

# **EXHIBIT A**

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

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

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

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

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

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

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

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

18 MAY I USE YOUR MICROPHONE, MR. PICKETT?

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

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

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

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

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

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

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

1 ACQUISITIONS.

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

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

8 MR. McDONELL: WE DON'T KNOW WHAT THEY'RE BASED ON.  
 9 THEY'RE SIMPLY PROJECTIONS WHICH ARE PRESUMABLY --

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

13 MR. McDONELL: YES. SO --

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

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

25 THE COURT: OKAY. LOOK, I THINK THAT I CAN MAKE THIS

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

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

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

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

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

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

23 JUDGE LAPORTE FOUND THAT WE WERE DENIED DISCOVERY OF  
 24 ACTUAL LICENSE SALES BY THE PLAINTIFFS, EITHER FOR PEOPLESOFT OR  
 25 SIEBEL, OR FOR ANY OTHER PARTY. EVIDENCE OF ACTUAL LICENSE --

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

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

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

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

23 THE COURT: NOW, ARE YOU SAYING, THEN, THAT THE  
 24 PROJECTIONS THAT ARE INCLUDED POST-ACQUISITION OF TOMORROWNOW BY  
 25 SAP, THAT'S POST-JANUARY 2005, ARE BASED UPON THE PRE-2005

1 ON IT. THAT'S -- THAT'S WHY IT'S NOT AN ISSUE. THAT'S WHY  
 2 THERE'S NO PREJUDICE, UNLIKE IN THE OTHER SITUATION.  
 3 NOW, THERE IS SOME CLAIM HERE THAT -- WHICH IS A NEW  
 4 CLAIM -- SOME PRIOR DATA WAS NOT PRODUCED. BUT TWO POINTS ON  
 5 THAT. FIRST THESE PROJECTIONS ARE THE BEST EVIDENCE OF WHAT'S  
 6 IN THEIR MIND. AND THEY HAD THOSE.

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

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

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

22 WELL, IT'S THIS DATA RIGHT HERE, WHICH, AGAIN, HAS  
 23 BEEN PRODUCED LONG AGO, FULLY DISCLOSED, FULL OPPORTUNITY TO  
 24 TAKE DISCOVERY AND. AND IF THEY DISAGREE, AND THEY DO, THEY CAN  
 25 SAY TO MR. ELLISON, WELL, YOU KNOW, YOU THOUGHT THAT IT'S 20 TO

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

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

7 THE COURT: OKAY.

8 MR. McDONELL: WE HAD NEITHER.

9 THE COURT: OKAY. MR. --

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

12 THE COURT: -- SHAKING HIS HEAD.

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

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

24 THEY COULD HAVE SOUGHT -- THEY DON'T HAVE TO TAKE  
 25 THEM AT FACE VALUE. THEY HAD AN OPPORTUNITY TO TAKE DISCOVERY

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

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

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

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

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

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

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

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

6 MR. McDONELL: NO.

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

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

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

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

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

1 GENERALLY, THESE KINDS OF MATTERS ARE DETERMINED  
2 BEFORE TRIAL. WHEN THE MAGISTRATE JUDGE LAPORTE LOOKED AT  
3 THESE, SHE MADE A DETERMINATION. I AFFIRMED IT. DIDN'T OCCUR  
4 TO ME THAT THERE WAS THE DISTINCTION THAT YOU'RE NOW DRAWING.  
5 YOU ALL NEED TO GIVE ME SOME ASSISTANCE IN  
6 DETERMINING HOW I'M SUPPOSED TO DECIDE AN ISSUE OF -- DISCOVERY  
7 ISSUE THAT SHOULD HAVE BEEN RESOLVED BEFORE TRIAL.

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

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

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

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

1 TWO.

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

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

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

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

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

19 MR. PICKETT: I NEED TO CORRECT --

20 THE COURT: EXCUSE ME. EXCUSE ME.

21 MR. PICKETT: SORRY.

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

1 AGAIN.

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

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

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

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

22 MR. McDONELL: THANK YOU, YOUR HONOR.

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

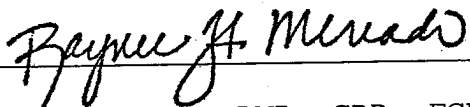
25 THE COURT: SURE.

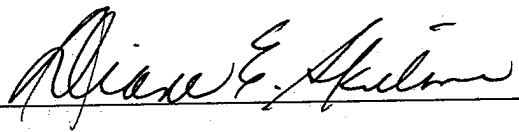
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CERTIFICATE OF REPORTER

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

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

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

  
DIANE E. SKILLMAN, CSR, RPR, FCRR

TUESDAY, NOVEMBER 9, 2010

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

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REPORTED BY:

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DIANE E. SKILLMAN, CSR NO. 4909

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

1 COVERED BY A MOTION IN LIMINE ORDER.  
 2 MR. BOIES: ALL --  
 3 THE COURT: WERE YOU GETTING READY TO SAY I WILL  
 4 WITHDRAW IT?  
 5 MR. BOIES: NO.  
 6 THE COURT: WHICH IN LIMINE ORDER?  
 7 MR. MITTELSTAEDT: ABOUT PRECLUDED EVIDENCE.  
 8 THE COURT: DO YOU REMEMBER WHICH NUMBER IT WAS?  
 9 THERE WAS A NUMBER OF THEM.  
 10 MR. MITTELSTAEDT: NUMBERS ONE AND TWO.  
 11 MR. BOIES: THIS JUST REQUIRES A "YES" OR "NO"  
 12 ANSWER AT THIS POINT.  
 13 THE COURT: YOU MAY ANSWER THIS QUESTION, BUT YOU  
 14 MAY NOT EXPLORE THAT AREA.  
 15 THE WITNESS: NO.  
 16 BY MR. BOIES:  
 17 Q. WHAT?  
 18 A. NO.  
 19 Q. OKAY.  
 20 MR. BOIES: LET ME PUT ONE QUESTION AND -- WHICH I  
 21 DON'T THINK HAS ANYTHING TO DO WITH THE IN LIMINE MOTIONS, YOUR  
 22 HONOR, BUT LET ME JUST PUT IT AND SEE.  
 23 BY MR. BOIES:  
 24 Q. DID YOU INVESTIGATE THE EXTENT TO WHICH ORACLE REDUCED  
 25 PRICES IN ORDER TO KEEP CUSTOMERS?

1 DO YOU RECALL THAT?  
 2 A. I DO.  
 3 Q. NOW, THE VALUATION DATE FOR THAT LICENSE WOULD HAVE BEEN  
 4 EITHER JANUARY 18TH OR JANUARY 19TH OF 2005; IS THAT CORRECT?  
 5 A. YES.  
 6 Q. AND WHEN YOU ARE VALUING SOMETHING AS OF A VALUATION DATE,  
 7 YOU NEED TO LOOK AT THE STATE OF AFFAIRS THAT EXISTS AT THAT  
 8 TIME, NOT SOME OTHER TIME. FAIR?  
 9 A. YES.  
 10 Q. SO THAT WHAT YOU WOULD BE LOOKING AT IS WHAT WOULD HAVE  
 11 BEEN IN THE MINDS OF SAP AND ORACLE ON JANUARY 18TH OR  
 12 JANUARY 19TH, CORRECT?  
 13 A. YES.  
 14 Q. ON JANUARY 18TH OR 19TH -- JUST SO I DON'T HAVE TO KEEP  
 15 SAYING IT, IN YOUR OPINION, IS IT THE 18TH OR IS IT THE 19TH?  
 16 A. LET'S CALL IT THE 19TH.  
 17 Q. ON JANUARY 19TH, NEITHER SAP NOR ORACLE HAD A CRYSTAL BALL  
 18 THAT WOULD HAVE TOLD THEM EXACTLY WHAT WAS GOING TO HAPPEN IN  
 19 THE FUTURE, CORRECT?  
 20 A. NO CRYSTAL BALL.  
 21 Q. SO ALL THEY COULD GO ON IN NEGOTIATING A LICENSE WAS WHAT  
 22 THEY KNEW AND BELIEVED AT THE TIME, CORRECT?  
 23 A. CORRECT.  
 24 Q. SO IN TERMS OF COMING UP WITH WHAT YOU REFER TO AS THIS  
 25 HYPOTHETICAL LICENSE, WHAT YOU ARE GOING TO BE DOING IS TRYING

1 MR. MITTELSTAEDT: SAME OBJECTION.  
 2 THE COURT: I THINK THAT'S GETTING PRETTY CLOSE,  
 3 MR. BOIES.  
 4 MR. BOIES: WHY DON'T I -- I AM NOT GOING TO FINISH  
 5 TODAY ANYWAY. PERHAPS WE CAN TAKE THAT UP AT THE BREAK, YOUR  
 6 HONOR.  
 7 THE COURT: OKAY.  
 8 BY MR. BOIES:  
 9 Q. IN TERMS OF YOUR ANALYSIS OF THE LOST PROFITS TO ORACLE,  
 10 THE LOST PROFITS THAT YOU CALCULATED RELATED TO THE DEPRIVATION  
 11 OF A MAINTENANCE STREAM THROUGH 2008; IS THAT CORRECT?  
 12 A. YES.  
 13 Q. AND SOME OF THE CUSTOMERS FROM TOMORROWNOW WENT BACK TO  
 14 ORACLE, CORRECT?  
 15 A. YES.  
 16 Q. AND SOME DID NOT, CORRECT?  
 17 A. CORRECT.  
 18 Q. AND FOR THE CUSTOMERS THAT DID NOT GO BACK TO ORACLE, YOU  
 19 DID NOT INCLUDE ANY DAMAGES FOR PERIODS AFTER 2008; IS THAT  
 20 CORRECT?  
 21 A. THAT'S CORRECT.  
 22 Q. LET ME TURN TO THE LICENSE, FAIR VALUE -- FAIR MARKET  
 23 VALUE LICENSE. THAT IS SOMETHING THAT YOU TESTIFIED WAS  
 24 SOMETHING THAT IS NEGOTIATED BEFORE THE INFRINGEMENT BEGINS SO  
 25 IT SHOULD NOT HAVE A PUNISHMENT ELEMENT TO IT.

1 TO FIGURE OUT WHAT WOULD HAVE BEEN THEIR PLANS AND  
 2 EXPECTATIONS -- I THINK YOU USED THE WORD "FORECASTS" AT  
 3 JANUARY 19TH, 2005, CORRECT?  
 4 A. YES.  
 5 Q. NOW, DID YOU LOOK AT WHAT THE PLANS, PROJECTIONS,  
 6 FORECASTS WERE OF SAP AS TO WHAT THEY THOUGHT WAS GOING TO  
 7 HAPPEN ON JANUARY 19TH, 2005?  
 8 A. YES.  
 9 Q. AND WHAT DOCUMENTS DID YOU LOOK AT IN THAT CONNECTION AND  
 10 RELY ON?  
 11 A. I LOOKED AT THE BUSINESS CASE, WHICH I THINK WAS A  
 12 JANUARY 7TH DOCUMENT. AND THAT WAS THE DOCUMENT THAT HAD THE  
 13 FORECAST IN IT.  
 14 THE ONLY REASON I AM SLIGHTLY HESITANT ON THAT IS  
 15 YOU ASKED ME IF I RELIED UPON THAT. AND I CONSIDERED IT, BUT I  
 16 AM NOT SURE IT ROSE TO THE LEVEL OF RELIANCE. I DIDN'T BASE  
 17 ANY CALCULATION ON IT, IF YOU LIKE.  
 18 Q. NOW, IN ORDER TO COME UP WITH A VALUE OF A HYPOTHETICAL  
 19 LICENSE, YOU HAD TO FIGURE OUT WHAT SAP AND ORACLE WOULD HAVE  
 20 NEGOTIATED ON JANUARY 19TH, 2005, CORRECT?  
 21 A. YES.  
 22 Q. AND TO DO THAT YOU WOULD HAVE HAD TO DETERMINE WHAT YOU  
 23 BELIEVED WOULD HAVE BEEN IN THEIR MINDS ON THAT DATE, CORRECT?  
 24 A. YES. IN PART, YES.  
 25 Q. AND IN ORDER TO DO THAT, YOU WOULD HAVE NEEDED TO KNOW



1 WHAT THEY FORECASTED OR PROJECTED WAS GOING TO HAPPEN AS A  
 2 RESULT OF THEIR USE OF THE COPYRIGHTED MATERIALS, CORRECT?  
 3 A. THAT'S PARTLY CORRECT.  
 4 AS I SAY, IT'S A DOCUMENT I WOULD CONSIDER, BUT IN  
 5 TERMS OF QUANTIFYING A NUMBER, I THINK THAT WOULD ONLY BE  
 6 RELEVANT IF YOU WERE DOING A LUMP SUM PAID IN ADVANCE.  
 7 SO IN MY ANALYSIS, BECAUSE I AM USING WHAT I KNOW AT  
 8 THAT POINT TO COME UP WITH A ROYALTY RATE AS OPPOSED TO A LUMP  
 9 SUM PAYMENT, I CONSIDERED IT AND I DIDN'T RELY ON IT TO DO A  
 10 CALCULATION.  
 11 Q. LET ME FOLLOW UP ON THAT.  
 12 YOU DID NOT CALCULATE A LUMP SUM ROYALTY PAYMENT,  
 13 CORRECT?  
 14 A. THAT'S CORRECT.  
 15 Q. YOU DID NOT MAKE ANY EFFORT TO DETERMINE WHAT THE AMOUNT  
 16 OF A LUMP SUM ROYALTY PAYMENT WOULD HAVE BEEN IF THAT IS WHAT  
 17 THE PARTIES HAD AGREED TO, CORRECT?  
 18 A. THAT'S CORRECT.  
 19 Q. NOW, YOU ARE AWARE OF LICENSE NEGOTIATIONS FOR SOFTWARE  
 20 THAT RESULT IN LUMP SUM ROYALTY PAYMENTS, CORRECT?  
 21 A. YES.  
 22 Q. AND YOU ARE AWARE OF LICENSE AGREEMENTS THAT INVOLVE A  
 23 VERY SUBSTANTIAL AMOUNT OF MONEY THAT RELATE TO LUMP SUM  
 24 ROYALTY PAYMENTS, CORRECT?  
 25 A. WELL, I DON'T REALLY KNOW WHAT YOU MEAN BY "VERY

1 A. YES, I THINK I DID.  
 2 Q. SO YOU TRIED TO FIND EXAMPLES OF LUMP SUM ROYALTY PAYMENTS  
 3 FOR INTELLECTUAL PROPERTY, CORRECT?  
 4 A. CORRECT.  
 5 Q. WHAT WAS THE HIGHEST ONE YOU FOUND?  
 6 A. I DON'T RECALL.  
 7 Q. APPROXIMATELY?  
 8 A. I COULDN'T TELL YOU.  
 9 Q. JUST A RANGE.  
 10 A. I CAN'T TELL YOU. I WOULD TELL YOU IF I REMEMBERED, BUT I  
 11 DON'T REMEMBER.  
 12 Q. WAS IT MORE THAN A QUARTER OF A BILLION DOLLARS?  
 13 A. YOU KNOW, I COULDN'T TELL YOU.  
 14 Q. MORE THAN HALF A BILLION DOLLARS?  
 15 A. I CAN'T TELL YOU MEANS I CAN'T TELL YOU. I COULDN'T TELL  
 16 YOU.  
 17 Q. YOU DID THIS IN THE COURSE OF YOUR WORK ON THIS CASE,  
 18 CORRECT?  
 19 A. I DID IT LOOKING TO SEE IF THERE WERE COMPARABLE  
 20 TRANSACTIONS, NOT FOR JUST ANY OLD TRANSACTION. AND YOUR  
 21 QUESTION SEEMS TO BE BROADER THAN THE COMPARABLE TRANSACTION.  
 22 Q. ALL RIGHT.  
 23 LET ME REFINE THAT. WHEN YOU TALK ABOUT A  
 24 COMPARABLE TRANSACTION, WHAT ARE THE CRITERIA THAT YOU USE TO  
 25 DETERMINE WHETHER A ROYALTY PAYMENT IS OR IS NOT COMPARABLE TO

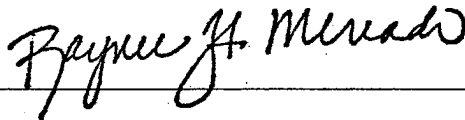
1 SUBSTANTIAL", BUT I --  
 2 Q. LET ME PUT A NUMBER ON IT.  
 3 A. LET ME FINISH MY QUESTION (SIC).  
 4 Q. OKAY.  
 5 A. I AM NOT -- I CAN'T THINK OF A PARTICULAR LUMP SUM PAID IN  
 6 ADVANCE ROYALTY THAT I WOULD DESCRIBE AS VERY SUBSTANTIAL.  
 7 Q. OKAY.  
 8 WOULD YOU DESCRIBE SOMETHING IN EXCESS OF A BILLION  
 9 DOLLARS AS VERY SUBSTANTIAL?  
 10 A. YES, I THINK THAT WILL BE PRETTY SUBSTANTIAL.  
 11 Q. SO, IS IT YOUR TESTIMONY THAT YOU'RE NOT AWARE OF ANY LUMP  
 12 SUM ROYALTY PAYMENTS FOR INTELLECTUAL PROPERTY OF MORE THAN A  
 13 BILLION DOLLARS?  
 14 A. NOT THAT I CAN THINK OF THAT WILL BE A TALL COMPARABLE  
 15 WITH THIS CASE.  
 16 Q. SINCE I AM NOT EXACTLY SURE OF WHAT YOU MEAN BY  
 17 "COMPARABLE WITH THIS CASE," LET ME ASK A MORE GENERAL  
 18 QUESTION.  
 19 ARE YOU AWARE OF ANY LUMP SUM ROYALTY PAYMENTS FOR  
 20 INTELLECTUAL PROPERTY IN EXCESS OF A BILLION DOLLARS, WHETHER  
 21 YOU WOULD CONSIDER THEM COMPARABLE OR NOT?  
 22 A. NOTHING SHORT OF A TRANSACTION WHERE OWNERSHIP WAS  
 23 TRANSFERRING. I CAN'T THINK OF ANY LICENSE AGREEMENT OF A  
 24 BILLION DOLLARS OR MORE IN A LUMP SUM.  
 25 Q. DID YOU INVESTIGATE THAT?

1 THIS CASE?  
 2 A. WHAT I WAS LOOKING FOR WAS TRANSACTIONS, MOSTLY BY THE TWO  
 3 PARTIES TO THIS CASE, TO SEE IF THEY HAD SOMETHING IN THEIR  
 4 BACKGROUND THAT MIGHT BE HELPFUL AND INSTRUCTIVE.  
 5 AND THEN I WAS LOOKING TO SEE IF I COULD FIND  
 6 LICENSES FOR SIGNIFICANT SOFTWARE SYSTEMS THAT WOULD -- WHERE  
 7 THERE WOULD BE A LUMP SUM PAYMENT FOR THAT ACQUISITION. NOT OF  
 8 AN OWNERSHIP, BUT ONLY OF A LICENSE.  
 9 Q. I AM ONLY TALKING ABOUT LICENSES.  
 10 A. I UNDERSTAND.  
 11 Q. I AM LEAVING OWNERSHIP ASIDE.  
 12 A. I AM LETTING YOU KNOW WHAT I LOOKED FOR.  
 13 Q. AND YOU DIDN'T JUST LIMIT YOUR INVESTIGATION TO  
 14 TRANSACTIONS BETWEEN SAP AND ORACLE, DID YOU?  
 15 A. YOU KNOW, FAIRLY SOON INTO THIS PIECE OF WORK I GAVE UP ON  
 16 IT BECAUSE I CAME TO THE CONCLUSION THAT A LUMP SUM WOULDNT  
 17 WORK IN THE CIRCUMSTANCES AND I WASN'T GETTING ANY RESULTS FROM  
 18 LOOKING FOR THIS TYPE OF THING. SO, I GAVE UP, IF YOU LIKE.  
 19 I DIDN'T, MAYBE DIDN'T COMPLETE AN ENTIRE ANALYTICAL  
 20 APPROACH WHICH IS WHAT I WOULD BE DOING IF SOMEONE SAID, "I  
 21 WANT YOU TO GO AND FIND A COMPARABLE LUMP SUM ROYALTY." SO  
 22 ONCE I DETERMINED THAT A LUMP SUM WASN'T APPROPRIATE, I DIDN'T  
 23 NEED TO LOOK ANY FURTHER.  
 24 Q. ARE YOU SAYING THAT YOU DIDN'T REALLY COMPLETE THE WORK  
 25 THAT YOU WOULD NEED TO DO TO DETERMINE WHETHER OR NOT THERE

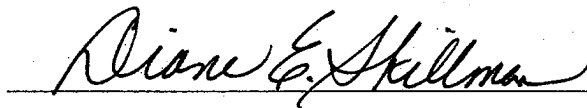
CERTIFICATE OF REPORTER

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