS SERIOUS BUSINESS, AND SO I --
 7 WE NEED TO BE CAREFUL ABOUT NOT MAKING THINGS UP, EVEN COLORFUL
 8 ANALOGIES.
 9 SAP (SIC) SUBSIDIARY TOMORROWNOW -- SO WE DON'T HAVE
 10 TO HAVE THAT FIGHT -- USED THE SOFTWARE TO SERVE 358 CUSTOMERS,
 11 CORRECT?
 12 **A. THAT'S HOW MANY CUSTOMERS THEY TOLD US ABOUT THAT PAID THEM**
 13 **SOMETHING. I DON'T KNOW HOW MANY OTHER CUSTOMERS -- THEY USED**
 14 **THE INTELLECTUAL PROPERTY IN ANY OTHER WAY.**
 15 Q. MS. CATZ, YOU KNOW FULL WELL THAT THESE PARTIES HAVE AGREED
 16 THAT THERE ARE 358 CUSTOMERS AT ISSUE HERE, RIGHT?
 17 YOU'RE NOT REALLY ARGUING WITH THAT, ARE YOU?
 18 **A. THOSE ARE THE NUMBERS THAT HAVE BEEN PRESENTED AT TRIAL.**
 19 Q. OKAY. ALL RIGHT. AND SO TOMORROWNOW DIDN'T ACTUALLY SELL
 20 THAT SOFTWARE, LIKE YOUR COLORFUL WARNER BROTHERS ANALOGY --
 21 THEY DIDN'T SELL THAT SOFTWARE TO ANYBODY. THEY GOT PAID FOR
 22 PROVIDING SERVICE, UPDATES, ET CETERA, ON THAT SOFTWARE,
 23 CORRECT?
 24 **A. IT'S -- THEY GAVE FOLKS THE RIGHT TO USE OUR SOFTWARE,**
 25 **CORRECT.**
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1921

CATZ - CROSS / LANIER

1 **A. YEAH.**
 2 Q. OKAY.
 3 **A. I MEAN, WE CAN LOOK AT THE ACTUAL WORDS OF THE STIPULATIONS**
 4 **AND ALL THAT, AND -- BUT -- WE CAN PRETEND THAT TOMORROWNOW'S**
 5 **NOT A SUBSIDIARY OF SAP, BUT IT IS.**
 6 Q. ALL RIGHT.
 7 SO WE HEARD A LOT ABOUT WATCHES AND CROW BARS AND ALL
 8 SORT OF STUFF LIKE THAT, AND I JUST WANTED TO FOLLOW UP A LITTLE
 9 BIT ON THIS, TOO.
 10 THIS IS A COPYRIGHT CASE. YOU KNOW THAT?
 11 **A. YES.**
 12 Q. OKAY. AND A COPYRIGHT CASE MEANS THAT SOMEBODY -- KIND OF A
 13 BROAD LEGAL MEANING -- COPIED SOME SOFTWARE, RIGHT?
 14 **A. YES.**
 15 Q. SO ORACLE'S STILL GOT IT, RIGHT? THEY STILL HAVE THAT
 16 SOFTWARE.
 17 **A. YEAH --**
 18 Q. OKAY.
 19 **A. -- YOU --**
 20 **Q. AND THE VALUE THAT ORACLE LOST IN SOMEBODY ELSE COPYING THAT**
 21 **SOFTWARE IS THAT ORACLE DOESN'T GET THE CHANCE TO SELL THAT**
 22 **SOFTWARE TO SOMEBODY ELSE, CORRECT? THAT'S WHAT'S AT ISSUE**
 23 **HERE, RIGHT?**
 24 **A. IF -- YOU KNOW IF WARNER BROTHERS HAD A LITTLE SUBSIDIARY**
 25 **THAT COPIED A DISNEY'S ENTIRE LIBRARY AND STARTED SELLING IT FOR**
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1923

CATZ - CROSS / LANIER

1 Q. LET'S BE VERY CLEAR HERE. THEY DIDN'T GIVE ANYONE A SET OF
 2 THE UNDERLYING APPLICATION SOFTWARE THAT DOESN'T ALREADY HAVE A
 3 LICENSE. AND IF YOU DISAGREE, GIVE ME ONE SINGLE EXAMPLE.
 4 **A. REMEMBER, THEY -- THOSE UPDATES WERE APPLIED TO CUSTOMERS'**
 5 **SYSTEMS THAT THEY DIDN'T HAVE THE RIGHT TO THE UPDATE. THEY**
 6 **DIDN'T --**
 7 Q. OKAY. ACTUALLY, MS. CATZ, LET'S BE -- LET'S BE CLEAR ABOUT
 8 THIS. AND, AGAIN, IT'S TOO BAD YOU DIDN'T SEE MR. MANDIA'S
 9 TESTIMONY WHEN MR. MANDIA CONFIRMED THAT THAT SITUATION HE
 10 DESCRIBED INVOLVED USING SOMETHING ONE CUSTOMER WAS LICENSED FOR
 11 BUT JUST USING THE WRONG COPY OF IT. AND YOU ACTUALLY CAN'T
 12 DISAGREE WITH THAT, CAN YOU?
 13 **A. USING THE WRONG COPY OF IT?**
 14 Q. YEAH.
 15 **A. I --**
 16 Q. AND, AGAIN, YOU WEREN'T HERE. I DON'T MEAN TO TAKE
 17 ADVANTAGE OF THAT, BUT YOU DON'T DISAGREE.
 18 MS. HOUSE: JUST WANT TO OBJECT INsofar AS THIS
 19 MISCHARACTERIZES MR. MANDIA'S TESTIMONY. IF HE WANTS TO PROVIDE
 20 THE ACTUAL TESTIMONY SO WE DON'T HAVE ANY MISREPRESENTATIONS OF
 21 WHAT MR. MANDIA SAYS, THAT'S AN OPTION, BUT HE SHOULDN'T --
 22 THE COURT: EXCUSE ME, COUNSEL. THE JURY HAS HEARD
 23 MR. MANDIA'S TESTIMONY. THEIR RECOLLECTION OF HIS TESTIMONY
 24 CONTROLS, REGARDLESS OF HOW YOU ALL CHARACTERIZE IT ONE WAY OR
 25 THE OTHER.
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

1980

1 MR. BOIES: THE FOURTH PARAGRAPH OF 6B?
 2 THE COURT: YES. ALTHOUGH THE FIRST SENTENCE, BOTH
 3 OF YOU SOMEWHERE IN THE INSTRUCTIONS DO SAY THAT IT'S NOT
 4 DEPENDENT UPON WHETHER OR NOT THE PARTIES WOULD HAVE ACTUALLY
 5 AGREED. THE FIRST SENTENCE IS FINE.
 6 THE SECOND SENTENCE, "THE PARTIES HAVE DIFFERENT
 7 VIEWS ON THE VALUE OF A POTENTIAL LICENSE DOES NOT PREVENT
 8 ORACLE FROM RECOVERING THE FULL MARKET VALUE," I WOULDN'T GIVE
 9 THAT. I JUST THINK IT'S ARGUMENT.
 10 AND I AM NOT SURE ABOUT THE LAST SENTENCE. "IN
 11 DETERMINING THE FAIR MARKET VALUE OF THE RIGHTS INFRINGED, YOU
 12 MUST CONSIDER THE ENTIRE SCOPE OF INFRINGEMENT INCLUDING ALL
 13 WORKS INFRINGED, WHETHER OR NOT ANY DEFENDANT MADE ANY
 14 ADDITIONAL USE OF THE WORK AFTER COPYING IT."
 15 THIS IS WHAT I SAID EARLIER. IT SEEMS TO ME ORACLE
 16 IS FOCUSING ON JUST THE COPYING AS BEING THE INFRINGEMENT AND
 17 THE DEFENDANTS FOCUSING ON THE ACTUAL USE. THE NINTH CIRCUIT
 18 INSTRUCTION DOES REFER TO ACTUAL USE, SO I CAN'T TOTALLY IGNORE
 19 THAT.
 20 MR. LANIER: YOUR HONOR, I THINK THE SUGGESTION
 21 HERE, I THINK THE WAY TO BRIDGE THIS GAP IS TO SAY YOU MUST
 22 CONSIDER THE ENTIRE SCOPE OF INFRINGEMENT. THE PARTIES HAVE
 23 STIPULATED TO THE SCOPE OF INFRINGEMENT.
 24 NOW THAT WE HAVE REACHED STIPULATIONS EVEN GOING
 25 BEYOND THOSE THAT EXISTED WHEN WE FILED THESE --
 DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

1982

1 THE COURT: CAN WE GO TO 6C?
 2 THE SECOND PARAGRAPH OF PLAINTIFFS' 6C IS
 3 ARGUMENTATIVE AND I WOULD NOT INCLUDE THAT.
 4 AND THE DEFENDANTS, I AM JUST NOT SURE ABOUT THE
 5 GEORGIA-PACIFIC FACTORS. SEVERAL -- I MEAN, THE -- SEVERAL
 6 WITNESSES, EVEN BESIDES THE TWO EXPERTS, MENTIONED THE
 7 GEORGIA-PACIFIC FACTORS. YOU ALL HAVE BOTH PROCEEDED ON THE
 8 BASIS THAT THE GEORGIA-PACIFIC FACTORS ARE VALID CONSIDERATIONS
 9 EVEN IN A COPYRIGHT CASE. CORRECT?
 10 MR. LANIER: SUBJECT TO OUR ONGOING OBJECTION ABOUT
 11 THIS MEASURE OF DAMAGES, YES. ONCE YOU GET TO THE VALUATION,
 12 GEORGIA-PACIFIC IS APPROPRIATE.
 13 I THINK ACTUALLY WE COULD WITHDRAW OUR 6C. IT
 14 DOESN'T EXACTLY CORRESPOND TO THEIRS BECAUSE THERE USED TO BE A
 15 GEORGIA-PACIFIC INSTRUCTION. WE ARE CONTENT TO WITHDRAW IT AS
 16 WELL. IT DOESN'T HELP.
 17 THE COURT: I WAS GOING TO SUGGEST WE EITHER TELL
 18 THEM WHAT THE GEORGIA-PACIFIC FACTORS ARE, THERE WAS A SLIDE,
 19 WE TELL THEM EACH EXPERT RELIED UPON SOME OF THE FACTORS MORE
 20 THAN OTHERS. EITHER WE TELL THEM THESE ARE THE FACTORS YOU CAN
 21 CONSIDER OR WE DON'T TELL THEM ANYTHING ABOUT GEORGIA-PACIFIC.
 22 I THINK TO REFER TO THE FACT THAT SOME OF THE
 23 WITNESSES TESTIFIED TO IT DOESN'T REALLY GIVE THEM ANY
 24 DIRECTION.
 25 MR. LANIER: WE ARE CONTENT, AND WE'LL OBVIOUSLY
 DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

1981

1 MR. BOIES: I THINK WE CAN DO SOMETHING LIKE THAT,
 2 YOUR HONOR. I THINK WE CAN WORK SOMETHING LIKE THAT OUT.
 3 THE COURT: OKAY. NOW THAT DOESN'T MEAN I AM
 4 ACCEPTING 6B IN ITS ENTIRETY WITH JUST THOSE TWO SENTENCES.
 5 TURNING TO DEFENDANTS' 6B, I AM TRYING TO GET YOU
 6 ALL TO WORK TOGETHER TO COME TO SOMETHING THAT'S JUST NOT QUITE
 7 SO ARGUMENTATIVE.
 8 MR. BOIES: UH-HUH.
 9 MR. LANIER: IN OUR 6B, WE WERE TRYING TO SET UP
 10 THIS CHOICE. WE HAVE YOUR HONOR'S GUIDANCE NOW ON BREAKING IT
 11 DOWN INTO FOUR SPECIFIC INSTRUCTIONS, BUT THAT'S PARTLY WHAT WE
 12 WERE TRYING TO DO.
 13 THE COURT: TRYING TO DO. I THINK THAT THE -- I
 14 LIKE THE FIFTH PARAGRAPH, AND PERHAPS THIS IS THE PLACE THAT
 15 SAYS THAT SAYS THAT YOU -- IT'S NOT TO BE BASED UPON UNDUE
 16 SPECULATION.
 17 MR. LANIER: OKAY.
 18 MR. BOIES: THIS IS THE FIFTH PARAGRAPH --
 19 THE COURT: THE FIFTH AND SIXTH PARAGRAPHS ARE FINE
 20 OF DEFENDANTS' 6B.
 21 MR. LANIER: THAT'S ON PAGE 24.
 22 MR. BOIES: RIGHT.
 23 THE COURT: SO IF YOU CAN KIND OF COMBINE THE TWO
 24 6B'S WITH THOSE PROVISIONS IT WOULD BE OKAY.
 25 MR. LANIER: ALL RIGHT.
 DIANE E. SKILLMAN, OFFICIAL COURT REPORTER, USDC (510) 451-2930

1983

1 DISCUSS IT WITH COUNSEL, IF YOUR HONOR IS COMFORTABLE WITH IT,
 2 WE WOULD BE CONTENT JUST TO WITHDRAW THIS INSTRUCTION AND THEN
 3 EACH SIDE CAN ARGUE RATHER THAN TRYING TO AGREE ON A
 4 GEORGIA-PACIFIC INSTRUCTION.
 5 MR. BOIES: I THINK THAT'S RIGHT, YOUR HONOR. I
 6 THINK IT IS CONFUSING TO REFERENCE THE GEORGIA-PACIFIC FACTORS.
 7 IN PART BECAUSE WHAT GEORGIA-PACIFIC FACTORS MEAN IS NOT JUST
 8 THE FACTORS THAT ARE LISTED IN GEORGIA-PACIFIC, BUT IN THE
 9 SUBSEQUENT NINTH CIRCUIT CASES THAT HAVE INTERPRETED IT.
 10 THE COURT: SURE. AND THE EXPERTS MENTIONED SOME OF
 11 THE --
 12 MR. BOIES: RIGHT.
 13 THE COURT: -- PROVISIONS AND NOT ALL OF THEM. I
 14 THINK IT IS UNNECESSARY AND CONFUSING.
 15 MR. LANIER: WE ARE CONTENT TO WITHDRAW THIS
 16 PROPOSED INSTRUCTION.
 17 MR. BOIES: I THINK THAT'S RIGHT. I DO THINK,
 18 HOWEVER, THE COURT NEEDS TO CONSIDER INSTRUCTING THE JURY AS TO
 19 WHAT THE BASIC FACTORS ARE TO -- NOT BY NAME AND
 20 GEORGIA-PACIFIC, BUT WHAT THE BASIC CRITERIA ARE TO USE TO
 21 DETERMINE A FAIR MARKET VALUE.
 22 THE COURT: THAT'S WHAT I SAID. EITHER WE DON'T
 23 SIMPLY REFER TO THE FACT THAT WITNESSES HAVE REFERRED TO IT,
 24 EITHER YOU LEAVE IT OUT COMPLETELY OR YOU GIVE THEM A LIST OF
 25 THE GEORGIA-PACIFIC FACTORS.
 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.

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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

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2097

CLOSING ARGUMENT \ BOIES

1 AND LET'S GO TO 225. THIS IS PLAINTIFFS' EXHIBIT 23.
 2 (DEMONSTRATIVE PUBLISHED TO JURY.)
 3 MR. BOIES: THIS IS A CONFERENCE CALL, JANUARY 19TH,
 4 THE DAY OF THE HYPOTHETICAL NEGOTIATION. THIS IS WHAT
 5 MR. AGASSI, THE SAP BOARD MEMBER, SAYS: HE'S ASKED ABOUT THE
 6 VALUES. SAYS IF YOU WANT TO LOOK AT IT FROM A FINANCIALS
 7 PERSPECTIVE, THE RATIONALE IS MORE AROUND THE VALUE THAT THESE
 8 CUSTOMERS REPRESENT AS POTENTIAL FUTURE CUSTOMERS OF SAP.
 9 AND THE CUSTOMERS OF -- PEOPLESOF CUSTOMERS. AND HE
 10 GOES ON. AND THIS IS MR. AGASSI'S WORDS AT THE TIME. AND IT'S
 11 THE VALUE WAS ESTIMATED BY ORACLE RIGHTLY OR WRONGLY AS
 12 \$10 BILLION.

13 WE BELIEVE THAT THIS CUSTOMER BASE IS NOT NECESSARILY
 14 CAPTIVE (SIC) BY ORACLE. I THINK THIS CUSTOMER BASE HAS TO MAKE
 15 A CHOICE RIGHT NOW. AND THE REASON THEY HAD TO MAKE A CHOICE
 16 RIGHT NOW WAS BECAUSE OF TOMORROWNOW. BECAUSE WITHOUT
 17 TOMORROWNOW, YOU'VE SEEN THEY HAD NO MAINTENANCE OFFERING.

18 MR. CLARKE TESTIFIED THAT SAP ON ITS OWN COULD NEVER
 19 HAVE COME UP WITH A SOFTWARE NECESSARY TO SERVICE ORACLE
 20 CUSTOMERS. THEY COULD NOT HAVE DONE IT ON THEIR OWN. ALSO
 21 TESTIFIED THAT TOMORROWNOW COULDN'T HAVE DONE IT LEGALLY. BUT
 22 THEY NEEDED TOMORROWNOW, THEY NEEDED THESE INFRINGING COPIES IN
 23 ORDER TO COMPETE. THEY COULD ONLY GIVE THESE CUSTOMERS WORTH
 24 \$10 BILLION A CHOICE THROUGH THE INFRINGEMENT, AND THAT SHOWS
 25 YOU THE VALUE OF THE INFRINGEMENT.

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

2099

CLOSING ARGUMENT \ BOIES

1 MR. BOIES: I WANT TO REMIND YOU OF WHO TESTIFIED IN
 2 THIS TRIAL AND WHAT THEY SAID ABOUT THE VALUE OF A FAIR MARKET
 3 VALUE LICENSE. ALL RIGHT?

4 MR. PHILLIPS, FORMER PRESIDENT OF ORACLE; MS. CATZ,
 5 CURRENT PRESIDENT OF ORACLE --
 6 (DEMONSTRATIVE PUBLISHED TO JURY.)

7 MR. BOIES: -- MR. ELLISON, ORACLE'S C.E.O., ALL
 8 TESTIFIED THAT THE FAIR MARKET VALUE LICENSE WOULD HAVE A VALUE
 9 IN THE BILLIONS OF DOLLARS. MAYBE 4 BILLION, MAYBE 4 AND A
 10 HALF, MAYBE \$5 BILLION BUT BILLIONS OF DOLLARS.

11 MR. MEYER, OUR EXPERT, CAME IN AND HE QUANTIFIED IT
 12 AT 1.65 BILLION, SAYING THAT WAS A MINIMUM NUMBER. THERE WERE
 13 OTHER ELEMENTS THAT HE COULDN'T QUANTIFY, BUT IT WAS \$1.656
 14 BILLION.

15 NOBODY -- NO FACT WITNESS FROM SAP CAME IN TO GIVE
 16 CONTRARY TESTIMONY. NOT A SINGLE FACT WITNESS GOT ON THE STAND
 17 FROM SAP TO TELL YOU WHAT THEY BELIEVED THE FAIR MARKET VALUE OF
 18 THIS LICENSE WAS. NOT A SINGLE FACT WITNESS WOULD COME INTO
 19 THIS COURTROOM, SUBJECT THEMSELVES TO CROSS-EXAMINATION, AS
 20 MR. ELLISON, AND MR. PHILLIPS AND MS. CATZ DID, AND TRY TO
 21 DEFEND A NUMBER FOR YOU. THE BUSINESS TESTIMONY IS UNDISPUTED.
 22 YOU HAVE THE ORACLE TESTIMONY. AND YOU HAVE NOTHING FROM SAP
 23 ABOUT WHAT THE VALUE WAS OF THIS FAIR MARKET VALUE LICENSE.

24 WHAT THEY DID DO WAS THEY BROUGHT IN MR. CLARKE, WHO
 25 SAYS IT'S \$40 MILLION. NOW, YOU HEARD THE CROSS-EXAMINATION OF
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

2098

CLOSING ARGUMENT \ BOIES

1 AND PLAINTIFFS' EXHIBIT 4850.
 2 (DEMONSTRATIVE PUBLISHED TO JURY.)
 3 MR. BOIES: QUOTE, THERE IS A LOT AT STAKE. 9200
 4 PEOPLESOF AND JD EDWARDS CUSTOMERS, 1.3 BILLION IN ANNUAL
 5 MAINTENANCE REVENUE, AND ORACLE'S \$10.3 BILLION ACQUISITION
 6 COSTS.

7 PLAINTIFFS' EXHIBIT 4850.
 8 (DEMONSTRATIVE PUBLISHED TO JURY.)
 9 MR. BOIES: AND JANUARY 16TH, 2005, PLAINTIFFS'
 10 EXHIBIT 18, THIS IS LESS THAN TWO WEEKS BEFORE THE ACQUISITION,
 11 LESS THAN TWO WEEKS BEFORE THE HYPOTHETICAL LICENSE NEGOTIATION.
 12 SAP EXECUTIVE BOARD MEMBER AGASSI WRITES --
 13 (DEMONSTRATIVE PUBLISHED TO JURY.)

14 MR. BOIES: -- THE PRESS RELEASE ON THIS DEAL WILL BE
 15 THE CHEAPEST ADVERTISING WE HAVE EVER GOT, AND ORACLE'S SHARE
 16 PRICE WILL PROBABLY GO DOWN BY 10 PERCENT THAT MINUTE. ORACLE'S
 17 MARKET CAPITALIZATION ON JANUARY 6, 2005, WAS APPROXIMATELY
 18 \$70 MILLION. A 10 PERCENT DROP WOULD BE A \$7 BILLION LOSS IN
 19 VALUE.

20 BUT THAT'S NOT A DAMAGE CALCULATION, LADIES AND
 21 GENTLEMEN, BUT IT IS SOMETHING THAT SHOWS YOU THE MAGNITUDE OF
 22 WHAT WE'RE DEALING WITH.

23 AND TO PUT THAT MAGNITUDE IN PERSPECTIVE, GO TO -- GO
 24 TO 75.

25 (DEMONSTRATIVE PUBLISHED TO JURY.)
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2100

CLOSING ARGUMENT \ BOIES

1 MR. CLARKE. AND YOU HEARD ALL THE PROBLEMS WITH THAT ANALYSIS.
 2 YOU HEARD ALL THE THINGS HE DIDN'T TAKE INTO ACCOUNT.

3 YOU'VE SEEN SOME OF THOSE THINGS TODAY, BUT YOU HAVE
 4 THEIR EXPERT AT 40, OUR EXPERT AT 1.656 BILLION, AND YOU HAVE
 5 FACT WITNESS TESTIMONY, BUSINESS TESTIMONY FROM OUR WITNESSES
 6 GIVING YOU A VALUATION. YOU HAVE NOTHING FROM THEM.

7 NOW, THIS IS 237 --
 8 (DEMONSTRATIVE PUBLISHED TO JURY.)

9 MR. BOIES: -- MR. MEYER'S CALCULATION. THAT COMES
 10 UP WITH A \$1.655.6 BILLION (SIC), \$1,655,600,000. AND IT'S GOT
 11 THE THREE COMPONENTS, THE PEOPLESOF LICENSE, THE SIEBEL
 12 LICENSE, AND THE DATABASE LICENSE. THE VAST MAJORITY OF IT IS
 13 THE PEOPLESOF LICENSE.

14 AND THERE, WHAT HE SAID WAS, THIS IS A MINIMUM
 15 NUMBER. IT'S LARGER. I CAN'T TELL YOU HOW MUCH LARGER BECAUSE
 16 THE DATA ISN'T THERE.

17 SO ONE OF THE -- ONE OF THE PROBLEMS WE'RE CONFRONTED
 18 WITH HERE IS A QUESTION OF WHAT CAN BE QUANTIFIED AND WHAT DO
 19 YOU HAVE TO ESTIMATE? AND THIS WAS HIS QUANTIFICATION.

20 NOW, LET ME GO TO 239 BECAUSE I WANT TO JUST COMPARE
 21 THAT QUANTIFICATION.

22 (DEMONSTRATIVE PUBLISHED TO JURY.)

23 MR. BOIES: YOU HAVE MR. PHILLIPS' VALUATION, YOU
 24 HAVE MR. ELLISON'S VALUATION OF LICENSE. YOU HAVE WHAT A
 25 LICENSE AT 20 PERCENT OF THE PEOPLESOF AND SIEBEL ACQUISITIONS
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLOSING ARGUMENT \ BOIES

1 WOULD BE. YOU HAVE THE VALUE OF 3,000 CUSTOMERS, JUST
 2 \$1 MILLION PER CUSTOMER.
 3 YOU HAVE THE MEYER'S INDICATION VALUE AT 2.86
 4 BILLION. YOU HAVE SAP'S ROAD MAP REVENUE THROUGH 2007 EXTENDED
 5 FOR THE TEN MONTHS IN 2008, AT 1.7 -- 1.77 --
 6 YOU HAVE 10 PERCENT OF PEOPLESOFT AND SIEBEL
 7 ACQUISITION PRICE, WHICH WOULD BE 1.72 BILLION, AND ON AND ON
 8 AND ON, EXAMPLE AFTER EXAMPLE AFTER EXAMPLE.
 9 YOU HAVE MR. MEYER'S AT 1.65 BILLION, AND YOU HAVE
 10 MR. CLARK AT 40 MILLION.
 11 AND LET ME GO TO 240. AND MAYBE THIS IS A CHART TO
 12 LEAVE YOU WITH.
 13 (DEMONSTRATIVE PUBLISHED TO JURY.)
 14 MR. BOIES: THIS IS A GRAPHIC DEPICTION OF THE
 15 VARIOUS VALUATIONS -- FAIR MARKET VALUE LICENSE THAT YOU'VE
 16 HEARD. NO. 9 IS MR. MEYER'S VALUATION, WHICH, AS YOU SEE IS IN
 17 THE LOWER HALF, BUT IN THE RANGE OF A NUMBER OF THOSE
 18 VALUATIONS.
 19 NO. 14, WHICH YOU CAN BARELY SEE, IS MR. CLARKE'S
 20 VALUATION, VIRTUALLY OFF THE CHART. HE'S NOT EVEN IN THE
 21 BALLPARK. AND THE REASON HE'S NOT EVEN IN THE BALLPARK IS THE
 22 REASONS YOU HEARD ON CROSS-EXAMINATION AND THE EVIDENCE THAT
 23 I -- THAT I'M SHOWING YOU TODAY.
 24 NOW, I'LL GET ANOTHER CHANCE TO TALK TO YOU -- NOT AS
 25 LONG AS I JUST HAD -- AFTER COUNSEL FOR SAP HAS TALKED TO YOU,
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLOSING ARGUMENT \ BOIES

1 THAT WAS REALLY VALUABLE?
 2 THANK YOU.
 3 THE COURT: ALL RIGHT. THANK YOU, MR. BOIES.
 4 LADIES AND GENTLEMEN, WE'RE GOING TO TAKE OUR
 5 MORNING -- OUR FIRST MORNING BREAK FOR 15 MINUTES, AND THEN
 6 WE'LL COME BACK FOR THE DEFENSE CLOSING.
 7 (RECESS TAKEN AT 10:38 A.M.)
 8 (CONTINUED NEXT PAGE; NOTHING OMITTED.)
 9
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 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLOSING ARGUMENT \ BOIES

1 BUT I WANT TO LEAVE YOU RIGHT NOW WITH THESE THOUGHTS. AND I'D
 2 LIKE YOU TO KEEP THEM IN MIND AS YOU LISTEN TO WHAT YOU'RE GOING
 3 TO HEAR FROM DEFENSE COUNSEL.
 4 I WANT YOU TO ASK YOURSELF WHY, IF THIS WAS A VERY,
 5 VERY SMALL THING, IF IT WAS VERY LIMITED -- WHY DID THEY HAVE IT
 6 REPORT DIRECTLY TO THE EXECUTIVE BOARD.
 7 REMEMBER MR. MCDERMOTT SAYING -- REPORTED DIRECTLY TO
 8 THE EXECUTIVE BOARD, NOT THE WAY IT USUALLY HAPPENS WHERE THEY
 9 REPORT THROUGH SAP AMERICA, BUT DIRECTLY TO THE EXECUTIVE BOARD.
 10 WHY ARE ALL OF THE CONTEMPORANEOUS ESTIMATES OF WHAT
 11 WAS GOING TO HAPPEN AFTER THE ACQUISITION SO OPTIMISTIC, SO HIGH
 12 IF IT WAS A VERY, VERY SMALL --
 13 WHY IF IT WAS A VERY, VERY SMALL PART DID THEY CALL
 14 IT A KEY COMPONENT, A CORNERSTONE, A MAJOR CORNERSTONE,
 15 SOMETHING THAT WAS INSTRUMENTAL IN SAFE PASSAGE'S SUCCESS IF IT
 16 WAS A VERY, VERY SMALL PART?
 17 AND WHY DID THEY GET \$689 MILLION IN REVENUE FROM
 18 JUST 86 CUSTOMERS IF THIS DIDN'T HAPPEN?
 19 AND PERHAPS MOST IMPORTANTLY, WHY WOULD THIS COMPANY
 20 TAKE ON THE SERIOUS RISKS THAT IT HAS ADMITTED OVER AND OVER
 21 AGAIN IN -- INTERNAL DOCUMENTS THAT IT DID, IF THIS WASN'T
 22 SOMETHING THAT WAS VERY VALUABLE? EVERY ONE OF THOSE BOARD
 23 MEMBERS KNEW HOW SERIOUS THIS WAS -- EVERY ONE OF THOSE BOARD
 24 MEMBERS KNEW WHAT THEY WERE EXPOSING THEMSELVES TO IF THEY GOT
 25 CAUGHT. WHY WOULD THEY TAKE THAT RISK IF THIS WASN'T SOMETHING
 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR (510) 451-7530

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 (PROCEEDINGS RESUMED AT 10:55 A.M.)
 2 (PROCEEDINGS HELD IN THE PRESENCE OF THE JURY.)
 3 THE CLERK: PLEASE BE SEATED AND COME TO ORDER.
 4 THE COURT: MR. MITTELSTAEDT?
 5 CLOSING ARGUMENT
 6 MR. MITTELSTAEDT: IF IT PLEASE THE COURT, LADIES
 7 AND GENTLEMEN OF THE JURY.
 8 IF TRUTH BE TOLD, THIS HAS NOT BEEN A GOOD MONTH OR
 9 A GOOD WEEK OR A GOOD DAY FOR EITHER COMPANY. IT HASN'T BEEN
 10 GOOD FOR SAP BECAUSE IT HAS OWNED UP TO COPYRIGHT INFRINGEMENT
 11 BY TOMORROWNOW AND COPYRIGHT INFRINGEMENT INDIRECTLY BY ITSELF.
 12 WHEN I STOOD UP HERE, WHAT IS IT THREE OR FOUR WEEKS
 13 AGO, I TOLD YOU THAT SAP TOOK RESPONSIBILITY FOR THAT AND WAS
 14 PREPARED AND HAS STOOD WILLING AND CONTINUES TO STAND WILLING
 15 TO PAY ORACLE FOR REASONABLE COMPENSATION.
 16 WHY HASN'T IT BEEN A GOOD TRIAL OR A GOOD DAY OR A
 17 GOOD SHOWING FOR ORACLE?
 18 THEY HAVE HAD THEIR CHANCE TO PUT ON ALL THIS
 19 EVIDENCE OF STUFF THAT WE HAVE ALREADY ADMITTED TO. MAYBE THEY
 20 THOUGHT THAT WAS GOOD FOR CUSTOMERS, MAYBE THEY THOUGHT THAT
 21 WAS GOOD FOR COMPETITION, MAYBE THEY THOUGHT THAT WOULD BE
 22 PICKED UP AND HELP THEM.
 23 BUT I THINK THE EVIDENCE AND THE WAY ORACLE HAS
 24 PRESENTED ITS CASE AND THE DAMAGES ITS ASKING FOR SHOW THEY
 25 HAVE BEEN OVERREACHING. THEY ARE ASKING FOR FAR MORE THAN THEY
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2105

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 ARE ENTITLED TO, AND THEY ARE TRYING TO TRICK YOU IN DOING
 2 THAT. AND I WILL EXPLAIN EXACTLY THE TRICKS THEY ARE USING.
 3 THIS CASE REALLY COMES DOWN TO WHAT'S THE BEST
 4 MEASURE OF COMPENSATION. JUDGE HAMILTON WILL INSTRUCT YOU THAT
 5 IT IS UP TO YOU TO DECIDE THE BEST MEASURE. IS IT BASED ON --
 6 AND YOU HAVE TWO CHOICES.
 7 ONE WAY IS BASED ON GUESSWORK. THE OTHER WAY IS
 8 BASED ON REALITY. ONE WAY IS BASED ON HOPES AND ASPIRATIONS
 9 THAT SOMEBODY PUT DOWN ON A PIECE OF PAPER, THE OTHER IS BASED
 10 ON WHAT ACTUALLY HAPPENED. ONE IS BASED ON WHAT MS. CATZ TOLD
 11 YOU ME AND LARRY DEMAND. THE OTHER IS BASED ON WHAT A VERY
 12 EXPERIENCED EXPERT IN HYPOTHETICAL NEGOTIATIONS SAID IS THE
 13 RIGHT RESULT TAKEN INTO ACCOUNT NOT JUST THE INTEREST OF
 14 ORACLE, BUT THE INTEREST OF BOTH PARTIES. A COMPROMISE. AND
 15 ONE WOULD GIVE ORACLE A WINDFALL, A BONANZA, A JACKPOT AND THE
 16 OTHER WOULD GIVE ORACLE WHAT ORACLE IS ENTITLED TO.
 17 IN TRYING TO COME UP WITH A NUMBER IN THE BILLIONS,
 18 ORACLE IS USING TWO BASIC TRICKS. FIRST OF ALL, THEY ARE
 19 TRYING TO TURN WHAT SOMEBODY WROTE DOWN AS A GOAL OR A TARGET
 20 INTO AN EXPECTATION; INTO AN EXPECTATION SO FIRM THAT A COMPANY
 21 WOULD BE WILLING JUST BASED ON THAT PIECE OF PAPER, JUST BASED
 22 ON THAT BOLD TO WRITE A CHECK AS BIG AS THEY WANT WITHOUT ANY
 23 FURTHER WORK, WITHOUT ANY FURTHER ANALYSIS. THAT'S ONE TRICK.
 24 IT'S WHAT MR. MEYER DID WITH HIS CHARTS. AND YOU
 25 REMEMBER HIS CHART, AND I WILL SHOW IT TO YOU IN A BIT. CHART
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2107

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 DOWN AND TAKE OFF 50 PERCENT OF IT.
 2 MORE THAN THAT, THESE 86 CUSTOMERS ARE THE CUSTOMERS
 3 THAT BOUGHT SOMETHING FROM SAP DURING THE TIME THAT THEY WERE
 4 TOMORROWNOW CUSTOMERS. SO THEY WERE GETTING MAINTENANCE ON
 5 THEIR PEOPLESFT SOFTWARE FROM TOMORROWNOW AND THEY WERE ALSO
 6 BUYING SOMETHING FROM SAP.
 7 THAT DOESN'T MEAN THEY BOUGHT FROM SAP BECAUSE OF
 8 TOMORROWNOW. SOME OF THESE, INDEED, HAVE BEEN CUSTOMERS OF SAP
 9 LONG BEFORE TOMORROWNOW EVER CAME ALONG, AND THEY JUST BOUGHT
 10 SOMETHING, EXTRA SOMETHING ADDITIONAL FROM SAP AFTERWARDS.
 11 SO WHEN WE GET TO THE INFRINGERS' PROFITS, THE
 12 IMPORTANT THING IS IT'S NOT HOW MANY CUSTOMERS BOUGHT SOFTWARE
 13 FROM SAP, IT'S HOW MANY BOUGHT SOFTWARE FROM SAP BECAUSE OF THE
 14 INFRINGING ACT BY TOMORROWNOW.
 15 YOU HEARD A LOT OF THINGS THAT WERE VERY MISLEADING.
 16 LET ME JUST GIVE YOU A COUPLE OF EXAMPLES RIGHT AT THE START TO
 17 TRY AND SET THE FRAMEWORK HERE.
 18 YOU WERE SHOWN THIS CHART OR THIS E-MAIL WHERE
 19 MR. AGASSI SAYS, WHEN WE ANNOUNCE THE TOMORROWNOW ACQUISITION,
 20 ORACLE'S SHARE PRICE WILL PROBABLY GO DOWN BY 10 PERCENT THAT
 21 SAME MINUTE.
 22 YOU WILL REMEMBER THAT.
 23 AND UP AT THE TOP, THEY TOLD YOU SAP'S DOCUMENTS
 24 CONFIRM THE MAGNITUDE OF ORACLE'S DAMAGES.
 25 SO WHAT THEY ARE SAYING IS THIS E-MAIL WHERE
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2106

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 21 WHERE HE SAYS UP AT THE TOP, "SAP'S EXPECTATION" AS IF THAT
 2 IS WHAT SAP WOULD EXPECT TO GET SO FIRMLY THAT THEY WOULD BE
 3 WILLING TO WRITE A CHECK FOR IT. BUT WHEN YOU WENT DOWN THOSE
 4 COLUMNS, THERE WERE NO EXPECTATIONS. THERE WERE ASSUMPTIONS,
 5 GOALS, PROJECTIONS, SCENARIOS, AND SO FORTH.
 6 COUNSEL IS DOING THE SAME TRICK A LITTLE MORE
 7 CLEVERLY, BUT I WILL SHOW YOU HOW, BASED ON THE CHARTS THEY'VE
 8 USED, THEY ARE STILL TRYING TO TURN GOALS INTO EXPECTATIONS.
 9 THAT'S ONE TRICK.
 10 THE OTHER TRICK IS WHEN THEY SHOW YOU THESE
 11 DOCUMENTS ABOUT THE VALUE OR THE -- NOT THE EXPECTATIONS, THE
 12 GOALS OR THE TARGETS OF SAFE PASSAGE, THEY PRETEND THAT'S JUST
 13 THE GOAL OR THE TARGET FOR TOMORROWNOW.
 14 AND SO WHAT -- UNDER THEIR FAIR MARKET VALUE
 15 APPROACH, WHAT THEY NEED TO DO IS PUT A VALUE ON TOMORROWNOW,
 16 NOT A VALUE ON EVERYTHING THAT SAP DID AS PART OF SAFE PASSAGE.
 17 AND AN EXAMPLE IS THIS CHART WITH 86 CUSTOMERS.
 18 (SLIDE DISPLAYED ON SCREEN.)
 19 THEY ACT LIKE THEY ARE ENTITLED TO REVENUE FOR ALL
 20 86 CUSTOMERS. FIRST OF ALL, I THINK EVERYBODY AGREES ON BOTH
 21 SIDES, MR. MEYER AND MR. CLARKE, THAT UNDER THE INFRINGERS'
 22 PROFITS, ALL THEY ARE ENTITLED TO IS THE PROFIT, NOT THE
 23 REVENUE. AND DESPITE WHAT COUNSEL MAY SAY, BOTH EXPERTS AGREE
 24 THAT THE PROFIT MARGIN IS 50 PERCENT.
 25 SO THIS IS VERY MISLEADING BECAUSE HE DOESN'T COME
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2108

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 MR. AGASSI SAYS, STOCK PRICE WILL PROBABLY GO DOWN BY
 2 10 PERCENT THAT SAME MINUTE, AND THEN THEY SAY THE VALUE OF THE
 3 STOCK WAS WORTH \$70 BILLION ON THAT DAY, AND 10 PERCENT OF
 4 7 BILLION -- 70 BILLION IS \$7 BILLION? THEY ACT LIKE THAT
 5 SHOWS THE MAGNITUDE OF ORACLE'S DAMAGES.
 6 IF THERE WERE ANYTHING TO THIS, IF THE PROPER WAY TO
 7 MEASURE DAMAGES IN THIS CASE WAS THE EFFECT ON ORACLE'S STOCK
 8 PRICE, MR. MEYER WOULD HAVE SAID IT, MR. BOJES WOULD HAVE SAID
 9 IT, SOMEBODY WOULD HAVE SAID IT. BUT THEY JUST THROW THIS OUT
 10 THERE AS IF THIS WOULD LEAD YOU TO THINK THE DAMAGES HERE OUGHT
 11 TO BE IN THE BILLIONS.
 12 AGAIN, IF THERE WERE ANYTHING TO THIS, THEY WOULD
 13 TELL YOU WHAT, IN FACT, HAPPENED TO ORACLE'S STOCK PRICE.
 14 THERE IS NO EVIDENCE OF WHAT HAPPENED TO ORACLE'S STOCK PRICE
 15 AND YOU CAN IMAGINE IF ORACLE'S STOCK PRICE WENT DOWN
 16 10 PERCENT, AND STAYED DOWN 10 PERCENT THE WHOLE TIME
 17 TOMORROWNOW IS IN BUSINESS, AND IF THIS WERE A LEGITIMATE WAY
 18 TO MEASURE DAMAGES, THEY WOULD TELL YOU ABOUT IT.
 19 WHY DIDN'T THEY? THIS IS WHAT I CALL A HIT-AND-RUN
 20 TACTIC. THEY JUST PUT IT UP THERE, HOPE IT MAKES SOME AFFECT
 21 ON YOU, RILE YOU UP, BUT IT DOESN'T MEAN ANYTHING. AND THEY
 22 PROVE IT DOESN'T MEAN ANYTHING BY NOT FOLLOWING UP ON IT.
 23 THEY HAVE OFFERED SOME ANALOGIES. ONE OF THE
 24 ANALOGIES THEY OFFERED WAS IF SOMEONE STOLE MS. CATZ'S WATCH
 25 AND THEN HOCKED IT AND THEN GAVE HER BACK THE MONEY. TRICK.
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2109

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 NOTHING TO DO WITH THE CASE. MS. CATZ HAS HER WATCH. NOBODY
 2 TOOK THE WATCH FROM HER.
 3 WHAT WE ARE TALKING ABOUT IN THIS CASE IS MAKING A
 4 COPY. SO A CLOSER ANALOGY WOULD BE IF SOMEBODY MADE A COPY OF
 5 HER WATCH, AND THEN YOU'D FIGURE OUT THE VALUE OF THAT, I
 6 SUPPOSE. BUT NOBODY TOOK A WATCH. NOBODY TOOK A CROWBAR AND
 7 BROKE INTO A HOME AND STOLE THE CONTENTS OF A \$10 MILLION HOME.
 8 THAT DOESN'T FIT.
 9 THE CLOSEST THEY HAVE COME TO AN ANALOGY THAT MIGHT
 10 HELP YOU THINK ABOUT THIS IS SOMEBODY GOING OUT AND MAKING A
 11 COPY OF A MOVIE, AND THEN SELLING IT OR HAVING SOMEBODY WATCH
 12 IT FOR \$2. SO YOU START SHOWING THE MOVIE TO SOMEBODY AND YOU
 13 MAKE \$2.
 14 LET'S SAY THAT PERSON WHO TOOK THE MOVIE, MADE THE
 15 COPY OF THE MOVIE WENT HOME AND HE HAD THIS ELABORATE BUSINESS
 16 PLAN. AND THE BUSINESS PLAN WAS, I AM GOING TO MAKE A COPY
 17 THEN I AM GOING TO MAKE A MILLION COPIES. THEN I AM GOING TO
 18 SHOW THAT MOVIE TO EVERYBODY IN THE WORLD. AND I AM GOING TO
 19 MAKE \$2 A MOVIE. AND I AM GOING -- HOWEVER MANY BILLIONS OF
 20 PEOPLE IN THE WORLD AND I AM GOING TO BECOME RICHER THAN
 21 ANYBODY.
 22 LET'S SAY WHAT ACTUALLY HAPPENS IS HE GOES OUT AND
 23 HE CAN FIND ONE PERSON WHO WANTS TO WATCH THIS BOOTLEG COPY OF
 24 HIS MOVIE.
 25 ORACLE WOULD COME IN AND SAY -- IF THEY OWN THE
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2111

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 WHEN THEY ASKED MR. BRANDT, HE JUST SAID, WELL, I
 2 WOULDN'T HAVE GIVEN A LICENSE, SO I CAN'T REALLY THINK ABOUT
 3 THAT.
 4 THEY MISUNDERSTAND THIS FAIR MARKET VALUE
 5 HYPOTHETICAL NEGOTIATION. IT IS NOT ABOUT ASKING MS. CATZ OR
 6 MR. ELLISON OR MR. PHILLIPS HOW MUCH THEY WOULD DEMAND. WE
 7 KNOW THE ANSWER TO THAT. IT'S A LOT OF MONEY. THEY CAN'T EVEN
 8 AGREE ON WHAT IT IS. IT'S A HUGE RANGE, BUT IT HAS ONE THING
 9 IN COMMON. IT'S A LOT OF MONEY.
 10 SO IF WE ASK SOMEBODY FROM SAP FOR PURPOSES OF TRIAL
 11 LIKE THEY ASKED THEIR PEOPLE FOR PURPOSES OF THIS TRIAL, HOW
 12 MUCH WOULD YOU LIKE TO PAY FOR A LICENSE? IT WOULDN'T BE VERY
 13 MUCH. SO THAT DOESN'T GET YOU VERY MUCH -- VERY FAR. THAT'S
 14 WHY BOTH SIDES HAVE EXPERTS WHO GET UP THERE AND THEY ARE
 15 SUPPOSED TO TELL YOU WHAT IT WOULD BE LIKE IF YOU CONDUCTED A
 16 HYPOTHETICAL NEGOTIATION WHERE YOU HAD NOT PEOPLE WITH THE
 17 MINDSET OF THE PARTIES HERE, BUT PEOPLE WHO WERE REASONABLE,
 18 PEOPLE WHO WERE PRUDENT, PEOPLE WHO WANTED TO REACH AN
 19 AGREEMENT, AND PEOPLE WHO WANTED TO BE FAIR TO BOTH SIDES.
 20 THE REAL QUESTION ABOUT WITNESSES HERE IS THIS CASE
 21 IS ABOUT CUSTOMERS. IT'S ABOUT HOW MANY CUSTOMERS LEFT ORACLE
 22 AND WENT TO TOMORROWNOW BECAUSE OF THE INFRINGING, AND HOW MANY
 23 PEOPLE WENT ON TO SAP BECAUSE OF THE INFRINGING.
 24 WE PUT ON TESTIMONY FROM CUSTOMERS. WE HAD AN
 25 EXPERT WHO REVIEWED A LOT OF PAGES OF DOCUMENTS AND OFFERED HIS
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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 MOVIE, THEY ARE ENTITLED TO THE WORLD -- THE VALUE OF THE
 2 WORLDWIDE DISTRIBUTION RIGHTS OF THIS MOVIE. THAT'S WHAT THEY
 3 ARE TRYING TO SELL YOU.
 4 WHAT THEY ARE REALLY ENTITLED TO IS THE PROFIT THEY
 5 LOST ON SHOWING THAT MOVIE TO ONE CUSTOMER, OR THE PROFIT THE
 6 INFRINGER MADE ON SHOWING THAT MOVIE TO ONE CUSTOMER. THAT, I
 7 THINK, GIVES YOU AN IDEA OF WHAT'S GOING ON HERE.
 8 THEY ALSO SAID AT THE START WHY DIDN'T WE BRING IN
 9 WITNESSES TO -- WHY DIDN'T WE BRING IN A WITNESS TO TALK ABOUT
 10 THE INFRINGEMENT? THEY BROUGHT IN MANDIA, THEY BROUGHT IN
 11 OTHER PEOPLE TO TALK ABOUT THE INFRINGEMENT.
 12 THE REAL QUESTION IS, WHY DID THEY SPEND SO MUCH
 13 TIME TALKING ABOUT THE INFRINGEMENT? WE STIPULATED TO IT.
 14 THERE'S A STIPULATION OF FACT. THEY SHOWED YOU PART OF IT
 15 ABOUT HOW MUCH WAS DOWNLOADED AND WHAT WAS DONE WITH IT.
 16 THE REASON WE DIDN'T BRING ANY WITNESSES ON THAT IS
 17 WE ADMITTED IT. WE STIPULATED TO IT.
 18 THEN THEY SAID, WELL, WHY DIDN'T SAP -- AND BY THE
 19 WAY, IT IS SAP. IT STANDS FOR SYSTEMS APPLICATIONS AND
 20 PROGRAMS. THAT'S THE WAY IT IS PRONOUNCED. WHY DIDN'T WE
 21 BRING IN ANY WITNESSES TO TALK ABOUT HOW MUCH WE WOULD HAVE
 22 WANTED TO PAY FOR A LICENSE?
 23 WELL, THAT'S A REAL HARD THING TO HAVE IN MIND.
 24 WHAT WOULD YOU HAVE WANTED TO DO FIVE YEARS AGO IF SOMETHING
 25 HAD BEEN DIFFERENT?
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2112

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 OPINION ON HOW MANY CUSTOMERS ARE IN PLAY HERE. ORACLE DID NOT
 2 BRING A SINGLE CUSTOMER AS A WITNESS, NOT A SINGLE WITNESS AS A
 3 WITNESS. THIS CASE IS ABOUT CUSTOMERS AND THEY DIDN'T BRING IN
 4 ANYBODY.
 5 OKAY. AT THE START, ORACLE KEPT ACTING LIKE IT WAS
 6 SAP WHO TOOK THE SOFTWARE AND WHO USED THE SOFTWARE. WITH
 7 ALMOST EVERY WITNESS WE HAD TO FIGHT ABOUT THAT. AND
 8 EVENTUALLY EVERY WITNESS AGREED THAT, NO, WE'RE REALLY JUST
 9 TALKING ABOUT TOMORROWNOW.
 10 SAP IS INDIRECTLY RESPONSIBLE, BUT IT DIDN'T USE THE
 11 SOFTWARE THAT WAS DOWNLOADED BY TOMORROWNOW. AND EVEN TODAY
 12 THEY STILL TALK ABOUT SAP TAKING THE SOFTWARE.
 13 SO LET'S GO TO MY FIRST SLIDE, THAT'S THE SECOND
 14 SLIDE -- FIRST SLIDE IS MR. ELLISON.
 15 (SLIDE DISPLAYED ON SCREEN.)
 16 AND, YOUR HONOR, COULD YOU INQUIRE IF THE JURY CAN
 17 SEE ME IF I STAY BACK ON THIS SIDE?
 18 THE COURT: LADIES AND GENTLEMEN, YOU CAN'T SEE THE
 19 SCREEN?
 20 JURORS: NO.
 21 THE COURT: NO, OKAY.
 22 MR. MITTELSTAEDT: THIS IS MR. ELLISON, THE FIRST
 23 DAY OF TRIAL -- WHENEVER HE TESTIFIED.
 24 *AND SO YOU UNDERSTAND THAT TO THE EXTENT
 25 LICENSE SHOULD BE PART OF THIS CASE, IT'S BASED
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2121

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 OH, WELL, I'LL JUST USE SAP'S NUMBER. AND SO HE STUCK THE SAME
 2 3,000 NUMBER IN THERE. THAT TELLS YOU A LOT ABOUT WHAT HE
 3 THOUGHT OF THE RELIABILITY OF THEIR ESTIMATES.
 4 OKAY. THE OTHER REASON ORACLE'S ESTIMATES ARE
 5 UNRELIABLE IS BECAUSE OF WHAT THEY WERE SAYING AT THE TIME.
 6 LET ME GIVE YOU A COUPLE OF EXAMPLES.
 7 (SLIDE DISPLAYED ON SCREEN.)
 8 RIGHT AT THE START THEY SAY THIS ACQUISITION IS A
 9 POSITIVE FOR ORACLE, REFERRING TO SAP'S ACQUISITION OF
 10 TOMORROWNOW. SINCE CUSTOMERS THAT WANT THIRD PARTY SUPPORT
 11 WANTED SUPPORT, NOT MIGRATION PRESSURE. THEY JUST GO TO
 12 TOMORROWNOW FOR SUPPORT, BUT NOT ON TO SAP.
 13 MR. PHILLIPS, MARCH: I DON'T THINK IT WILL WORK BUT
 14 WILL TRACK IT.
 15 MR. JONES: DON'T OVERREACT TO THESE GNATS.
 16 DECEMBER OF THAT YEAR: TOMORROWNOW HAS CAPTURED
 17 LESS THAN 1 PERCENT OF OUR SUPPORT REVENUE, ABOUT 30 CUSTOMERS.
 18 THIS IS MINIMAL. SOME OF THESE CUSTOMERS WOULD PROBABLY HAVE
 19 LEFT ORACLE ANYWAY.
 20 AND THEN IN FEBRUARY OF 2007 JUST BEFORE THEY SUED,
 21 WHEN THEY KNEW OR WHEN THEY SUSPECTED THAT THEIR IP RIGHTS WERE
 22 BEING VIOLATED, MR. ROTTLER SAYS: THEY ARE A MARGINAL PLAYER,
 23 MARGINAL TRACK RECORD. AND THAT'S A451.
 24 AND SO MR. MEYER WOULD HAVE A HARD TIME COMING IN
 25 AND JUSTIFYING ORACLE'S BELIEF THAT TOMORROWNOW WAS REALLY A
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2123

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 MARKET WHERE THE PRODUCT IS UNTESTED IS ONE SIDE OR THE OTHER
 2 IS GOING TO GET HURT. THE ONE, IF YOU SET IT TOO LOW, ONE SIDE
 3 IS GOING TO GET HURT. IF YOU SET IT TOO HIGH, THE OTHER SIDE
 4 IS GOING TO GET HURT. THAT IS THE BEAUTY OF A RUNNING ROYALTY;
 5 YOU SET THE ROYALTY RATE AT THE TIME AND THEN YOU PAY OFF,
 6 DEPENDING ON HOW MANY SALES YOU MAKE. I WILL COME TO THAT A
 7 LITTLE BIT MORE.
 8 SO THAT'S WHY THIS WHOLE THING IS TOO RISKY.
 9 THERE'S ALSO NO BASIS FOR WHAT THEY ARE SAYING ON THE SAP SIDE.
 10 AND I WANT TO WALK THROUGH THIS IN THIS WAY.
 11 (SLIDE DISPLAYED ON SCREEN.)
 12 LET'S GO BACK TO WHEN MR. MEYER WAS TESTIFYING. I
 13 HAVE ADDED THE RED CIRCLES. AND THIS IS HIS SLIDE 21 WHERE HE
 14 TAKES ALL THESE GOALS, THE GOAL IS TO CONVERT 50 PERCENT, THE
 15 TARGET IS 4,000, OUR GOAL IS TO CONVERT THE MAJORITY, AND SO
 16 FORTH. AND THIS IS THE CHART WHERE HE PERFORMS MAGIC AND TAKES
 17 A GOAL AND HE MAKES IT INTO EXPECTED GAINS.
 18 AND YOU HEARD MORE OF THAT, MORE OF THAT TODAY.
 19 SLIDE 42, SAYS SAP'S BOARD EXPECTED THAT THE INFRINGEMENT WOULD
 20 BE WORTH BILLIONS OF DOLLARS. AND THAT'S REFERRING TO THE
 21 ZIEMEN DOCUMENT, WHICH I WILL COME TO. THERE IS NOTHING IN
 22 THAT DOCUMENT THAT SAYS ANYTHING ABOUT EXPECTED. THAT'S
 23 JUST -- THAT FIRST COLUMN UP THERE WHERE IT'S THE 3,000
 24 MAINTENANCE CUSTOMERS, AND THAT IS BASED ON THAT DOCUMENT THAT
 25 SAYS ASSUMPTIONS. IT DOESN'T SAY EXPECTATIONS, IT SAYS
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2122

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 PROBLEM. SO THAT'S WHY HE DEFAULTS.
 2 OKAY. THE OTHER THING WRONG WITH THIS LUMP SUM
 3 APPROACH HERE IS IT IS TOO RISKY. IT'S TOO RISKY BECAUSE
 4 TOMORROWNOW HAD A NEW METHOD OF DOING BUSINESS. SAP BUYING
 5 THEM WAS BRAND NEW. THIS IDEA THAT IT WOULD HELP SAP SELL
 6 SOFTWARE WAS UNTESTED. NOBODY KNEW IF IT WOULD WORK.
 7 SO WHEN THESE PARTIES COME INTO THIS HYPOTHETICAL
 8 NEGOTIATION, SAP WOULDN'T BE WILLING TO PAY VERY MUCH MONEY
 9 BECAUSE IT DIDN'T KNOW HOW IT WAS GOING TO TURN OUT. ORACLE,
 10 ON THE OTHER HAND, WOULD BE AFRAID OF SETTING A PRICE TOO LOW.
 11 THEY WOULDN'T MIND IF IT WAS TOO HIGH, BUT IF IT WAS TOO LOW
 12 AND THE IDEA REALLY TOOK OFF, THEY WOULD BE LEFT SHORT.
 13 THE ONLY REASON ORACLE IS HAPPY TO USE THIS 3,000
 14 CUSTOMER NUMBER AS A BASIS FOR THE HYPOTHETICAL NEGOTIATION,
 15 ONLY REASON THEY ARE WILLING TO USE 3,000 IS THEY KNOW HOW IT
 16 TURNS OUT. AND USING 3,000 AS THE BASIS FOR THE FAIR MARKET
 17 VALUE LICENSE IS A LOT BETTER THAN USING 358.
 18 BUT ASK YOURSELF, IF ALL OF OUR DOCUMENTS, WHICH
 19 THEY DIDN'T HAVE AT THE TIME, BUT ALL OF OUR DOCUMENTS HAD
 20 SAID, JUST LIKE THE BUSINESS CASE SAYS, WE THINK WE ARE GOING
 21 TO GET 358 CUSTOMERS OR 350 OR 400, YOU KNOW, WHAT KIND OF --
 22 WOULD ORACLE BE WILLING TO DO A FAIR MARKET VALUE LICENSE BASED
 23 ON THAT AND RUN THE RISK THAT THE PROGRAM IS GOING TO DO BETTER
 24 AND RUN THE RISK THEY ARE GOING TO LOSE A LOT OF MONEY?
 25 A PROBLEM WITH LUMP SUM ROYALTIES IN A BRAND NEW
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2124

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 ASSUMPTIONS.
 2 YOU WERE SHOWN ANOTHER CHART BY THEM. THIS WAS
 3 SLIDE 52. AND IT SAID AT THE TOP, SAP'S EXPECTED TO GAIN,
 4 SAP'S EXPECTED REVENUE. BUT IT'S REFERRING TO THE SAME
 5 DOCUMENT. AGAIN, NOTHING ABOUT EXPECTATIONS.
 6 THEY DID IT AGAIN. SLIDE 247. THEY SAY AT THE TOP,
 7 SAP EXPECTED TO GAIN. IN THE FIRST COLUMN, NUMBER OF CUSTOMERS
 8 THAT SAP EXPECTED. AGAIN, THIS IS BASED ON THE ZIEMEN
 9 DOCUMENT. NOTHING IN THE DOCUMENT ABOUT EXPECTATIONS.
 10 AND THEN, THIS IS THE ONE THAT RILES ME UP MORE THAN
 11 ANYTHING. ACTUALLY I WILL COME TO THIS AFTER I DO THE ZIEMEN
 12 DOCUMENT.
 13 LET'S GO TO THE ZIEMEN DOCUMENT. THIS IS THE
 14 DOCUMENT THAT THEY BASE THEIR CASE ON. THIS IS THE ONE THEY
 15 HAVE TALKED ABOUT THE MOST AND THIS IS THE ONE THEY ARE RESTING
 16 ON.
 17 (SLIDE DISPLAYED ON SCREEN.)
 18 BUT WE NEVER REALLY WALKED THROUGH IT. BEFORE I
 19 LEAVE THE ZIEMEN DOCUMENT, THIS IS -- THIS IS ONE EARLIER ONE.
 20 THIS IS THE ONE THAT IS ENTITLED "SAFE PASSAGE". AND THEN IT
 21 EXPLAINS THE SITUATION; THAT ORACLE HAD ANNOUNCED FUSION.
 22 THERE IS UNCERTAINTY AMONG THE CUSTOMERS. ORACLE FORCED
 23 DISRUPTION -- ORACLE FORCING DISRUPTION ON THE MARKET. EXTENDS
 24 SAP'S LEADERSHIP OPPORTUNITY.
 25 THEY KEEP TALKING ABOUT HOW ORACLE BUYING PEOPLESOFT
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CLOSING ARGUMENT - MR. MITTELSTAEDT

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
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CLOSING ARGUMENT - MR. MITTELSTAEDT

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.
 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.
 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.
 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
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CLOSING ARGUMENT - MR. MITTELSTAEDT

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.
 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.
 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.
 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.
 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.
 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
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CLOSING ARGUMENT - MR. MITTELSTAEDT

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.
 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.
 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.
 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
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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 LUMP SUM ROYALTY PAYMENTS OF MORE THAN A BILLION
 2 DOLLARS?
 3 NONE THAT I CAN THINK OF THAT WOULD BE COMPARABLE.
 4 AND I WAS WAITING FOR THEM TO PULL OUT THIS BILLION
 5 DOLLAR CONTRACT THAT THEY SAY IS COMPARABLE. BUT THEY DIDN'T
 6 DO THAT. NO MENTION OF THAT UNTIL THE LAST FIVE MINUTES OF
 7 MS. CATZ'S TESTIMONY WHERE SHE SAYS:
 8 I AM SURPRISED BECAUSE I KNOW QUALCOMM LICENSED
 9 TO SAMSUNG FOR WELL OVER A BILLION DOLLARS
 10 TECHNOLOGY.
 11 THEY SAY THAT BECAUSE THEY WANT YOU TO THINK THAT IF
 12 QUALCOMM AND SAMSUNG HAVE A DEAL FOR A BILLION DOLLARS OR OVER
 13 A BILLION DOLLARS, YOU OUGHT TO AWARD THEM THE SAME THING.
 14 WHY DIDN'T THEY SHOW YOU THE CONTRACT? WHY DIDN'T
 15 THEY TELL YOU WHAT IT WAS ABOUT? WHY DIDN'T THEY TELL YOU ITS
 16 TERMS? WHY DID THEY JUST FLOAT OUT THERE AND WHY DO THEY WAIT
 17 UNTIL THE LAST MINUTE? WHY DIDN'T THEIR EXPERT SAY SOMETHING
 18 ABOUT IT? WHY DON'T THEY GIVE US A CHANCE TO LOOK FOR THE
 19 CONTRACT AND COME IN AND DO WHAT WE DID FOR THE JAVA CONTRACT?
 20 BECAUSE WHEN YOU LOOK AT THE JAVA CONTRACT, DESPITE
 21 THE SUGGESTION THAT THIS IS A HUGE LUMP SUM PAYMENT SIMILAR TO
 22 WHAT THEY ARE ASKING FOR HERE, WE FIND OUT THAT IT IS A
 23 NONREFUNDABLE, NONTRANSFERABLE SUM OF -- OR A PREPAYMENT OF
 24 1.5 MILLION.
 25 REMEMBER, THEY SAY THIS IS A BUSINESS OF BILLIONS AS
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2147

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 TOMORROWNOW. AND ON THE DATABASE OF 1.9. THEY DIDN'T SAY
 2 ANYTHING ABOUT THE DATABASE EXCEPT TO PUT UP THEIR \$55 MILLION
 3 NUMBER. AND I ONLY WANT TO SAY ONE OR TWO THINGS ABOUT THAT.
 4 MR. MEYER DID NOT DO A HYPOTHETICAL NEGOTIATION FOR
 5 THE LICENSE. HE SIMPLY TOOK THE WORD OF MR. ALLISON ABOUT
 6 WHAT -- MR. ALLISON OF ORACLE SUPPORT, ABOUT WHAT HE WOULD WANT
 7 TO CHARGE. MR. MEYER EVENTUALLY ADMITTED ON THE STAND THAT IF
 8 ALLISON SAID HE WANTED TWICE AS HIGH, THAT'S THE NUMBER MEYER
 9 WOULD HAVE USED. IF HE WANTED HALF AS MUCH, THAT'S THE NUMBER
 10 MEYER WOULD USE. THEY DIDN'T DO THE HYPOTHETICAL NEGOTIATION;
 11 IT'S JUST WHAT THEY WOULD WANT TO CHARGE.
 12 BUT MORE IMPORTANT, WITH THIS DATABASE, THE CUSTOMER
 13 ALREADY HAS THE DATABASE. THEY HAVE ALREADY BOUGHT IT.
 14 TOMORROWNOW NEEDS A LICENSE FOR THE DATABASE IT HAS THAT IT IS
 15 USING TO HELP THE CUSTOMER.
 16 THEIR APPROACH IS THAT IF YOU'VE GOT A DATABASE AND
 17 YOU'RE USING IT TO SERVE MORE THAN ONE CUSTOMER, YOU NEED A
 18 SEPARATE \$40,000 LICENSE FOR EACH CUSTOMER WHOSE INFORMATION
 19 YOU ENTER ON YOUR DATABASE. THAT'S CRAZY. THEY PRESENTED NO
 20 EVIDENCE THAT THAT'S HOW THEY DO IT.
 21 MR. CLARKE'S NUMBER, 1.9 MILLION, IS NOT BAD FOR A
 22 DATABASE THAT ORACLE ALREADY SOLD TO EACH CUSTOMER AND THAT
 23 TOMORROWNOW IS USING ONLY TO PROVIDE SERVICE TO A CUSTOMER.
 24 SO MR. CLARKE'S TOTAL FOR THE RUNNING ROYALTY IS
 25 40.6.
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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 IF THAT'S THE ONLY DENOMINATION THEY OPERATE IN. THIS IS
 2 1.5 MILLION PREPAYMENT TO BE CREDITED AGAINST THE ROYALTY OWED
 3 WITH RESPECT TO PRODUCTS.
 4 SO THAT'S NOT REALLY AN UPFRONT LUMP SUM. IT'S A
 5 PREPAYMENT TO BE CREDITED AGAINST ROYALTY. MORE IMPORTANT, IT
 6 DOESN'T HAVE ANYTHING TO DO WITH ANYTHING IN THIS CASE. THEIR
 7 EXPERT DOESN'T SAY IT DOES. IT'S SOMETHING THEY JUST FLOWED
 8 OUT AS IF THERE IS THIS LUMP SUM PAYMENT THAT OUGHT TO MAKE YOU
 9 MORE COMFORTABLE ACCEPTING THEIR VIEW HERE.
 10 OKAY. FINAL POINT ON THE RUNNING ROYALTY IS IF THEY
 11 ARE RIGHT THAT A RUNNING ROYALTY IS NO GOOD FOR THEM AND THEY
 12 WOULDN'T ENTER INTO ONE IN THIS HYPOTHETICAL NEGOTIATION, ALL
 13 THAT PROVES IS THE HYPOTHETICAL NEGOTIATION IS NOT THE RIGHT
 14 WAY TO DO IT.
 15 WE HAVE SEEN THAT A LUMP SUM IS TOO SPECULATIVE, TOO
 16 RISKY, THEY HAVE MISCONSTRUED THE DOCUMENT, SO THAT DOESN'T
 17 WORK. AND IF THEY ARE RIGHT THAT A RUNNING ROYALTY DOESN'T
 18 WORK, THEN IT DOESN'T WORK, AND WE GO TO THE BEST METHOD OF
 19 PROOF.
 20 BEFORE WE DO THAT, LET ME JUST REMIND YOU THAT
 21 MR. CLARKE'S APPROACH WOULD GIVE A RUNNING ROYALTY OF
 22 34.9 MILLION TO TOMORROWNOW. THAT'S BASED ON ALL OF THE
 23 TOMORROWNOW CUSTOMERS. SAP WOULD OWE 3.8 MILLION. THAT'S
 24 BASED ON THE FOUR CUSTOMERS OUT OF THE 86 WHO BOUGHT FROM -- WE
 25 CAN'T DISPROVE THAT THEY BOUGHT FROM SAP BECAUSE OF
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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 OKAY. LET ME TURN TO WHAT WE SAY IS THE BEST WAY TO
 2 DETERMINE COMPENSATION. AND IT IS THE WAY THAT IS TIED TO
 3 REALITY, TIED TO WHAT ACTUALLY HAPPENED.
 4 HOW MANY MAINTENANCE CUSTOMERS, SUPPORT CUSTOMERS
 5 DID ORACLE LOSE AS A RESULT OF TOMORROWNOW?
 6 WE START WITH THAT'S THAT. EVERYBODY AGREES THAT WE
 7 START WITH 358. EVERYBODY AGREES THAT WE EXCLUDE THOSE WHO
 8 WERE GOING TO LEAVE ORACLE ANYWAY. MR. MEYER AGREES,
 9 MR. CLARKE AGREES, MS. CATZ AGREES.
 10 YOU NEED TO GO CUSTOMER BY CUSTOMER. WHO IS GOING
 11 TO LEAVE ORACLE ANYWAY? ORACLE DEFAULTED ON THAT. MS. RANSOM
 12 TESTIFIED THAT SHE HASN'T DONE A CUSTOMER-BY-CUSTOMER ANALYSIS.
 13 MR. ELLISON AGREED THAT IF YOU WANT TO KNOW WHY CUSTOMERS LEFT,
 14 OR DID A PARTICULAR THING, YOU NEED TO ASK THE CUSTOMERS.
 15 WHY WERE CUSTOMERS LOOSE IN THE SADDLE AT THE TIME?
 16 WHY WERE THEY LIKELY TO LEAVE ORACLE?
 17 (SLIDE DISPLAYED ON SCREEN.)
 18 WE TALKED DURING THE TRIAL ABOUT THE AT RISK
 19 PROFILE. HERE ARE THE TYPES OF CUSTOMERS THAT WERE GOING TO
 20 LEAVE OR WERE IN HIGH RISK OF LEAVING ORACLE. THEY HAD
 21 UNCERTAINTY ABOUT THE ACQUISITION, ABOUT ORACLE'S NEW FUSION
 22 PROGRAM. THEY DIDN'T WANT TO UPGRADE. FINANCIAL DISTRESS.
 23 THEY HAD JUST BEEN BOUGHT OR MERGED WITH ANOTHER COMPANY THAT
 24 DIDN'T WANT TO USE ORACLE ANYMORE.
 25 (SLIDE DISPLAYED ON SCREEN.)
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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 THIS IS GOING TO BE THE VERDICT FORM THAT THE COURT
 2 GIVES YOU.
 3 AND THE FIRST QUESTION WILL BE ACTUAL DAMAGES FOR
 4 COPYRIGHT INFRINGEMENT. AND IT SAYS:
 5 WHAT IS THE DOLLAR AMOUNT THAT ORACLE IS ENTITLED TO
 6 FROM DEFENDANTS TO COMPENSATE ORACLE FOR ITS ACTUAL DAMAGES
 7 UNDER THE COPYRIGHT INFRINGEMENT CLAIM IN THE FORM OF* AND
 8 HERE'S WHERE YOU HAVE YOUR CHOICE. EITHER A FAIR MARKET VALUE
 9 LICENSE FOR COPYRIGHT INFRINGEMENT OR LOST PROFITS?
 10 AND SO ONE WAY TO FILL THIS OUT, AND I DON'T MEAN TO
 11 BE PRESUMPTUOUS, I'M JUST SAYING WHERE OUR NUMBERS WOULD COME
 12 OUT. IT'S UP TO YOU TO DECIDE.
 13 ONE WAY TO FILL THIS OUT WOULD BE TO PUT IN CLARKE'S
 14 NUMBER FOR LOSS PROFITS, 19.3 MILLION.
 15 AND THEN IT SAYS: "IF YOU ASSIGNED ACTUAL DAMAGES
 16 IN THE FORM OF FAIR MARKET VALUE, PLEASE PROCEED TO THE END."
 17 SO THAT WOULD BE IT.
 18 "IF YOU ASSIGNED ACTUAL DAMAGES IN THE FORM OF LOST
 19 PROFITS," WHICH I HAVE, "PLEASE PROCEED TO THE NEXT." AND THE
 20 NEXT IS: INFRINGERS' PROFITS. THESE ARE THE SOFTWARE SALES.
 21 "WHAT IS THE DOLLAR AMOUNT THAT ORACLE IS ENTITLED
 22 TO FROM DEFENDANTS AS INFRINGERS' PROFITS FOR THE COPYRIGHT
 23 INFRINGEMENT?"
 24 AND HERE CLARKE'S NUMBER IS 8.7 MILLION. AND THAT
 25 INCLUDES, LET ME WRITE THIS WITH A SMALLER PEN, THAT INCLUDES
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2171

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 THAT BACK ON, CHRIS?
 2 (SLIDE DISPLAYED ON SCREEN.)
 3 WHEN ORACLE BOUGHT PEOPLESOF, IT GOT BUILDINGS, IT
 4 GOT EMPLOYEES, IT GOT PATENTS, IT GOT TECHNOLOGIES, CUSTOMERS,
 5 AND A LOT OF THINGS. AND IT INCLUDED ALMOST 10,000 CUSTOMERS.
 6 AS A FINANCIAL MATTER, THAT ACQUISITION TURNED OUT
 7 WELL FOR ORACLE.
 8 THIS IS MS. CATZ SAYING THAT THEY DID
 9 101 PERCENT ON MAINTENANCE REVENUE COMPARED TO
 10 WHAT THEY PREDICTED TO THE BOARD.
 11 SO, THEY DID JUST FINE DESPITE THE GNAT OF
 12 TOMORROWNOW. THEIR RENEWAL RATES, THE RATES OF MAINTENANCE
 13 CUSTOMERS THAT CAME BACK TO THEM YEAR AND YEAR WERE JUST FINE.
 14 THIS IS MR. CUMMINS: OUR RENEWAL RATES ARE ON A
 15 PAR WITH HISTORICAL RENEWAL RATES EVEN WITH A
 16 THIRD PARTY THREAT. OUR SALES MANAGERS ARE VERY
 17 WELL EQUIPPED WITH THE VALUE PROPOSITION, VERY
 18 STRONG IN NEGOTIATIONS. THIS IS EVIDENCED BY
 19 OUR EXTREMELY STRONG RENEWAL RATES.
 20 AND THEN IN '07: WE ARE NOT SEEING -- SO THIS IS
 21 AFTER THEY HAVE SUED, OR JUST ABOUT THE TIME THEY ARE SUING:
 22 WE ARE NOT SEEING ANY SIGNIFICANT DIFFERENCE IN
 23 RENEWAL RATES NOW COMPARED TO PRE-ACQUISITION BY
 24 ORACLE.
 25 SO THE 358 CUSTOMERS THAT WENT TO TOMORROWNOW, DID
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CLOSING ARGUMENT - MR. MITTELSTAEDT

1 7.6 FOR SAP AND 1.1 FOR TOMORROWNOW.
 2 SO THAT WOULD BE ONE WAY OF DOING IT. THAT IS THE
 3 WAY THAT WE SAY GIVES THEM COMPENSATION FOR THE CUSTOMERS THEY
 4 ACTUALLY LOST. AND ALL OF THIS IS ABOUT CUSTOMERS JUST LIKE
 5 THEIR ANALOGY TO MAKING A COPY OF THE MOVIE. IF YOU DON'T SHOW
 6 IT TO ANYBODY, THERE'S NO ACTUAL USE. HARD TO SAY THEY ARE OUT
 7 OF POCKET.
 8 THE OTHER WAY OF DOING THIS WOULD BE IF YOU
 9 ANSWERED, IF YOU WANTED DO THE HYPOTHETICAL NEGOTIATION POINT.
 10 AND THERE YOU HAVE A CHOICE BETWEEN THEIR NUMBER, WHICH I THINK
 11 HAS BEEN THOROUGHLY DISCREDITED, OR CLARKE'S NUMBER.
 12 AND CLARKE'S NUMBER IS BASED ON THE RUNNING ROYALTY.
 13 IT'S BASED ON THE ROYALTY RATE OF 50 PERCENT OF REVENUE FOR
 14 TOMORROWNOW, 50 PERCENT OF PROFIT FOR SAP. WE KNOW WHAT THAT
 15 NUMBER IS NOW BECAUSE WE KNOW WHAT THE HISTORY HAS BEEN, WE ARE
 16 LOOKING BACK. AND THAT NUMBER, AS WE HAVE SEEN, IS
 17 40.6 MILLION. SO, THAT WOULD BE THE OTHER CHOICE IF YOU
 18 CONSIDER DOING IT THAT WAY.
 19 I AM GOING TO END AS I STARTED. THIS HAS BEEN AN
 20 UNFORTUNATE INCIDENT FOR SAP. IT STEPPED FORWARD. IT STOOD
 21 READY TO PAY COMPENSATION, AND WE ASK YOU TO DO WHAT ORACLE, IN
 22 OUR VIEW THUS FAR, HAS REFUSED TO DO AND THAT IS RESOLVE THIS
 23 DISPUTE IN A REASONABLE WAY.
 24 WHEN -- I WANT TO END ON REALITY. WHAT DO WE KNOW
 25 ABOUT REALITY? WHEN ORACLE BOUGHT PEOPLESOF -- COULD YOU TURN
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2172

CLOSING ARGUMENT - MR. MITTELSTAEDT

1 NOT MAKE ANY SIGNIFICANT DIFFERENCE IN RENEWAL RATES. WE
 2 HAVEN'T SEEN A LOT OF CUSTOMER DEFECTS. THIS IS '07 AGAIN. IN
 3 THOSE SITUATIONS A CUSTOMER IS MORE LIKELY TO SUPPORT ITSELF
 4 THAN TO GO TO SOMEONE LIKE TOMORROWNOW.
 5 SO, WE KNOW AS A FINANCIAL MATTER, THE ACQUISITION
 6 TURNED OUT FINE FOR ORACLE. THEY KEPT MORE CUSTOMERS OR ABOUT
 7 THE SAME NUMBER OF CUSTOMERS THAT THEY THOUGHT THEY WOULD. OF
 8 THE ALMOST 10,000 CUSTOMERS PEOPLESOF HAD, ONLY 358 WENT TO
 9 TOMORROWNOW, INCLUDING SOME WHO WENT BEFORE AND SOME WHO WOULD
 10 HAVE GONE REGARDLESS.
 11 LADIES AND GENTLEMEN, I SUBMIT TO YOU THAT KIND OF
 12 REALITY DOES NOT TRANSLATE INTO OR SUPPORT THE KIND OF MONEY
 13 THAT ORACLE IS ASKING FOR IN THIS CASE.
 14 THANK YOU VERY MUCH.
 15 THE COURT: ALL RIGHT, THANK YOU.
 16 WE ARE GOING TO TAKE OUR SECOND 15-MINUTE BREAK AND
 17 THEN WE'LL COME BACK AND CONCLUDE WITH THE REBUTTAL AND THEN
 18 THE COURT'S INSTRUCTIONS.
 19 ALL RIGHT. LADIES AND GENTLEMEN, YOU ARE EXCUSED
 20 FOR 15 MINUTES.
 21 (RECESS TAKEN AT 12:40 P.M.)
 22 (PROCEEDINGS RESUMED AT 12:53 P.M.)
 23 (PROCEEDINGS HELD IN THE PRESENCE OF THE JURY.)
 24 THE CLERK: PLEASE BE SEATED AND COME TO ORDER.
 25 THE COURT: MR. BOIES?
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2209

1 ALL OF THEM AND NOT SINGLE OUT SOME AND IGNORE OTHERS.
 2 NOW, THE EVIDENCE YOU ARE TO CONSIDER IN DECIDING
 3 WHAT THE FACTS ARE CONSISTS OF THREE THINGS. ONE, THE SWORN
 4 TESTIMONY OF THE WITNESSES, TWO, THE EXHIBITS WHICH HAVE BEEN
 5 RECEIVED INTO EVIDENCE AND, THREE, ANY FACTS TO WHICH THE
 6 LAWYERS AND PARTIES HAVE AGREED TO OR STIPULATED TO. AND IN
 7 REACHING YOUR VERDICT, YOU MAY ONLY CONSIDER THESE ITEMS OF
 8 EVIDENCE.

9 THERE ARE CERTAIN THINGS THAT ARE NOT EVIDENCE AND
 10 YOU MAY NOT CONSIDER THEM IN DECIDING WHAT THE FACTS ARE. I
 11 WILL LIST THOSE FOR YOU AS WELL.

12 ONE, THE ARGUMENTS AND STATEMENTS BY THE LAWYERS ARE
 13 NOT EVIDENCE. THE LAWYERS ARE NOT WITNESSES. WHAT THEY HAVE
 14 SAID IN THEIR OPENING STATEMENTS AND IN THEIR CLOSING ARGUMENTS
 15 AND AT OTHER TIMES DURING THE TRIAL IS SIMPLY DESIGNED TO HELP
 16 YOU INTERPRET THE EVIDENCE, BUT IT IS NOT ITSELF EVIDENCE.

17 IF THE FACTS AS YOU REMEMBER THEM DIFFER FROM THE
 18 WAY THE LAWYERS HAVE STATED THEM, YOUR MEMORY CONTROLS.

19 SECONDLY, THE QUESTIONS AND THE OBJECTIONS BY THE
 20 LAWYERS ARE NOT EVIDENCE. ATTORNEYS HAVE A DUTY TO THEIR
 21 CLIENTS TO OBJECT WHEN THEY BELIEVE A QUESTION IS IMPROPER
 22 UNDER THE RULES OF EVIDENCE, AND YOU SHOULD NOT BE INFLUENCED
 23 BY THE OBJECTION OR BY THE COURT'S RULING ON IT.

24 THREE, ANY TESTIMONY THAT HAS BEEN EXCLUDED OR
 25 STRICKEN OR THAT I HAVE INSTRUCTED YOU TO DISREGARD IS NOT
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2211

1 TAKE INTO ACCOUNT THE FOLLOWING: ONE, THE OPPORTUNITY AND THE
 2 ABILITY OF THE WITNESS TO SEE OR HEAR OR KNOW THE THINGS
 3 TESTIFIED TO.

4 TWO, THE WITNESS' MEMORY.

5 THREE, THE WITNESS' MANNER WHILE TESTIFYING.

6 FOUR, THE WITNESS' INTEREST IN THE OUTCOME OF THE
 7 CASE OR ANY BIAS OR PREJUDICE.

8 FIVE, WHETHER OTHER EVIDENCE CONTRADICTED THE
 9 WITNESS' TESTIMONY.

10 SIX, THE REASONABLENESS OF THE WITNESS' TESTIMONY IN
 11 LIGHT OF ALL THE EVIDENCE.

12 AND SEVEN, ANY OTHER FACTORS THAT BEAR ON
 13 BELIEVABILITY.

14 THE WEIGHT OF THE EVIDENCE AS TO A FACT DOES NOT
 15 NECESSARILY DEPEND UPON THE NUMBER OF WITNESSES WHO TESTIFY
 16 ABOUT IT.

17 AND FROM TIME TO TIME DURING THE TRIAL, THE PARTIES
 18 HAVE OFFERED INTO EVIDENCE DOCUMENTS THAT HAVE BEEN PARTIALLY
 19 REDACTED, WHICH MEANS THAT CERTAIN CONTENTS OF THE DOCUMENT
 20 HAVE BEEN BLACKED OUT OR WHITED OUT AND THE DOCUMENT HAS BEEN
 21 STAMPED REDACTED.

22 REDACTIONS ARE NECESSARY FOR A WIDE VARIETY OF
 23 REASONS, INCLUDING THAT THE REDACTED INFORMATION IS UNRELATED
 24 TO THE EVIDENCE IN THE CASE, OR THE COURT HAS DETERMINED THAT
 25 THE INFORMATION IS NOT ADMISSIBLE, OR TO PROTECT AS PRIVATE THE
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2210

1 EVIDENCE AND MUST NOT BE CONSIDERED.

2 IN ADDITION, SOMETIMES TESTIMONY AND EXHIBITS ARE
 3 RECEIVED ONLY FOR A LIMITED PURPOSE. AND WHEN I HAVE GIVEN YOU
 4 A LIMITING INSTRUCTION, YOU ARE REQUIRED TO FOLLOW IT.

5 AND, LASTLY, ANYTHING THAT YOU HAVE SEEN OR HEARD
 6 WHEN THE COURT WAS NOT IN SESSION IS NOT EVIDENCE. AND YOU ARE
 7 TO DECIDE THE CASE SOLELY BASED UPON THE EVIDENCE YOU RECEIVED
 8 HERE AT TRIAL.

9 EVIDENCE MAY BE DIRECT OR CIRCUMSTANTIAL. DIRECT
 10 EVIDENCE IS PROOF -- IS DIRECT PROOF OF A FACT SUCH AS
 11 TESTIMONY BY A WITNESS ABOUT WHAT THAT WITNESS PERSONALLY SAW
 12 OR HEARD OR DID.

13 CIRCUMSTANTIAL EVIDENCE IS PROOF OF ONE OR MORE
 14 FACTS FROM WHICH YOU CAN FIND ANOTHER FACT. AND YOU SHOULD
 15 CONSIDER BOTH KINDS OF EVIDENCE. THE LAW MAKES NO DISTINCTION
 16 BETWEEN THE WEIGHT TO BE GIVEN TO EITHER DIRECT OR
 17 CIRCUMSTANTIAL EVIDENCE. IT IS UP TO YOU TO DECIDE HOW MUCH
 18 WEIGHT TO GIVE, ANY AND ALL THE EVIDENCE.

19 IN DECIDING WHAT THE FACTS OF THE CASE ARE, YOU MAY
 20 HAVE TO DECIDE WHICH TESTIMONY TO BELIEVE AND WHICH TESTIMONY
 21 NOT TO BELIEVE. YOU MAY BELIEVE EVERYTHING A WITNESS SAYS, OR
 22 PART OF IT, OR NONE OF IT. PROOF OF A FACT DOES NOT
 23 NECESSARILY DEPEND UPON THE NUMBER OF WITNESSES WHO TESTIFY
 24 ABOUT IT.

25 IN CONSIDERING THE TESTIMONY OF ANY WITNESS, YOU MAY
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2212

1 PERSONAL INFORMATION OF INDIVIDUALS OR OTHER COMPANIES THAT ARE
 2 NOT PARTIES TO THIS LAWSUIT. THESE ARE JUST EXAMPLES. YOU MAY
 3 GIVE THE UNREDACTED INFORMATION IN ANY DOCUMENT WHATEVER WEIGHT
 4 YOU CHOOSE AND YOU ARE NOT TO CONSIDER ANY CHARACTERIZATIONS OF
 5 THE FACT OR EXISTENCE OF A REDACTION IN ANY DOCUMENT INCLUDING
 6 BY COUNSEL.

7 NOW, OVER THE COURSE OF THE TRIAL, YOU HAVE HEARD
 8 EVIDENCE ON ORACLE'S DAMAGES CLAIMS AGAINST TOMORROWNOW, SAP AG
 9 AND SAP AMERICA. AS REFLECTED IN THE STIPULATIONS BETWEEN THE
 10 PARTIES CONTAINED IN YOUR JUROR NOTEBOOK, THE PARTIES AGREE
 11 TOMORROWNOW IS LIABLE FOR THE COPYRIGHT INFRINGEMENT ASSERTED
 12 BY ORACLE AND THAT SAP AG AND SAP AMERICA ARE ALSO VICARIOUSLY
 13 AND CONTRIBUTORILY LIABLE FOR THAT COPYRIGHT INFRINGEMENT.

14 YOU MUST NOW DECIDE THE AMOUNT OF DAMAGES THAT
 15 SHOULD BE AWARDED TO ORACLE FOR THE DEFENDANTS' STIPULATED
 16 INFRINGEMENT OF ORACLE'S COPYRIGHTS, AND YOU MUST MAKE THIS
 17 DETERMINATION BASED ON THE INSTRUCTIONS THAT I WILL GIVE YOU
 18 NOW REGARDING THE LAW ON COPYRIGHT INFRINGEMENT AND THE DAMAGES
 19 YOU MAY AWARD BASED ON THE AGREED COPYRIGHT INFRINGEMENT IN
 20 THIS CASE.

21 NOW, A COPYRIGHT IS THE EXCLUSIVE RIGHT TO COPY.
 22 THIS RIGHT TO COPY INCLUDES EXCLUSIVE RIGHTS TO DO THE
 23 FOLLOWING THINGS:

24 ONE, TO REPRODUCE THE COPYRIGHTED WORK.

25 TWO, TO PREPARE DERIVATIVE WORKS BASED UPON THE
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2213

1 COPYRIGHTED WORK BY ADAPTING OR TRANSFORMING IT.
 2 THREE, TO DISTRIBUTE COPIES OF EITHER THE
 3 COPYRIGHTED WORK OR ANY UNAUTHORIZED DERIVATIVE WORK.
 4 AND, FOUR, TO DISPLAY PUBLICLY A COPY OF EITHER THE
 5 COPYRIGHTED WORK OR ANY UNAUTHORIZED DERIVATIVE WORK.
 6 IT IS THE OWNER OF THE COPYRIGHT WHO MAY EXERCISE
 7 THESE EXCLUSIVE RIGHTS. THE OWNER REFERS TO THE AUTHOR OF THE
 8 WORK OR ONE WHO HAS BEEN ASSIGNED THE OWNERSHIP OF THE
 9 EXCLUSIVE RIGHTS IN THE WORK.
 10 IN GENERAL, COPYRIGHT LAW PROTECTS AGAINST THE
 11 PRODUCTION, ADAPTION -- ADAPTATION, DISTRIBUTION OR PUBLIC
 12 DISPLAY OF THE OWNER'S COPYRIGHTED WORKS WITHOUT THE OWNER'S
 13 PERMISSION.
 14 AN OWNER MAY ENFORCE THESE RIGHTS TO EXCLUDE OTHERS
 15 IN AN ACTION FOR COPYRIGHT INFRINGEMENT.
 16 NOW, EVEN THOUGH ONE MAY ACQUIRE A COPY OF THE
 17 COPYRIGHTED WORK, THE COPYRIGHT OWNER RETAINS CERTAIN RIGHTS
 18 AND CONTROL OF THAT COPY, INCLUDING USES THAT MAY RESULT IN
 19 ADDITIONAL COPIES OR ALTERATIONS OF THE WORK.
 20 NOW, THE PARTIES HAVE ENTERED INTO SEVERAL
 21 STIPULATIONS OF LIABILITY AND FACTS. THESE STIPULATIONS HAVE
 22 NOW BECOME ORDERS OF THE COURT, AND THE STIPULATIONS HAVE BEEN
 23 REFERRED TO BY THE PARTIES THROUGHOUT THE TRIAL AND ENTERED
 24 INTO EVIDENCE LABELED JTX 1 THROUGH 5. THEY ALSO CAN BE FOUND
 25 IN YOUR JUROR NOTEBOOKS AND ARE REFERENCED IN THE TABLE OF
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2215

1 TOMORROWNOW AND THEY INTENTIONALLY AND MATERIALLY CONTRIBUTED
 2 TO TOMORROWNOW'S INFRINGING ACTIVITY.
 3 NOW YOU MUST DETERMINE, YOU MUST DETERMINE ORACLE'S
 4 DAMAGES RESULTING FROM THE COPYRIGHT INFRINGEMENT AGREED TO BY
 5 THE DEFENDANTS. ORACLE IS ENTITLED TO RECOVER THE ACTUAL
 6 DAMAGES SUFFERED AS A RESULT OF THE INFRINGEMENT.
 7 AS THE MEASURE OF ITS ACTUAL DAMAGES, ORACLE, AS THE
 8 PLAINTIFF, HAS THE RIGHT TO SEEK TO RECOVER EITHER THE FAIR
 9 MARKET VALUE OF A LICENSE FOR THE RIGHTS INFRINGED OR ITS LOST
 10 PROFITS.
 11 IF YOU AWARD ORACLE ACTUAL DAMAGES BASED ON ITS LOST
 12 PROFITS, THEN ORACLE IS ALSO ENTITLED TO RECOVER ANY PROFITS
 13 THAT EACH DEFENDANT MADE THAT ARE ATTRIBUTABLE TO THE
 14 INFRINGEMENT.
 15 IF YOU AWARD ORACLE ACTUAL DAMAGES BASED ON THE FAIR
 16 MARKET VALUE OF A LICENSE FOR THE RIGHTS INFRINGED, THAT AWARD
 17 TAKES INTO ACCOUNT THE DEFENDANTS' PROFITS ATTRIBUTABLE TO
 18 THEIR INFRINGEMENT AND ORACLE IS NOT ENTITLED TO ANY ADDITIONAL
 19 AWARD.
 20 ORACLE MUST PROVE DAMAGES BY A PREPONDERANCE OF THE
 21 EVIDENCE.
 22 NOW, ORACLE IS ENTITLED TO RECOVER THE ACTUAL
 23 DAMAGES SUFFERED AS A RESULT OF THE INFRINGEMENT. ACTUAL
 24 DAMAGES MEANS THE AMOUNT OF MONEY ADEQUATE TO COMPENSATE ORACLE
 25 FOR THE REDUCTION OF THE FAIR MARKET VALUE OF THE COPYRIGHTED
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2214

1 CONTENTS AS NUMBERS 2 THROUGH 6 IN YOUR NOTEBOOK.
 2 IN THESE STIPULATIONS, DEFENDANTS HAVE ADMITTED THAT
 3 TOMORROWNOW IS DIRECTLY LIABLE TO ORACLE FOR ALL OF ORACLE'S
 4 CLAIMS FOR DIRECT COPYRIGHT INFRINGEMENT OF ALL 120 ORACLE,
 5 PEOPLESOF, J.D. EDWARDS AND SIEBEL COPYRIGHTS THAT ARE LISTED
 6 IN ATTACHMENT A TO TRIAL STIPULATION NUMBER 3.
 7 TRIAL STIPULATION NUMBER 3 ALSO CONTAINS COUNTS OF
 8 THE MINIMUM NUMBERS OF INFRINGING COPIES AND DOWNLOADS MADE BY
 9 TOMORROWNOW. AND THE DEFENDANTS HAVE ALSO ADMITTED THAT SAP AG
 10 AND SAP AMERICA ARE CONTRIBUTORILY AND VICARIOUSLY LIABLE FOR
 11 ALL OF TOMORROWNOW'S COPYRIGHT INFRINGEMENT.
 12 YOU ARE, THEREFORE, TO TREAT ALL OF ORACLE'S
 13 COPYRIGHT INFRINGEMENT CLAIMS AS HAVING BEEN PROVED.
 14 NOW, SAP AG AND SAP AMERICA AGREE THEY ARE LIABLE
 15 FOR ALL OF TOMORROWNOW'S INFRINGEMENT BASED UPON PRINCIPLES OF
 16 VICARIOUS LIABILITY. AND BY AGREEING TO VICARIOUS LIABILITY,
 17 SAP AG AND SAP AMERICA AGREE THAT THEY BOTH RECEIVED A DIRECT
 18 FINANCIAL BENEFIT FROM THE INFRINGING ACTIVITY OF TOMORROWNOW
 19 AND THEY BOTH HAD THE RIGHT AND ABILITY TO SUPERVISE OR CONTROL
 20 THE INFRINGING ACTIVITY OF TOMORROWNOW.
 21 SAP AG AND SAP AMERICA ALSO AGREE THAT THEY ARE
 22 LIABLE FOR ALL OF TOMORROWNOW'S INFRINGEMENT BASED UPON
 23 PRINCIPLES OF CONTRIBUTORY INFRINGEMENT AND BY AGREEING TO
 24 CONTRIBUTORY INFRINGEMENT, SAP AG AND SAP AMERICA AGREED THAT
 25 THEY KNEW OR HAD REASON TO KNOW OF THE INFRINGING ACTIVITY OF
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2216

1 WORK CAUSED BY THE INFRINGEMENT.
 2 THE REDUCTION OF THE FAIR MARKET VALUE OF THE
 3 COPYRIGHTED WORK IS THE AMOUNT A WILLING BUYER WOULD HAVE BEEN
 4 REASONABLY REQUIRED TO PAY A WILLING SELLER AT THE TIME OF THE
 5 INFRINGEMENT FOR THE ACTUAL USE MADE BY DEFENDANTS OF ORACLE'S
 6 WORKS. THAT AMOUNT ALSO COULD BE REPRESENTED BY THE LOST
 7 LICENSE FEES THAT ORACLE WOULD HAVE RECEIVED FOR DEFENDANTS'
 8 UNAUTHORIZED USE OF ORACLE'S WORKS.
 9 IN DETERMINING THE FAIR MARKET VALUE OF THE RIGHTS
 10 INFRINGED, YOU MUST CONSIDER THE ENTIRE SCOPE OF INFRINGEMENT
 11 WHICH IS REFLECTED IN THE FIVE STIPULATIONS IN YOUR JURY
 12 NOTEBOOK.
 13 NOW, WHILE THERE IS NO PRECISE FORMULA FOR
 14 DETERMINING ACTUAL DAMAGES, YOUR AWARD MUST BE BASED ON
 15 EVIDENCE, NOT ON SPECULATION, GUESSWORK OR CONJECTURE.
 16 DETERMINING THE FAIR MARKET VALUE OF THE RIGHTS INFRINGED MAY
 17 INVOLVE SOME UNCERTAINTY AND ORACLE IS NOT REQUIRED TO
 18 ESTABLISH ITS ACTUAL DAMAGES WITH PRECISION.
 19 NOW, IF YOU DECIDE THAT THE BEST MEASURE OF ORACLE'S
 20 ACTUAL DAMAGES IS A FAIR MARKET VALUE LICENSE, YOU SHOULD
 21 CONSIDER ALL OF THE INFORMATION KNOWN TO AND ALL OF THE
 22 EXPECTATIONS OF THE PARTIES ON THE DATES OF THE HYPOTHETICAL
 23 NEGOTIATIONS, WHICH ARE THE DATES ON WHICH INFRINGEMENT BEGAN.
 24 YOU MUST DETERMINE WHAT WOULD HAVE BEEN THE RESULT
 25 OF THIS NEGOTIATION IN ORDER TO ESTABLISH THE FAIR MARKET
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2217

1 VALUE.
 2 THE FAIR VALUE MARKET VALUE IS AN OBJECTIVE MEASURE
 3 OF ORACLE'S DAMAGES THAT IS MEANT TO APPROXIMATE THE FAIR
 4 MARKET VALUE OF A LICENSE FOR ALL OF THE COPYRIGHTS DEFENDANTS'
 5 INFRINGED CALCULATED AT THE TIME THE INFRINGEMENT COMMENCED,
 6 WHICH THE PARTIES AGREE IS JANUARY 19TH, 2005 FOR THE
 7 PEOPLESOFT, J.D. EDWARDS AND THE DATABASE COPYRIGHTS, AND
 8 SEPTEMBER 29TH, 2006 FOR THE SIEBEL COPYRIGHTS.
 9 THE VALUE OF A HYPOTHETICAL LICENSE IS NOT
 10 NECESSARILY THE AMOUNT THE DEFENDANTS IN THIS CASE WOULD HAVE
 11 AGREED TO PAY OR THAT ORACLE WOULD HAVE ACTUALLY AGREED TO
 12 ACCEPT. YOU MAY CONSIDER EVIDENCE OF EVENTS AND FACTS THAT
 13 HAPPENED AFTER THE DATE OF THE HYPOTHETICAL NEGOTIATION ONLY TO
 14 THE EXTENT THAT IT PROVIDES INSIGHT INTO THE EXPECTATIONS OF
 15 THE PARTIES AT THE TIME THE INFRINGEMENT FIRST BEGAN OR INSIGHT
 16 INTO THE AMOUNT A WILLING BUYER WOULD HAVE BEEN REASONABLY
 17 REQUIRED TO PAY A WILLING SELLER AT THE TIME OF INFRINGEMENT.
 18 AND YOU MAY NOT LIMIT OR INCREASE THE FAIR MARKET VALUE OF THE
 19 RIGHTS INFRINGED BASED ON THE ACTUAL PROFITS DEFENDANTS MADE.
 20 IF YOU DECIDE THAT THE BEST MEASURE OF ORACLE'S
 21 DAMAGES IS LOST PROFITS, YOU MUST DETERMINE WHAT PROFITS ORACLE
 22 PROVES IT WOULD HAVE MADE WITHOUT THE INFRINGEMENT.
 23 LOST PROFITS ARE THE REVENUE ORACLE WOULD HAVE MADE
 24 WITHOUT THE INFRINGEMENT LESS ANY ADDITIONAL EXPENSES IT WOULD
 25 HAVE INCURRED IN MAKING THE SALES.

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2219

1 PROFIT IS TO BE ATTRIBUTED TO THE INFRINGEMENT. AND THE
 2 DEFENDANTS HAVE THE BURDEN OF PROVING THE PORTION OF THE
 3 PROFIT, IF ANY, ATTRIBUTABLE TO FACTORS OTHER THAN INFRINGING
 4 THE COPYRIGHTED WORKS.
 5 ALL RIGHT. NOW WHEN YOU BEGIN YOUR DELIBERATIONS,
 6 YOU SHOULD ELECT ONE MEMBER OF THE JURY TO ACT AS YOUR
 7 PRESIDING JUROR. THAT PERSON WILL PRESIDE OVER THE
 8 DELIBERATIONS AND SPEAK FOR YOU HERE IN COURT.
 9 YOU WILL THEN DISCUSS THE CASE WITH YOUR FELLOW
 10 JURORS TO REACH AGREEMENT, IF YOU CAN DO SO. YOUR VERDICT MUST
 11 BE UNANIMOUS. EACH OF YOU MUST DECIDE THE CASE FOR YOURSELF,
 12 BUT YOU SHOULD DO SO ONLY AFTER YOU HAVE CONSIDERED ALL OF THE
 13 EVIDENCE, DISCUSSED IT FULLY WITH THE OTHER JURORS AND LISTENED
 14 TO THE VIEWS OF YOUR FELLOW JURORS. DO NOT HESITATE TO CHANGE
 15 YOUR OPINION IF THE DISCUSSION PERSUADES YOU THAT YOU SHOULD.
 16 DO NOT COME TO A DECISION SIMPLY BECAUSE OTHER JURORS THINK
 17 THAT IT IS RIGHT. IT IS IMPORTANT THAT YOU ATTEMPT TO REACH A
 18 UNANIMOUS VERDICT BUT, OF COURSE, ONLY IF EACH OF YOU CAN DO SO
 19 AFTER HAVING MADE YOUR OWN CONSCIENTIOUS DECISION. DO NOT
 20 CHANGE AN HONEST BELIEF ABOUT THE WEIGHT AND EFFECT OF THE
 21 EVIDENCE SIMPLY TO REACH A VERDICT.
 22 DURING YOUR DELIBERATIONS, YOU MUST NOT COMMUNICATE
 23 WITH OR PROVIDE ANY INFORMATION TO ANYONE BY ANY MEANS ABOUT
 24 THIS CASE. YOU MAY NOT USE ANY ELECTRONIC DEVICE OR MEDIA SUCH
 25 AS A TELEPHONE, CELL PHONE, SMART PHONE, IPHONE, BLACKBERRY OR
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2218

1 NOW, IF YOU DECIDE THAT THE BEST MEASURE OF ORACLE'S
 2 ACTUAL DAMAGES IS LOST PROFITS, YOU MUST ALSO DETERMINE THE
 3 AMOUNT OF PROFITS MADE BY ANY DEFENDANT THAT ARE ATTRIBUTABLE
 4 TO THE STIPULATED INFRINGEMENT.
 5 YOU MAY NOT INCLUDE IN AN AWARD OF DEFENDANTS'
 6 PROFITS ANY AMOUNT THAT YOU ALREADY TOOK INTO ACCOUNT IN
 7 DETERMINING ORACLE'S LOST PROFITS. YOU MAY MAKE AN AWARD OF
 8 DEFENDANTS' PROFITS ONLY IF YOU FIND THAT ORACLE HAS SHOWED A
 9 CAUSAL RELATIONSHIP BETWEEN THE INFRINGEMENT AND THE PROFITS
 10 GENERATED INDIRECTLY FROM THE INFRINGEMENT.
 11 THE DEFENDANTS PROFITS ARE DETERMINED BY SUBTRACTING
 12 ALL EXPENSES FROM THE DEFENDANTS' GROSS REVENUE. DEFENDANTS'
 13 GROSS REVENUE IS ALL OF DEFENDANTS' RECEIPTS ASSOCIATED WITH
 14 THE STIPULATED INFRINGEMENT. EXPENSES -- I AM SORRY, I SKIPPED
 15 A SENTENCE.
 16 ORACLE HAS THE BURDEN OF PROVING DEFENDANTS' GROSS
 17 REVENUE BY A PREPONDERANCE OF THE EVIDENCE.
 18 AND EXPENSES ARE ALL OPERATING COSTS, OVERHEAD
 19 COSTS, AND PRODUCTION COSTS INCURRED IN PRODUCING DEFENDANTS'
 20 GROSS REVENUE.
 21 DEFENDANTS HAVE THE BURDEN OF PROVING THEIR EXPENSES
 22 BY A PREPONDERANCE OF THE EVIDENCE.
 23 NOW, UNLESS YOU FIND THAT A PORTION OF THE PROFIT
 24 FROM THE USE OF THE COPYRIGHTED WORKS IS ATTRIBUTABLE TO
 25 FACTORS OTHER THAN USE OF THE COPYRIGHTED WORKS, ALL OF THE
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2220

1 COMPUTER, THE INTERNET, ANY INTERNET SERVICE, OR ANY TEXT OR
 2 INSTANT MESSAGING SERVICE, OR ANY INTERNET CHAT ROOM, BLOG, OR
 3 WEBSITE SUCH AS FACEBOOK, MY SPACE, LINKED IN, U TUBE OR
 4 TWITTER TO COMMUNICATE TO ANYONE ANY INFORMATION ABOUT THIS
 5 CASE OR TO CONDUCT ANY RESEARCH ABOUT THIS CASE UNTIL I ACCEPT
 6 YOUR VERDICT HERE IN OPEN COURT.
 7 IF IT BECOMES NECESSARY DURING YOUR DELIBERATIONS TO
 8 COMMUNICATE WITH ME, YOU MAY SEND A NOTE THROUGH THE COURT
 9 SECURITY OFFICER, SIGNED BY YOUR PRESIDING JUROR, BY ONE OF THE
 10 OTHER MEMBERS OF THE JURY.
 11 NO MEMBER OF THE JURY SHOULD EVER ATTEMPT TO
 12 COMMUNICATE WITH ME EXCEPT BY A SIGNED WRITING AND I WILL
 13 COMMUNICATE WITH ANY OF YOU CONCERNING THE CASE ONLY IN WRITING
 14 OR HERE IN OPEN COURT.
 15 IF YOU SEND OUT A QUESTION, I WILL CONSULT WITH THE
 16 PARTIES BEFORE ANSWERING IT. IT MAY TAKE SOME TIME AND YOU MAY
 17 CONTINUE YOUR DELIBERATIONS WHILE WAITING FOR AN ANSWER TO ANY
 18 QUESTION.
 19 AND REMEMBER, YOU ARE NOT TO TELL ANYONE, INCLUDING
 20 ME, HOW THE JURY STANDS NUMERICALLY OR OTHERWISE UNTIL YOU HAVE
 21 REACHED A UNANIMOUS VERDICT OR HAVE BEEN DISCHARGED BY ME. AND
 22 DO NOT DISCLOSE ANY VOTE COUNT IN ANY NOTE THAT YOU MIGHT SEND
 23 OUT.
 24 A VERDICT FORM HAS BEEN PREPARED FOR YOU. AND AFTER
 25 YOU HAVE REACHED A UNANIMOUS AGREEMENT ON A VERDICT, YOUR
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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL.	)	JURY TRIAL
)	
PLAINTIFFS,	)	NO. C 07-01658 PJH
)	
VS.	)	VOLUME 13
)	
SAP AG, ET AL.,	)	PAGES 2231 - 2267
)	
DEFENDANTS.)	OAKLAND, CALIFORNIA
)	TUESDAY, NOVEMBER 23, 2010

Certified Copy

TRANSCRIPT OF PROCEEDINGS

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1 WROTE DOWN. I DID THE SAME THING. I WROTE THE NUMBERS DOWN. I
2 COULDN'T GO BACK AND TELL YOU EXACTLY WHAT THE POSITIONS ARE
3 NOW.

4 MR. BOIES: WE WILL WORK TOGETHER, YOUR HONOR, AND
5 SEE WHAT WE CAN AGREE TO.

6 THE COURT: OKAY. DO IT AS --

7 MR. LANIER: VERY BRIEFLY, YOUR HONOR, ONE ISSUE
8 RELATING TO THE REBUTTAL CLOSING ARGUMENT YESTERDAY. ONCE WE
9 GOT THE TRANSCRIPT, WE REALLY REFLECTED ON THIS. WE THINK --
10 AND WE'RE -- AGAIN, WE'RE SURE UNINTENTIONALLY, A STATEMENT WAS
11 MADE IN ARGUMENT THAT WE THINK ACTUALLY IS AN INCURABLE ERROR.
12 IT MIGHT BE A BASIS FOR A NEW TRIAL, WHICH WAS AN APPEAL -- AN
13 EXAMPLE BY MR. BOIES OF AN EXAMPLE OF STEALING, WHICH IS A
14 DIFFERENT ISSUE, FROM BEST BUY, WHO IS THE EMPLOYER OF ONE OF
15 THE JURORS.

16 THAT SECOND PART, WE THINK, IS INCURABLE. DON'T
17 IGNORE -- DON'T PAY ANY ATTENTION TO TESTIMONY ABOUT ONE OF YOUR
18 EMPLOYERS, JURORS. WE THINK THAT WOULD BE INCURABLE AND MAY BE
19 A BASIS WE RAISE LATER. BUT WE DON'T ASK FOR AN INSTRUCTION ON
20 THAT NOW.

21 THE STEALING POINT WE DO THINK IS WORTH A BRIEF
22 NEUTRALLY PHRASED CURATIVE INSTRUCTION FROM THE COURT. YOU MAY
23 HAVE HEARD TESTIMONY ABOUT STEALING. THIS IS A CASE ABOUT
24 COPYRIGHT INFRINGEMENT, NOT THEFT, SOMETHING LIKE THAT THAT
25 DOESN'T SINGLE OUT EITHER SIDE.

2257

1 THAT -- THAT A CURATIVE INSTRUCTION IS NECESSARY. I MEAN, KEEP
2 IN MIND THAT I THINK THAT REASONABLE JURORS MIGHT DIFFER ON
3 WHETHER OR NOT THE PLAINTIFFS SHOULD HAVE BEEN ABLE TO
4 CHARACTERIZE THE CONDUCT AS THEFT OR STEALING.

5 IT'S JUST THAT I FOUND IT TO BE UNNECESSARILY
6 INFLAMMATORY AND UNNECESSARY IN THIS KIND OF CASE, PARTICULARLY
7 GIVEN THE -- THE STIPULATION AS TO LIABILITY.

8 SO I DON'T THINK THAT I WANT TO GO SO FAR AS TO DRAW
9 FURTHER ATTENTION TO THE USE OF THAT KIND OF LANGUAGE, WHICH I
10 CERTAINLY PROHIBITED WITH RESPECT TO THE INFRINGEMENT. BUT BY
11 WAY OF THE ANALOGIES, THEFT OF THE WATCH, THE CROWBAR TO THE
12 CAR, AND THE VIDEO -- STEALING OF VIDEOTAPE, I DON'T THINK THAT
13 I'M GOING TO DO THAT.

14 MR. LANIER: UNDERSTOOD, YOUR HONOR.

15 THE COURT: ALTHOUGH I CERTAINLY DO UNDERSTAND THE
16 POSITION OF THE DEFENSE.

17 MR. LANIER: THANK YOU, YOUR HONOR.

18 THE COURT: OKAY. SO WORK ON THE TRANSCRIPTS.
19 (OFF-THE-RECORD DISCUSSION.)

20 THE COURT: OH, OKAY. ALL RIGHT. SO AS SOON AS YOU
21 CAN DOCUMENT UP WITH THE TRANSCRIPT PORTIONS, WE'LL READ IT TO
22 THE JURY.

23 MR. LANIER: WILL WE BRING THEM BACK IN FIRST, YOUR
24 HONOR, AND BRING THEM TO THE JURY.

25 THE COURT: NO, NO. THEY'RE IN THERE. THE DOOR'S

2256

1 MR. BOIES: YOUR HONOR, I DON'T THINK THAT THE
2 ANALOGY RAISES THAT PROBLEM AT ALL. FROM THE WITNESS STAND,
3 WITHOUT OBJECTION, WITNESSES TESTIFIED ABOUT USING A CROWBAR TO
4 BREAK INTO A HOUSE AND BURGLARIZE IT AND CLEAN IT OUT. THAT WAS
5 RECOGNIZED AS AN ANALOGY. THEY DIDN'T OBJECT TO THAT AT ALL AT
6 THE TIME. I DON'T THINK THEY CAN OBJECT TO THE BEST BUY
7 ANALOGY.

8 THE COURT: I'M NOT AS BOTHERED BY THE ANALOGY AS THE
9 BEST BUY -- I TOTALLY FORGOT THAT ONE OF THE WITNESSES WAS A
10 BEST BUY EMPLOYEE.

11 MR. LANIER: AND, CANDIDLY, WE HAD FORGOTTEN THAT,
12 TOO. AND UNTIL WE GOT THE RECORD AND DO WHAT WE ALWAYS DO,
13 WHICH IS READ IT. AND IT'S ALSO WHY WE DON'T -- WE DON'T KNOW
14 THAT THAT'S CURABLE NOW. AND, FRANKLY, THE ATTEMPT TO CURE IT
15 MIGHT MAKE IT WORSE. SO WE'RE NOT ASKING FOR A CURATIVE
16 INSTRUCTION ON THAT POINT.

17 I MEAN, ALL WE'LL SAY ON THE -- THE STEALING POINT IS
18 THAT YOUR HONOR HAD GIVEN SPECIFIC DIRECTION IMMEDIATELY BEFORE
19 ARGUMENT AND IN A COMMENT, "AND IF YOU THINK ABOUT IT IN
20 COMMON-SENSE TERM, IF SOMEBODY GOES IN AND STEALS A GAME," AND
21 IT GOES FROM THERE.

22 AND SO THE DIRECTION TO ARGUMENT THAT -- THAT IS OUR
23 OBJECTION THAT WE DO THINK A, AGAIN, NEUTRALLY PHRASED CURATIVE
24 INSTRUCTION MIGHT BE OF SOME VALUE.

25 THE COURT: YEAH, I'M NOT -- I'M NOT ENTIRELY SURE

2258

1 CLOSED. THEY'RE DELIBERATING.

2 (RECESS TAKEN AT 8:49 A.M.)

3 (COURT IN RECESS WHILE THE JURY IS DELIBERATING.)

4 (PROCEEDINGS RESUMED AT 9:47 A.M.)

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

7 THE CLERK: PLEASE BE SEATED AND COME TO ORDER.

8 THE COURT: OKAY. ALL RIGHT.

9 COUNSEL? I SEE THAT YOU WERE ABLE TO COME UP WITH A
10 DEMONSTRATIVE THAT YOU HAVE JOINTLY PARTICIPATED IN.

11 MR. LANIER: YES, YOUR HONOR.

12 THE COURT: OKAY. AND IT SEEMS FINE -- IT SEEMS FINE
13 TO ME. IS THERE ANY REASON WHY WE CAN'T JUST GIVE IT TO THE
14 JURY? WE JUST HAVE TO, FOR THE RECORD, MAKE SURE THAT IT'S
15 MARKED IN SOME FASHION.

16 MR. LANIER: AND WE JUST -- WE DON'T OBJECT TO GIVING
17 IT DIRECTLY TO THE JURY IN RESPONSE TO THEIR QUESTION, AND WE'RE
18 HAPPY TO CALL IT JOINT TRIAL EXHIBIT --

19 THE COURT: JOINT TRIAL EXHIBIT 1. HOW'S THAT?
20 (OFF-THE-RECORD DISCUSSION.)

21 MR. LANIER: WE HAVE A JTX1. I THINK WE'RE UP TO
22 JTX6, SO THIS WOULD BE 7?

23 MR. HOLTZMAN: I THINK THIS IS 6.

24 MR. HOWARD: 6.

25 MR. LANIER: JOINT TRIAL EXHIBIT 6.

