

EXHIBIT A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

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

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

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:	BINGHAM MUCCUTCHEN LLP THREE EMBARCADERO CENTER SAN FRANCISCO, CALIFORNIA 94111-4607
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REPORTED BY: RAYNEE H. MERCADO, CSR NO. 8258

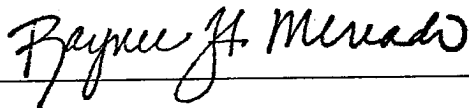
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<p style="text-align: right;">Page 399</p> <p>1 THINK OF A GROCERY STORE, IT'S REMOVING ALL THE SHELVING, TAKING</p> <p>2 ALL THE MATERIALS OFF, ALL THE FOOD, EVERYTHING OFF THE</p> <p>3 SHELVING, REPLACING THAT SHELVING, AND THEN PUTTING ALL THE</p> <p>4 MATERIALS BACK AND TRYING TO DO IT WHILE YOU'RE STILL RUNNING</p> <p>5 YOUR BUSINESS.</p> <p>6 IT'S EXPENSIVE, AND IT'S DISRUPTIVE, AND COMPANIES</p> <p>7 DON'T MAKE A BIG DECISION LIKE THAT WITHOUT A REALLY GOOD REASON</p> <p>8 TO DO IT.</p> <p>9 AND GETTING HALF PRICE ON YOUR SUPPORT FOR YOUR OLD</p> <p>10 ORACLE SOFTWARE DURING THIS TRANSITION PERIOD IS NOT A GOOD</p> <p>11 REASON OR GOOD ENOUGH REASON FOR A COMPANY TO DECIDE TO LEAVE</p> <p>12 ORACLE AND GO TO SAP TO BUY SAP SOFTWARE.</p> <p>13 OKAY. THAT'S WHAT I SAY. WHAT'S THE BASIS FOR THAT?</p> <p>14 WELL, YOU'LL HEAR THE TESTIMONY FROM ORACLE THEMSELVES, FROM</p> <p>15 CUSTOMERS, AND FROM SAP ON HOW COMPANIES MAKE THAT DECISION TO</p> <p>16 SWITCH FROM ONE SUPPLIER TO ANOTHER.</p> <p>17 AND LET ME START WITH ORACLE. AND REMEMBER, JUST SO</p> <p>18 WE'RE CLEAR, WE'RE TALKING NOW ABOUT CUSTOMERS WHO GO TO SAP TO</p> <p>19 BUY THEIR SOFTWARE. IF THEY GO TO SAP TO BUY THEIR SOFTWARE,</p> <p>20 COMPLETELY UNRELATED TO TOMORROWNOW, THEN WE DON'T OWE ORACLE</p> <p>21 FOR THE PROFITS WE MADE ON THAT SOFTWARE SALE. THAT'S JUST FAIR</p> <p>22 COMPETITION. IF THOSE CUSTOMERS CAME TO US AND BOUGHT OUR</p> <p>23 SOFTWARE BECAUSE OF TOMORROWNOW, WE ADMIT WE OWE ORACLE THE</p> <p>24 PROFITS WE MADE ON THAT. SO WE'VE GOT TO DISTINGUISH WHY</p> <p>25 CUSTOMERS CAME TO SAP.</p>	<p style="text-align: right;">Page 401</p> <p>1 AND TOMORROWNOW OFFERING HALF PRICE SUPPORT FOR THIS INTERIM</p> <p>2 TRANSITION PERIOD ON YOUR OLD PEOPLESOF SOFTWARE IS NOT A GOOD</p> <p>3 ENOUGH REASON FOR PEOPLE TO SWITCH.</p> <p>4 THAT'S WHAT HE'S SAYING.</p> <p>5 OKAY. LET ME GIVE YOU AN EXAMPLE OF A CUSTOMER.</p> <p>6 THIS CUSTOMER IS LEXMARK. IT'S A BIG MAKER OF PRINTERS. AND</p> <p>7 LEXMARK WAS TRYING TO DECIDE WHETHER TO STAY WITH PEOPLESOF OR</p> <p>8 TO SWITCH TO SAP OR SOMEBODY ELSE.</p> <p>9 (DEMONSTRATIVE PUBLISHED TO JURY.)</p> <p>10 MR. MITTELSTAEDT: AND AS YOU CAN IMAGINE FOR A BIG</p> <p>11 CORPORATION, THEY HAD A VERY SYSTEMATIC WAY OF GOING ABOUT THIS.</p> <p>12 AND HERE'S WHAT MR. O'DONNELL SAID.</p> <p>13 "Q. WHAT FACTORS INFLUENCED YOUR DECISION</p> <p>14 TO GO TO SAP?"</p> <p>15 AND HIS ANSWER WAS, "THERE WERE OVER 300</p> <p>16 DATAPOINTS THAT WERE MEASURED AND SCORED," SO 300</p> <p>17 ISSUES.</p> <p>18 "Q. WERE THOSE SAME 300 DATAPOINTS MEASURED</p> <p>19 AND SCORED FOR ORACLE?"</p> <p>20 "A. YES.</p> <p>21 "Q. SO THEY COMPARED HOW ORACLE AND SAP DID</p> <p>22 SAP SCORED HIGHER ON THOSE 300 DATAPOINTS?"</p> <p>23 "A. YES."</p> <p>24 MR. MITTELSTAEDT: AND THEN HE WAS ASKED, "WHEN</p> <p>25 SELECTING SAP, WHAT ROLE, IF ANY, DID THE EXISTENCE OF</p>
<p style="text-align: right;">Page 400</p> <p>1 THIS CASE IS ALL ABOUT CUSTOMERS, HOW CUSTOMERS MADE</p> <p>2 THE DECISIONS THEY MADE, AND YOU'LL HEAR A LOT OF TESTIMONY ON</p> <p>3 THAT. AND THE REASON YOU'LL BE HEARING TESTIMONY IS -- IS WHAT</p> <p>4 IN LEGAL TERMINOLOGY IS CALLED CAUSATION. WHAT CAUSED THESE</p> <p>5 CUSTOMERS TO MAKE THE DECISION THEY DID? WAS IT TOMORROWNOW?</p> <p>6 IF IT'S TOMORROWNOW, WE OWE THEM COMPENSATION. IF</p> <p>7 IT'S SOMETHING ELSE, WE DON'T. IT WOULD BE A WINDFALL FOR THEM</p> <p>8 TO SAY EVERY TIME ORACLE LOSES A CUSTOMER TO SAP, SAP'S GOT TO</p> <p>9 PAY US. THAT WOULDN'T MAKE ANY SENSE. THEIR ONLY HOOK HERE IS</p> <p>10 TOMORROWNOW, SO THEY'VE GOT TO TIE IN CUSTOMERS TO TOMORROWNOW.</p> <p>11 SO HERE'S -- HERE'S WHAT ORACLE SAID.</p> <p>12 (DEMONSTRATIVE PUBLISHED TO JURY.)</p> <p>13 MR. MITTELSTAEDT: THIS IS MR. PHILLIPS, AGAIN,</p> <p>14 COPRESIDENT OF ORACLE. AND THE QUESTION AT THE DEPOSITION WAS,</p> <p>15 "IN ANY OF THE INTERACTIONS THAT YOU'VE HAD WITH CUSTOMERS THAT</p> <p>16 ARE CONSIDERING A SWITCH ONE WAY OR THE OTHER, FROM ORACLE TO</p> <p>17 SAP OR SAP TO ORACLE, HAVE ANY OF THEM EVER MENTIONED</p> <p>18 MAINTENANCE OR SUPPORT AS A FACTOR IN THEIR DECISION?"</p> <p>19 SO IN OTHER WORDS, WHEN YOU'RE SWITCHING SOFTWARE</p> <p>20 SUPPLIERS, ARE YOU DOING THAT BECAUSE OF MAINTENANCE OR SUPPORT</p> <p>21 WHERE YOU'RE GETTING THAT?</p> <p>22 MR. PHILLIPS: THAT'S NEVER BEEN AN ISSUE. THAT --</p> <p>23 THAT WOULDN'T BE THE REASON NORMALLY THAT PEOPLE WOULD SWITCH.</p> <p>24 AND WHY WOULDN'T IT BE THE REASON?</p> <p>25 IT'S BECAUSE THESE ARE REALLY, REALLY BIG DECISIONS,</p>	<p style="text-align: right;">Page 402</p> <p>1 TOMORROWNOW HAVE TO DO WITH LEXMARK'S DECISION TO TRANSITION TO</p> <p>2 SAP?"</p> <p>3 "A. AND HIS ANSWER WAS, NOTHING TO MY</p> <p>4 KNOWLEDGE.</p> <p>5 "NOT A POSITIVE, NOT A NEGATIVE?" WAS THE</p> <p>6 QUESTION.</p> <p>7 AND HIS ANSWER WAS, "IT," REFERRING TO TOMORROWNOW,</p> <p>8 "WAS NOT A DATAPOINT."</p> <p>9 MR. MITTELSTAEDT: SO OUT OF THE 300 FACTORS THAT</p> <p>10 THIS CUSTOMER CONSIDERED IN SWITCHING FROM ORACLE TO TOMORROW --</p> <p>11 EXCUSE ME -- FROM ORACLE TO SAP FOR SOFTWARE, TOMORROWNOW WAS</p> <p>12 NOT ONE OF THOSE DATAPOINTS.</p> <p>13 SO THIS IS CLEARLY A CUSTOMER WHERE WE DON'T HAVE TO</p> <p>14 GIVE OUR PROFITS, OUR REVENUES, ON THIS CUSTOMER TO ORACLE</p> <p>15 BECAUSE TOMORROWNOW DIDN'T HAVE ANYTHING TO DO WITH IT.</p> <p>16 ANOTHER CUSTOMER YOU'LL HEAR ABOUT IS AMGEN, THE BIG</p> <p>17 BIOTECHNICAL COMPANY, AND HERE ARE SOME INTERNAL EMAILS FROM</p> <p>18 ORACLE.</p> <p>19 (DEMONSTRATIVE PUBLISHED TO JURY.)</p> <p>20 MR. MITTELSTAEDT: AMGEN WAS ALSO MAKING THE SAME</p> <p>21 DECISION THAT LEXMARK WAS MAKING, SHOULD WE SWITCH FROM ORACLE</p> <p>22 TO SAP OR SOMEBODY ELSE.</p> <p>23 AND SO THE QUESTION HERE IS, WHEN AMGEN WAS</p> <p>24 SWITCHING, DID THEY SWITCH BECAUSE SAP HAD BETTER SOFTWARE, DID</p> <p>25 THEY SWITCH BECAUSE THEY WERE DISSATISFIED WITH ORACLE SOFTWARE,</p>

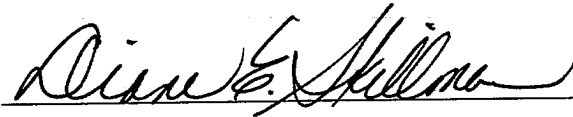
CERTIFICATE OF REPORTER

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

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



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



DIANE E. SKILLMAN, CSR, RPR, FCRR

WEDNESDAY, NOVEMBER 3, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

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

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:	BINGHAM MUCCUTCHEN LLP THREE EMBARCADERO CENTER SAN FRANCISCO, CALIFORNIA 94111-4607
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<p style="text-align: right;">Page 1140</p> <p>1 ORACLE TO GO TO TOMORROWNOW?</p> <p>2 A. THEY HAD HAD INFORMATION, A LITTLE BIT ABOUT THAT, MAYBE</p> <p>3 NOT TOTAL VISIBILITY, BUT SOME ABOUT THAT.</p> <p>4 Q. OKAY. SO HOWEVER TOMORROWNOW WAS DELIVERING SUPPORT</p> <p>5 SERVICES, WHETHER IN COMPLIANCE WITH THE COPYRIGHT LAWS, IN</p> <p>6 COMPLIANCE WITH ORACLE'S LICENSES OR NOT, ORACLE COULD SEE THE</p> <p>7 IMPACT IN THE MARKETPLACE, RIGHT?</p> <p>8 A. NO, THAT'S NOT CORRECT BECAUSE IT IS TWO MONTHS OUT.</p> <p>9 THESE ARE 12-MONTH SERVICE CONTRACTS. SO IF SOMEONE IS UNDER</p> <p>10 MAINTENANCE RIGHT NOW, THEY WON'T EVEN THINK ABOUT SWITCHING</p> <p>11 POTENTIALLY FOR A PERIOD OF, YOU KNOW, THREE, SIX, 12 MONTHS,</p> <p>12 THERE'S A RAMP-UP PERIOD.</p> <p>13 THEN ALSO YOU HAVE A SITUATION WHERE ORACLE DIDN'T</p> <p>14 KNOW THE LEVEL OF SERVICE, VENDOR LEVEL OF SERVICE USING THEIR</p> <p>15 SOFTWARE OR IS IT SOME OTHER LESSER SERVICE.</p> <p>16 SO, THESE EARLY DOCUMENTS REALLY DON'T TELL YOU MUCH</p> <p>17 ABOUT WHAT ORACLE COULD CAN BE ANTICIPATING IF THEY REALLY KNEW</p> <p>18 THE TRUE FACTS OF WHAT WAS TAKEN.</p> <p>19 Q. YOU ARE NOT SAYING ALL OF THE MAINTENANCE CONTRACTS ARE ON</p> <p>20 A CALENDAR YEAR BASIS, ARE YOU?</p> <p>21 A. I AM NOT SAYING THAT.</p> <p>22 Q. AND YOU ARE AGREEING THAT ORACLE COULD SEE THE RESULTS OF</p> <p>23 TOMORROWNOW IN THE MARKETPLACE, SUCH AS THEY WERE, RIGHT?</p> <p>24 A. I WOULD AGREE THAT THEY WOULD BEGIN TO GET A BETTER</p> <p>25 FEELING OF THAT OVER TIME. I WOULD AGREE WITH THAT.</p>	<p style="text-align: right;">Page 1142</p> <p>1 Q. YES.</p> <p>2 (EXHIBIT DISPLAYED ON SCREEN.)</p> <p>3 MR. MITTELSTAEDT: IF YOU COULD HIGHLIGHT THE TOP.</p> <p>4 BY MR. MITTELSTAEDT:</p> <p>5 Q. ACTUALLY, MR. MEYER, BEFORE WE GO ON, THE LAST DOCUMENT WE</p> <p>6 LOOKED AT A277, THAT IS A DOCUMENT YOU RELIED ON, CORRECT?</p> <p>7 A. THE LAST ONE I BELIEVE I HAVE SEEN.</p> <p>8 MR. MITTELSTAEDT: YOUR HONOR, I PUBLISHED THAT, I</p> <p>9 THINK, PREMATURELY. I MOVE IT INTO EVIDENCE --</p> <p>10 THE COURT: WHAT WAS THE NUMBER AGAIN, THE LAST ONE?</p> <p>11 MR. MITTELSTAEDT: 277.</p> <p>12 THE COURT: ANY OBJECTION?</p> <p>13 MR. PICKETT: IT IS IN EVIDENCE ALREADY.</p> <p>14 MR. LANIER: IT IS ALREADY IN.</p> <p>15 MR. MITTELSTAEDT: THEN MY CHART IS WRONG.</p> <p>16 THE COURT: OKAY.</p> <p>17 MR. PICKETT: WE SAW IT WITH MR. PHILLIPS ORIGINALLY</p> <p>18 AND SAW IT AGAIN LATER.</p> <p>19 THE COURT: THANKS.</p> <p>20 MR. MITTELSTAEDT: MY CHART IS STILL WRONG.</p> <p>21 MR. PICKETT: I AGREE WITH THAT.</p> <p>22 BY MR. MITTELSTAEDT:</p> <p>23 Q. OKAY. THIS NEXT ONE IS FROM MR. HENLEY, CHAIRMAN OF THE</p> <p>24 BOARD, TO MS. CATZ AND MR. ELLISON.</p> <p>25 DO YOU SEE THAT?</p>
<p style="text-align: right;">Page 1141</p> <p>1 Q. AND YOU COULD ALSO UNDERSTAND THAT ORACLE, BEING IN THE</p> <p>2 BUSINESS FOR AS LONG AS IT HAD BEEN, WOULD HAVE SOME IDEA OF</p> <p>3 THE EXTENT TO WHICH CUSTOMERS WOULD MIGRATE TO ANOTHER SOFTWARE</p> <p>4 SUPPLIER JUST BASED ON MAINTENANCE, RIGHT? YOU EXPECT ORACLE</p> <p>5 TO HAVE SOME UNDERSTANDING OF THAT CONCEPT?</p> <p>6 A. YES AND NO. YES, ON THE CONCEPT. NO ON THEY WOULDN'T</p> <p>7 HAVE ALL THE DETAILS OF THE SAFE PASSAGE PROGRAM AND HOW IT WAS</p> <p>8 BEING PRESENTED AND SUPPORTED BY THE EXECUTIVE BOARD OF SAP.</p> <p>9 Q. WELL, THEY HAD ALL THE PUBLIC INFORMATION ABOUT WHAT SAP</p> <p>10 WAS ADVERTISING AS PART OF THE SAFE PASSAGE, RIGHT?</p> <p>11 A. RIGHT, BUT NOT THE PRIVATE INFORMATION.</p> <p>12 Q. NOT THE INFORMATION ON HOW TOMORROWNOW WAS DOING ITS</p> <p>13 SERVICES, WHETHER IT WAS COMPLYING WITH LICENSES OR NOT, BUT WE</p> <p>14 HAVE ALREADY AGREED, RIGHT, THAT THEY WOULD SEE AT SOME POINT</p> <p>15 WHETHER TOMORROWNOW WAS HAVING IMPACT IN THE MARKET. YOU COULD</p> <p>16 SEE THAT?</p> <p>17 A. YES AND NO. IT'S A GENERAL QUESTION.</p> <p>18 THEY WOULDN'T UNDERSTAND THE LEVEL OF SERVICE, SO</p> <p>19 WERE THEY OFFERING -- WERE THEY OFFERING AND COULD DELIVER WITH</p> <p>20 VENDOR LEVEL. SO IF THEY COULD DELIVER ON IT, THAT WOULD BE A</p> <p>21 DIFFERENT ISSUE. IF THEY KNEW THAT THEY HAD THE SOFTWARE, THAT</p> <p>22 BECOMES A BIGGER COMPLICATION.</p> <p>23 SO IT'S YES AND NO WITH THAT.</p> <p>24 Q. OKAY. I WILL TAKE YES OR NO. LET'S GO TO A4089.</p> <p>25 A. 4089?</p>	<p style="text-align: right;">Page 1143</p> <p>1 A. YES.</p> <p>2 Q. AND THEN IF YOU GO DOWN TO THE SECOND PARAGRAPH. SAYS:</p> <p>3 "I THINK THERE MAY BE SOME LOSSES EVENTUALLY</p> <p>4 WHERE SAP CONVINCES SOME SAP CUSTOMERS TO SWITCH</p> <p>5 FROM PEOPLESFT TO SAP RATHER THAN UPGRADING,</p> <p>6 BUT OUR MODEL ALWAYS ASSUMED THERE WOULD BE SOME</p> <p>7 ATTRITION."</p> <p>8 DO YOU SEE THAT?</p> <p>9 A. YES.</p> <p>10 Q. AND THEN GOING DOWN TO MS. CATZ'S COMMENT THAT HE WAS</p> <p>11 RESPONDING TO, MS. CATZ SAYS:</p> <p>12 "I DON'T BELIEVE WE HAVE LOST ANY LARGE</p> <p>13 CUSTOMERS BECAUSE OF THIS."</p> <p>14 DO YOU UNDERSTAND THAT TO MEAN BECAUSE OF</p> <p>15 TOMORROWNOW?</p> <p>16 A. YOU MEAN THIS IS IN MARCH OF 2005?</p> <p>17 Q. CORRECT.</p> <p>18 A. YES. THIS WOULD BE -- YES, THAT'S MY UNDERSTANDING OF</p> <p>19 MS. CATZ'S RESPONSE.</p> <p>20 Q. THEN SHE SAID:</p> <p>21 "IF WE LOST, WE LOST TO SAP FOR OTHER REASONS."</p> <p>22 DO YOU SEE THAT?</p> <p>23 A. YES, I DO.</p> <p>24 Q. OKAY. LET'S GO TO A441.</p> <p>25 AND THIS IS ANOTHER DOCUMENT YOU CONSIDERED AND</p>

<p style="text-align: right;">Page 1144</p> <p>1 RELIED ON -- I WILL WAIT UNTIL YOU GET IT, ACTUALLY, SIR.</p> <p>2 A. OKAY. I AM HERE.</p> <p>3 Q. YOU'LL SEE, BEFORE WE PUT IT UP, THIS IS FROM MR. ROTTLER</p> <p>4 TO MR. PHILLIPS IN NOVEMBER OF 2005.</p> <p>5 DO YOU SEE THAT?</p> <p>6 A. YES.</p> <p>7 Q. THIS IS A DOCUMENT YOU RELIED ON?</p> <p>8 A. I BELIEVE I'VE SEEN THIS.</p> <p>9 Q. YOU BELIEVE IT TO BE AN INTERNAL ORACLE DOCUMENT AS IT</p> <p>10 APPEARS TO BE?</p> <p>11 SIR?</p> <p>12 A. I AM JUST TAKING A LOOK AT IT. I HAVEN'T SEEN THIS IN A</p> <p>13 WHILE.</p> <p>14 Q. OKAY.</p> <p>15 MR. MITTELSTAEDT: YOUR HONOR, I MOVE THIS INTO</p> <p>16 EVIDENCE.</p> <p>17 THE COURT: ANY OBJECTION?</p> <p>18 MR. PICKETT: DEPENDS ON WHAT THE WITNESS SAYS ABOUT</p> <p>19 IT, YOUR HONOR.</p> <p>20 THE COURT: ALL RIGHT.</p> <p>21 MR. PICKETT: HE'S NOT A SPONSORING WITNESS. I AM</p> <p>22 NOT SURE IF HE IS RELYING ON IT, BUT THAT'S THE BASIS OF MY</p> <p>23 POSITION.</p> <p>24 THE COURT: OKAY.</p> <p>25 MR. MITTELSTAEDT: I THINK IT IS A BUSINESS RECORD</p>	<p style="text-align: right;">Page 1146</p> <p>1 (DEFENDANTS' EXHIBIT A441 RECEIVED IN</p> <p>2 EVIDENCE)</p> <p>3 (EXHIBIT DISPLAYED ON SCREEN.)</p> <p>4 MR. MITTELSTAEDT: IF YOU CAN HIGHLIGHT THE TOP,</p> <p>5 PLEASE.</p> <p>6 BY MR. MITTELSTAEDT:</p> <p>7 Q. YOU WILL SEE THIS IS A DOCUMENT FROM MR. ROTTLER TO</p> <p>8 MR. PHILLIPS, NOVEMBER 2005?</p> <p>9 SIR?</p> <p>10 A. YES.</p> <p>11 Q. AND, AGAIN, MR. ROTTLER IS HEAD OF SUPPORT SERVICES FOR</p> <p>12 ORACLE?</p> <p>13 A. YES.</p> <p>14 Q. AND HE'S THE ONE RESPONSIBLE FOR KEEPING TRACK OF THIRD</p> <p>15 PARTY MAINTENANCE SUPPORT PROVIDERS FOR ORACLE, AS YOU</p> <p>16 UNDERSTAND IT?</p> <p>17 A. WELL, I IMAGINE SOMEONE IN HIS GROUP WOULD BE LOOKING AT</p> <p>18 THAT, BUT HE WOULD BE IN CHARGE OF THE GROUP.</p> <p>19 Q. IF YOU LOOK AT THE SECOND BULLET, STARTING "THE THIRD</p> <p>20 PARTY PLAYERS", AND I WILL READ IT. IT SAYS:</p> <p>21 "THE THIRD PARTY PLAYERS HAVE HAD LITTLE IMPACT</p> <p>22 AS YOU SAW LAST NIGHT AND I THINK WE HAVE MADE</p> <p>23 GREAT PROGRESS IN SLOWING DOWN THEIR MOMENTUM."</p> <p>24 DO YOU SEE THAT?</p> <p>25 A. YES.</p>
<p style="text-align: right;">Page 1145</p> <p>1 OF ORACLE ANYWAY.</p> <p>2 THE COURT: THIS IS 2089 WE ARE TALKING ABOUT?</p> <p>3 MR. MITTELSTAEDT: 441.</p> <p>4 THE WITNESS: IS THERE A PENDING QUESTION? I AM</p> <p>5 SORRY.</p> <p>6 BY MR. MITTELSTAEDT:</p> <p>7 Q. IS THIS A DOCUMENT YOU'VE SEEN AND RELIED ON?</p> <p>8 A. I BELIEVE I HAVE SEEN IT. WHEN YOU SAY "RELIED ON", I AM</p> <p>9 AWARE OF IT.</p> <p>10 Q. OKAY. AND IT IS CITED IN YOUR REPORT, DO YOU BELIEVE?</p> <p>11 A. I WOULD IMAGINE IT'S IN THE LONG LIST OF DOCUMENTS WE</p> <p>12 RECEIVED.</p> <p>13 Q. IN ANY EVENT, YOU RECOGNIZE IT AS AN ORACLE DOCUMENT?</p> <p>14 A. YES.</p> <p>15 THE COURT: WELL, IF YOU'VE SEEN IT AND TAKEN IT</p> <p>16 INTO CONSIDERATION, WHETHER OR NOT HE RELIED UPON IT OR NOT, IS</p> <p>17 NOT NECESSARILY RELEVANT. BUT IF HE CONSIDERED IT WHILE</p> <p>18 FORMULATING HIS OPINION, THEN I WOULD ALLOW IT IN AS I HAVE</p> <p>19 OTHER SIMILAR EXHIBITS.</p> <p>20 BY MR. MITTELSTAEDT:</p> <p>21 Q. YOU'VE CONSIDERED THIS DOCUMENT, SIR, IN DOING YOUR WORK</p> <p>22 IN THIS CASE?</p> <p>23 A. YES.</p> <p>24 THE COURT: ALL RIGHT. IT'S ADMITTED.</p> <p>25 ///</p>	<p style="text-align: right;">Page 1147</p> <p>1 Q. NOW, IS THIS ONE OF THE DOCUMENTS YOU CONSIDERED AS A</p> <p>2 REALITY CHECK ON THE ESTIMATES YOU WERE GETTING, THE POTENTIALS</p> <p>3 YOU WERE GETTING FROM ORACLE, POTENTIAL LOSS OF CUSTOMERS?</p> <p>4 A. WHAT DO YOU MEAN BY "REALITY CHECK"?</p> <p>5 Q. LIKE THE BOOK OF WISDOM, WHEN YOU RELY ON SUBSEQUENT</p> <p>6 EVENTS TO MAKE SURE YOU'VE GOT THE HYPOTHETICAL NEGOTIATION</p> <p>7 RIGHT?</p> <p>8 A. YOU'RE OFF ON ANOTHER LINE OF QUESTIONING.</p> <p>9 IN THIS CASE, WITH THE INFORMATION WE HAD AT THE</p> <p>10 TIME OF THE HYPOTHETICAL AND THE PROJECTIONS FROM SAP, THERE</p> <p>11 WAS NO NEED TO LOOK FORWARD. WE HAD SO MUCH INFORMATION ABOUT</p> <p>12 SAP'S PROJECTIONS, SO I DIDN'T HAVE TO DO A REALITY CHECK GOING</p> <p>13 PASSED THE DATE OF THE HYPOTHETICAL.</p> <p>14 Q. I'M SORRY, I WASN'T CLEAR.</p> <p>15 I'M TALKING ABOUT A REALITY CHECK ON WHAT YOU WERE</p> <p>16 HEARING FROM ORACLE.</p> <p>17 A. NO. BECAUSE, ONCE AGAIN, THAT WAS A DISCUSSION ABOUT</p> <p>18 OVERALL IMPACT. I DON'T GET THE CONTEXT OF YOUR QUESTION.</p> <p>19 Q. WELL --</p> <p>20 (SIMULTANEOUS COLLOQUY.)</p> <p>21 A. I WASN'T GOING TO SAY TO MS. CATZ AND MR. ELLISON, OH,</p> <p>22 HERE'S SOME DOCUMENTS, WHAT DO YOU THINK ABOUT THAT?</p> <p>23 OUR CONVERSATION, AS I MENTIONED, WAS VERY BROAD</p> <p>24 ABOUT OVERALL PERSPECTIVE. AND SO I HAVE SEEN THESE DOCUMENTS,</p> <p>25 I'VE CONSIDERED THEM, THESE KINDS OF RECORDS. SO I DON'T</p>

<p style="text-align: right;">Page 1148</p> <p>1 UNDERSTAND YOUR QUESTION.</p> <p>2 Q. LET ME REPHRASE IT.</p> <p>3 WHEN MR. ELLISON TOLD YOU WHAT THE POTENTIAL LOSSES</p> <p>4 COULD BE, DID YOU SAY, WELL, TAKE A LOOK AT WHAT ACTUALLY</p> <p>5 HAPPENED AS OF NOVEMBER 2005 WHEN YOUR PERSON RESPONSIBLE FOR</p> <p>6 THIS SAID THE THIRD PARTY PLAYERS HAVE HAD LITTLE IMPACT.</p> <p>7 DID YOU SAY THAT TO HIM; YES OR NO?</p> <p>8 A. NO, BECAUSE OF THE SOFTWARE ISSUE. THEY DIDN'T KNOW ABOUT</p> <p>9 THE SOFTWARE. IT MAKES A BIG DIFFERENCE.</p> <p>10 Q. WE HAVE BEEN THROUGH THAT.</p> <p>11 THEY KNEW WHAT WAS GOING ON IN THE MARKET. THEY</p> <p>12 COULD SEE THE RESULTS IN THE MARKET. AS OF THAT TIME. THEY</p> <p>13 COULDN'T SEE IT LATER ON. AS OF NOVEMBER, THEY COULDN'T SEE</p> <p>14 ANYTHING LATER AFTER NOVEMBER, BUT THEY COULD SEE WHAT WAS</p> <p>15 GOING ON IN THE MARKET AS OF NOVEMBER 2005.</p> <p>16 WOULD YOU AGREE WITH THAT MUCH?</p> <p>17 A. NO, NOT BASED ON THE FACTS OF THIS CASE.</p> <p>18 Q. OKAY. LET'S GO TO A374.</p> <p>19 A. OKAY.</p> <p>20 MR. MITTELSTAEDT: THIS IS IN EVIDENCE, SO LET'S PUT</p> <p>21 IT UP, PLEASE.</p> <p>22 (EXHIBIT DISPLAYED ON SCREEN).</p> <p>23 BY MR. MITTELSTAEDT:</p> <p>24 Q. THIS IS THE SAME TIME FRAME, SEPTEMBER 2005 FROM</p> <p>25 MR. JONES?</p>	<p style="text-align: right;">Page 1150</p> <p>1 WHETHER THE EXPECTATIONS YOU WERE HEARING ABOUT WERE ACCURATE?</p> <p>2 A. YES. ONCE AGAIN, THESE ORACLE PERSONS DID NOT KNOW ABOUT</p> <p>3 THE EXTENT OF THE SOFTWARE INFRINGEMENT.</p> <p>4 Q. BUT, ONCE AGAIN, THEY DID KNOW WHAT WAS GOING ON IN THE</p> <p>5 MARKETPLACE, CORRECT?</p> <p>6 A. THEY WERE GATHERING INFORMATION IN 2005, THAT'S CORRECT,</p> <p>7 IN TRYING TO FIGURE OUT THE LEVEL OF SERVICE THAT WAS BEING</p> <p>8 OFFERED AND WHAT COULD BE SORT OF DELIVERED ON, COULD THEY</p> <p>9 ACTUALLY DO THAT AND TRYING TO FIGURE THAT OUT, BUT THEY DIDN'T</p> <p>10 KNOW ABOUT THE SOFTWARE.</p> <p>11 Q. BUT THEY DID KNOW THE NUMBER OF CUSTOMERS, IF ANY, THAT</p> <p>12 HAD LEFT ORACLE FOR TOMORROWNOW; THEY WERE KEEPING TRACK OF</p> <p>13 THAT, RIGHT?</p> <p>14 A. I AGREE WITH THAT.</p> <p>15 Q. AND THEN LET'S GO DOWN TWO PAGES TO THE PARAGRAPH THAT</p> <p>16 STARTS "FINALLY LET'S GET SERIOUS"?</p> <p>17 A. YOU ARE ON PAGE 3?</p> <p>18 Q. YES.</p> <p>19 HAVE YOU READ THIS BEFORE? THIS IS THE ONE WHERE</p> <p>20 MR. JONES SAYS:</p> <p>21 "IT'S A SILLY ARGUMENT TO SAY THAT PEOPLE SWITCH</p> <p>22 APPS SUPPLIERS BASED ON MAINTENANCE SUPPORT."</p> <p>23 A. ONE MOMENT.</p> <p>24 (PAUSE IN THE PROCEEDINGS.)</p> <p>25 OKAY.</p>
<p style="text-align: right;">Page 1149</p> <p>1 A. OKAY.</p> <p>2 Q. AND YOU'LL SEE AT THE TOP -- ACTUALLY, LET'S GO TO THE</p> <p>3 FIRST SENTENCE.</p> <p>4 THIS IS WHERE MR. JONES SAYS:</p> <p>5 "LET'S ENSURE WE DON'T OVERREACT TO THESE GNATS.</p> <p>6 I EXPECT THERE WILL BE MORE. GO ON THE</p> <p>7 OFFENSIVE."</p> <p>8 DO YOU SEE THAT?</p> <p>9 A. YES.</p> <p>10 Q. AND THEN ON THE E-MAIL DOWN ON THE MIDDLE OF THE PAGE IN</p> <p>11 THE SAME STRING, YOU SEE THIS IS ALSO FROM MR. JONES?</p> <p>12 A. OKAY.</p> <p>13 Q. AND THEN IN THE SECOND PARAGRAPH, THE THIRD LINE -- THE</p> <p>14 THIRD SENTENCE, ONE BEFORE THAT, I AM SORRY.</p> <p>15 SECOND -- FIRST FULL PARAGRAPH, AND THE LINE</p> <p>16 STARTING WITH "I AM MORE CONFIDENT."</p> <p>17 YOU WILL SEE MR. JONES SAYS:</p> <p>18 "I'M MORE CONFIDENT THAN EVER THAT WE WILL</p> <p>19 MARGINALIZE TOMORROWNOW AND MAKE THEM NOTHING</p> <p>20 MORE THAN A NEGOTIATING PLOY, SOMETHING TO BE</p> <p>21 TAKEN SERIOUSLY WITH EACH THREAT, BUT SIMPLY A</p> <p>22 PLOY NONETHELESS."</p> <p>23 DO YOU SEE THAT?</p> <p>24 A. YES, I DO.</p> <p>25 Q. DID YOU CONSIDER THIS DOCUMENT IN DETERMINING WHAT THE</p>	<p style="text-align: right;">Page 1151</p> <p>1 Q. DO YOU SEE -- HAVE YOU READ THAT DOCUMENT BEFORE?</p> <p>2 A. I HAVE SEEN THIS BEFORE.</p> <p>3 Q. AND YOU SEE MR. JONES REFERS TO THAT AS THE SILLIEST</p> <p>4 ARGUMENT?</p> <p>5 A. I SEE THAT.</p> <p>6 Q. OKAY.</p> <p>7 DID YOU TAKE THIS INTO ACCOUNT AS A REALITY CHECK ON</p> <p>8 THE EXPECTATION -- EXCUSE ME, ON THE POTENTIAL LOSS OF</p> <p>9 CUSTOMERS THAT MR. ELLISON GAVE YOU?</p> <p>10 A. I WAS AWARE OF THESE DOCUMENTS AND I WAS AWARE OF THE</p> <p>11 CONVERSATION WITH MR. ELLISON AND I WAS AWARE OF MY OWN</p> <p>12 CALCULATIONS I HAVE DONE IN THIS CASE.</p> <p>13 Q. LET'S TURN TO EXHIBIT 6036. IF YOU TAKE A LOOK AT THAT.</p> <p>14 A. IS THAT IN BINDER 2? EXCUSE ME, SIR? IS THAT IN</p> <p>15 BINDER 2?</p> <p>16 Q. BINDER 1.</p> <p>17 A. 6036?</p> <p>18 Q. YES.</p> <p>19 A. (WITNESS LOCATING EXHIBIT.)</p> <p>20 Q. YOU'LL SEE THIS IS A DECEMBER 2005 INTERNAL ORACLE E-MAIL?</p> <p>21 A. YES.</p> <p>22 Q. ON THE SECOND PAGE THERE'S ANOTHER E-MAIL THAT IS PART OF</p> <p>23 THE STRING THAT IS FROM MR. ROTTLER? SECOND PAGE?</p> <p>24 A. SECOND PAGE.</p> <p>25 Q. MIDDLE OF THE PAGE.</p>

Page 1152	Page 1154
<p>1 A. OKAY. ONE MOMENT. 2 (WITNESS LOCATING EXHIBIT.) 3 OKAY. 4 Q. YOU WILL SEE IN THE MIDDLE OF THE PAGES TALKING ABOUT CORE 5 MESSAGES? 6 A. YES. 7 Q. IS THIS ANOTHER DOCUMENT THAT YOU CONSIDERED IN REACHING 8 YOUR OPINIONS HERE? 9 A. YES. I WOULD HAVE SEEN THIS. 10 MR. MITTELSTAEDT: MOVE 6036 INTO EVIDENCE. 11 MR. PICKETT: YOUR HONOR, I CONTINUE TO OBJECT. I 12 THINK MERE CONSIDERATION, NOT RELIANCE IS NOT SUFFICIENT TO GET 13 IN EVERY SINGLE DOCUMENT THAT THIS WITNESS HAS SEEN. OTHERWISE 14 WE WOULD HAVE LITERALLY HUNDREDS OF THOUSANDS OF DOCUMENTS. 15 THE COURT: I AM GOING TO ALLOW IT IN, COUNSEL. 16 OBJECTION NOTED. OVERRULED. 17 (DEFENDANTS' EXHIBIT A6036 RECEIVED IN 18 EVIDENCE) 19 BY MR. MITTELSTAEDT: 20 Q. LET'S GO TO THE SECOND PAGE, THE DECEMBER 12 E-MAIL FROM 21 MR. ROTTLER. 22 A. PAGE 2, OKAY. 23 Q. YES. ARE YOU WITH ME? 24 A. I AM ON PAGE 2. 25 (EXHIBIT DISPLAYED ON SCREEN.)</p>	<p>1 "BECAUSE OF THIS, SAP'S SAFE PASSAGE PROGRAM HAS 2 NOT IMPACTED ORACLE BUSINESS. NOT SURE WE 3 SHOULD EVEN MENTION TOMORROWNOW BY NAME AS THIS 4 GIVES THEM FREE ADVERTISING." 5 DO YOU SEE THAT? 6 A. YES. 7 Q. DID YOU CONSIDER THIS DOCUMENT AS A REALITY CHECK TO WHAT 8 YOU WERE HEARING FROM ORACLE? 9 A. YES, BECAUSE THIS WHOLE DOCUMENT WAS ABOUT WHETHER OR NOT 10 ORACLE SHOULD ANNOUNCE THAT A CUSTOMER, THIS MANITOWAC BANK, I 11 THINK, CAME BACK. 12 AND THE DEBATE WAS, IF YOU'RE SAYING THIS MANITOWAC 13 CUSTOMER COMES BACK AND IT DOESN'T SOUND VERY GLAMOROUS, THEN 14 WE ARE NOT GAINING ANY PR BY SAYING THEY WENT TO TOMORROWNOW 15 AND CAME BACK. 16 SO I COULD SEE THIS GOING BACK AND FORTH AMONGST THE 17 BUSINESS PEOPLE ABOUT HOW TO COMMUNICATE TO THE PUBLIC AND 18 CUSTOMERS AND INTERNALLY ABOUT WHAT THEY THOUGHT WAS GOING ON, 19 BUT THEY DIDN'T KNOW ABOUT THE USE OF THE SOFTWARE BY 20 TOMORROWNOW. 21 Q. WE WON'T GO THROUGH THAT AGAIN. 22 THIS IS DECEMBER OF 2005, CORRECT? 23 A. THIS IS DECEMBER 2005, YES, SIR. 24 Q. SO IT IS ALMOST A YEAR AFTER THE ACQUISITION? 25 A. GETTING CLOSE TO IT.</p>
Page 1153	Page 1155
<p>1 Q. UNDER "CORE MESSAGES", THE SECOND BULLET. STARTING OFF 2 "BECAUSE OF THIS" -- ACTUALLY LET'S READ THE FIRST BULLET. 3 SO UNDER CORE MESSAGES, MR. JUERGEN SAYS, 4 "PEOPLESOFT AND JDE" -- 5 MR. MITTELSTAEDT: YOUR HONOR, COULD ASK YOU THE 6 JURY IF I AM IN THE WAY? I AM NOT SURE WHERE I WOULD GO, 7 BUT.... 8 THE COURT: LADIES AND GENTLEMEN, CAN YOU SEE THE 9 SCREEN ALL RIGHT WITH COUNSEL? 10 NO, THEY CAN'T. OKAY. 11 MR. MITTELSTAEDT: I WILL BACK UP. SORRY. 12 BY MR. MITTELSTAEDT: 13 Q. OKAY. YOU WILL SEE IN THIS E-MAIL MR. ROTTLER SAYS: 14 "PEOPLESOFT AND J.D. EDWARDS CUSTOMERS ARE VERY 15 PLEASED WITH ORACLE'S SUPPORT. HIGHEST CUSTOMER 16 SATISFACTION EVER," ET CETERA. 17 AND IN THE SECOND BULLET SAYS: 18 "BECAUSE OF THIS, ORACLE IS EXPERIENCING" -- GO DOWN 19 TO THE NEXT BULLET. 20 "BECAUSE OF THIS, ORACLE IS EXPERIENCING GREAT 21 RENEWAL RATES ON SUPPORT AND CONTINUES TO SEE 22 YEAR OVER YEAR REVENUE GROWTH IN THIS AREA." 23 DO YOU SEE THAT? 24 A. YES. 25 Q. AND THEN IN THE NEXT BULLET:</p>	<p>1 Q. LET'S GO TO A4090. 2 MR. MITTELSTAEDT: I BELIEVE THIS IS IN EVIDENCE. 3 SO LET'S PUBLISH IT PLEASE. 4 (EXHIBIT DISPLAYED ON SCREEN.) 5 BY MR. MITTELSTAEDT: 6 Q. DO YOU HAVE THAT THERE, SIR? 7 A. YES, SIR. THANK YOU. 8 Q. YOU SEE THE E-MAIL ON THE BOTTOM OF THE PAGE? IT IS FROM 9 MR. ROTTLER TO MR. HENLEY, CHAIRMAN OF THE BOARD. 10 AND NOW WE ARE INTO MARCH OF 2006. 11 DO YOU SEE THAT? 12 A. YES. 13 Q. AND IN THE SECOND PARAGRAPH HE SAYS: 14 "HERE'S WHAT WE HAVE DONE ON THAT FRONT", TALKING 15 ABOUT TOMORROWNOW. 16 AND THE SECOND BULLET SAYS: "WE DISCUSSED 17 SEVERAL SCENARIOS FOR US ATTACKING SAP'S SUPPORT 18 BASE AT THE EC".... 19 "EC" MEANING WHAT, EXECUTIVE COMMITTEE? 20 A. I DON'T KNOW. IF YOU ARE TELLING ME THAT'S THE CASE, THEN 21 I WOULD ACCEPT IT. 22 Q. I DON'T KNOW FOR SURE. IT SOUNDS REASONABLE, RIGHT? 23 A. AT THE EC OFF-SITE. I JUST DON'T KNOW. 24 Q. OKAY. 25 "AND CONCLUDED TO HOLD OFF ON IMMEDIATE ACTION.</p>

53 (Pages 1152 to 1155)

Raynee H. Mercado, CSR, RMR, CRR, FCRR & Diane E. Skillman, CSR, RPR, FCRR

<p style="text-align: right;">Page 1156</p> <p>1 TWO KEY DRIVERS." AND THEN A IS, "WE HAVE OUR</p> <p>2 HANDS FULL WITH INTEGRATING THE SIEBEL CUSTOMER</p> <p>3 BASE."</p> <p>4 DO YOU SEE THAT?</p> <p>5 A. YES.</p> <p>6 Q. AND THEN B IS:</p> <p>7 "GIVEN THAT WE HAVE PRETTY MUCH ELIMINATED</p> <p>8 TOMORROWNOW AS A THREAT, HOW ACTIVELY DO WE WANT</p> <p>9 TO GO AFTER SAP SUPPORT PROFIT POOL, GIVEN THAT</p> <p>10 AS A SIDE EFFECT" -- THAT IS A SIDE EFFECT, "IT</p> <p>11 WILL DRAW PLENTY OF ATTENTION TO OUR OWN AND</p> <p>12 MUCH LARGER AND MORE PROFITABLE PROFIT POOL."</p> <p>13 DO YOU SEE THAT?</p> <p>14 A. YES, I SEE THAT.</p> <p>15 Q. OKAY.</p> <p>16 IS THIS A DOCUMENT THAT YOU CONSIDERED AS A REALITY</p> <p>17 CHECK TO WHAT YOU WERE HEARING FROM ORACLE?</p> <p>18 A. I CONSIDERED IT IN DOING MY STUDY. THAT'S, OVERALL THAT'S</p> <p>19 CORRECT.</p> <p>20 Q. LET'S GO TO A303.</p> <p>21 A. OKAY.</p> <p>22 Q. IS THIS A DOCUMENT THAT YOU CONSIDERED IN REACHING YOUR</p> <p>23 OPINIONS HERE, SIR?</p> <p>24 A. ONE MOMENT.</p> <p>25 (WITNESS REVIEWING EXHIBIT.)</p>	<p style="text-align: right;">Page 1158</p> <p>1 Q. THAT'S THE DATE OF THE E-MAIL, CORRECT?</p> <p>2 A. YES.</p> <p>3 Q. AND IN THE FOURTH BULLET HE SAYS:</p> <p>4 "TWELVE MONTHS OF ANALYSIS HAS SHOWN</p> <p>5 CONSISTENTLY THAT THE LOSS TO THIRD PARTIES IS</p> <p>6 CONSISTENTLY ABOUT 2 PERCENT OF THE CONTRACT</p> <p>7 BASE."</p> <p>8 DO YOU SEE THAT?</p> <p>9 A. I SEE THAT, YES.</p> <p>10 Q. DID YOU --</p> <p>11 A. BUT UP ABOVE, THERE'S OTHER THINGS THAT ARE ALSO -- WE</p> <p>12 SHOULD PROBABLY READ THE WHOLE DOCUMENT, OR PARTS OF IT.</p> <p>13 SEE WHERE HE SAYS: "OVER THE PAST YEAR, WE HAVE</p> <p>14 NOT HAD A PROBLEMATIC APPROACH TO THE THIRD</p> <p>15 PARTY THREAT. ALTHOUGH THE TEAM HAS SPENT</p> <p>16 SIGNIFICANT TIME ON THAT SITUATION, IT HAS BEEN</p> <p>17 SUCCESSFUL. THAT THREAT IS STILL VERY REAL AND</p> <p>18 POSSIBLY EVEN STRONGER GOING INTO FISCAL YEAR</p> <p>19 '07."</p> <p>20 Q. AND WHAT HE WAS SAYING IN ADDITION TO THAT, WAS FOR THE</p> <p>21 LAST 12 MONTHS, THE LOSS TO THIRD PARTIES WAS ABOUT 2 PERCENT,</p> <p>22 CORRECT?</p> <p>23 A. THAT IS WHAT IT SAYS.</p> <p>24 Q. OKAY. LET'S GO TO A367, WHICH IS IN EVIDENCE. THIS IS</p> <p>25 FROM MR. JONES IN AUGUST OF 2006, CORRECT?</p>
<p style="text-align: right;">Page 1157</p> <p>1 OKAY. I HAVE SEEN THIS.</p> <p>2 Q. AND HAVE YOU CONSIDERED IT, SIR, IN REACHING YOUR OPINIONS</p> <p>3 IN THIS CASE?</p> <p>4 A. YES.</p> <p>5 Q. I THINK IN THE --</p> <p>6 MR. MITTELSTAEDT: YOUR HONOR, I MOVE IT INTO</p> <p>7 EVIDENCE, A303?</p> <p>8 THE COURT: 303?</p> <p>9 MR. MITTELSTAEDT: YES.</p> <p>10 THE COURT: I ASSUME SAME OBJECTION OR ANY</p> <p>11 OBJECTION?</p> <p>12 MR. PICKETT: I AM SURE THE SAME RULING.</p> <p>13 YES, SAME OBJECTION, SAME RULING.</p> <p>14 THE COURT: YES.</p> <p>15 (DEFENDANTS' EXHIBIT A303 RECEIVED IN</p> <p>16 EVIDENCE)</p> <p>17 BY MR. MITTELSTAEDT:</p> <p>18 Q. IN THE INTEREST OF TIME, LET ME JUST READ THE THIRD BULLET</p> <p>19 DOWN THERE. THIS IS FROM MR. CUMMINS, WHO IS THE SENIOR</p> <p>20 DIRECTOR OF NORTH AMERICAN SUPPORT SALES FOR ORACLE; IS THAT</p> <p>21 RIGHT?</p> <p>22 (EXHIBIT DISPLAYED ON SCREEN.)</p> <p>23 A. HE'S IN THE SUPPORT GROUP, THAT'S CORRECT.</p> <p>24 Q. AND THE FOURTH BULLET -- THIS IS APRIL 2006, RIGHT?</p> <p>25 A. APRIL 2006.</p>	<p style="text-align: right;">Page 1159</p> <p>1 A. AUGUST 2006.</p> <p>2 (EXHIBIT DISPLAYED ON SCREEN.)</p> <p>3 Q. LET'S GO TO PARAGRAPH 5.</p> <p>4 YOU SEE HE SAYS:</p> <p>5 "IF TOMORROWNOW, SAP IS GOING TO WIN A BUNCH OF</p> <p>6 MAINTENANCE ONLY CUSTOMERS WITH NO PLANS TO</p> <p>7 UPGRADE, THEN I DON'T THINK TOMORROWNOW WILL BE</p> <p>8 TOO LONG FOR THIS WORLD AS SAP WON'T MAKE</p> <p>9 PROFITABLE MONEY ON THOSE CUSTOMERS IF THEY</p> <p>10 CAN'T GET THEM TO IMPLEMENT SAP."</p> <p>11 DO YOU SEE THAT?</p> <p>12 A. YES.</p> <p>13 Q. AND THEN IT SAYS "LJE TOOK NOTE OF THIS LONG AGO."</p> <p>14 DO YOU SEE THAT?</p> <p>15 A. YES.</p> <p>16 Q. NOW WHEN YOU WERE MEETING WITH MR. ELLISON, DID YOU BRING</p> <p>17 THIS TO HIS ATTENTION?</p> <p>18 A. NO. I HAD A PHONE CALL AND I WOULDN'T HAVE BROUGHT THIS</p> <p>19 TO HIS ATTENTION.</p> <p>20 Q. THERE WERE OTHER PEOPLE WHO WERE THERE IN PERSON WITH HIM,</p> <p>21 RIGHT, OTHER LAWYERS?</p> <p>22 A. I DON'T KNOW EXACTLY WHO HE WAS SITTING WITH.</p> <p>23 Q. BUT YOU DIDN'T THINK HE WAS ALONE, DID YOU?</p> <p>24 A. I GUESS I NEVER REALLY CONTEMPLATED THAT.</p> <p>25 Q. DO YOU KNOW ANY REASON WHY SOMEONE COULDN'T HAVE HANDED</p>

<p style="text-align: right;">Page 1160</p> <p>1 HIM THIS DOCUMENT OR WHY YOU COULDN'T HAVE READ THIS DOCUMENT</p> <p>2 TO HIM OVER THE PHONE, IF YOU HAD WANTED TO?</p> <p>3 A. WELL, WE HAD ALREADY HAD THE CONVERSATION ABOUT MY</p> <p>4 OBJECTIVES IN TALKING TO MR. ELLISON, BUT IF YOU ARE SAYING IF</p> <p>5 I WANTED TO SHOW HIM THIS DOCUMENT, I AM CERTAIN I COULD HAVE</p> <p>6 ARRANGED TO HAVE SOMEONE PDF IT TO HIM OR SOMETHING, AND HE</p> <p>7 COULD HAVE TAKEN A PEAK AT IT.</p> <p>8 Q. LOOKING AT THE LAST LINE IN THIS PARAGRAPH, IT'S</p> <p>9 HIGHLIGHTED:</p> <p>10 "TO BE CLEAR, WE WANT EVERY RENEWAL, BUT IF</p> <p>11 TOMORROWNOW FILLS UP ON UNPROFITABLE LAGGARDS,</p> <p>12 THEN I AM NOT SURE THAT'S ACTUALLY A BAD THING</p> <p>13 FOR US IN THE MEDIUM LONG TERM."</p> <p>14 DO YOU SEE THAT?</p> <p>15 A. YES, I SEE THAT.</p> <p>16 Q. OKAY. TWO MORE DOCUMENTS. A371. THIS IS ANOTHER ONE</p> <p>17 FROM MR. JONES. OCTOBER OF 2006?</p> <p>18 A. OKAY. THAT'S THE DATE.</p> <p>19 (EXHIBIT DISPLAYED ON SCREEN.)</p> <p>20 Q. AND IN THE SECOND PARAGRAPH MR. JONES WRITES:</p> <p>21 "HOWEVER, TOMORROWNOW IS WELCOME TO HAVE KOONTZ</p> <p>22 WAGNER AS A CUSTOMER WHO FEELS LIKE IT COULD RUN</p> <p>23 THE CURRENT VERSION OF J.D. EDWARDS WORLD FOR</p> <p>24 ANOTHER FIVE YEARS, MAYBE MORE. THAT IS A</p> <p>25 CUSTOMER I WOULD WANT TO FIRE ANYWAY. LET THEM</p>	<p style="text-align: right;">Page 1162</p> <p>1 Q. HAVE YOU TALKED TO MR. JONES ABOUT THIS DOCUMENT?</p> <p>2 A. NO, I HAVE NOT.</p> <p>3 Q. YOU DON'T KNOW WHAT HE WAS THINKING WHEN HE WROTE IT, DO</p> <p>4 YOU?</p> <p>5 A. I HAVE NOT TALKED TO HIM SPECIFICALLY, SO I COULDN'T SPEAK</p> <p>6 TO THAT.</p> <p>7 Q. YOU DO SEE THAT HE WRITES "THAT IS A CUSTOMER I WOULD LIKE</p> <p>8 TO FIRE ANYWAY."</p> <p>9 DO YOU SEE THAT?</p> <p>10 A. HE'S TALKING ABOUT KOONTZ WAGNER, SO THAT IS PROBABLY A</p> <p>11 VERY PARTICULAR SITUATION THAT MAY HAVE A HISTORY WITH ORACLE</p> <p>12 THAT'S MAYBE NOT PROFITABLE, SO, HE'S ENTITLED TO SAY THAT.</p> <p>13 BUT THEY HAVE LOTS OF CUSTOMERS AND THEY HAVE LOTS</p> <p>14 OF SATISFIED CUSTOMERS.</p> <p>15 Q. ARE YOU SPECULATING, SIR, ABOUT WHAT MR. JONES THOUGHT</p> <p>16 ABOUT KOONTZ WAGNER, OTHER THAN WHAT YOU SEE HERE?</p> <p>17 A. I AM NOT SPECULATING. HE'S TALKING ABOUT A CUSTOMER THAT</p> <p>18 IS ON AN OLD VERSION OF J.D. WORLD THAT PROBABLY IS NOT TAKING</p> <p>19 AN UPGRADE, SO IT'S A MAINTENANCE-ONLY CUSTOMER, WHICH ORACLE</p> <p>20 LOVES TO HAVE, BUT IT MAY BE HE'S NOT THE MOST PROFITABLE</p> <p>21 CUSTOMER. AND THAT'S OKAY.</p> <p>22 Q. CAN WE AGREE ON THIS AT THIS LATE HOUR, HE WRITES "THAT IS</p> <p>23 A CUSTOMER I WOULD LIKE TO FIRE ANYWAY"?</p> <p>24 A. I AGREE THAT'S WHAT HE WRITES, YES.</p> <p>25 Q. AND THEN HE WRITES: "LET THEM BEING A DRAG ON TOMORROWNOW</p>
<p style="text-align: right;">Page 1161</p> <p>1 BE A DRAG ON TOMORROWNOW INSTEAD WHILE WE</p> <p>2 DELIVER VALUE AND ENABLE CUSTOMERS ALONG WITH</p> <p>3 THEIR GROWING BUSINESS, INTO THE FUTURE."</p> <p>4 DO YOU SEE THAT?</p> <p>5 A. YES.</p> <p>6 Q. IS THIS A DOCUMENT YOU CONSIDERED AS A REALITY CHECK TO</p> <p>7 THE THREAT OF TOMORROWNOW?</p> <p>8 A. YES, BUT THAT FIRST PARAGRAPH THAT SAYS:</p> <p>9 "THIS PISSES ME OFF ROYALLY SINCE WE WON THE JD</p> <p>10 POWER AWARD."</p> <p>11 I THINK THAT'S THE AWARD ORACLE GOT FOR THE HIGHEST</p> <p>12 RATED SERVICE.</p> <p>13 SO THAT'S WHY HE'S FRUSTRATED. AND HE SAYS:</p> <p>14 "THEY DON'T FOCUS ON PROVIDING BEST-IN-THE-WORLD</p> <p>15 MAINTENANCE AND SUPPORT SERVICES," BUT THE POINT IS HE DOESN'T</p> <p>16 KNOW THAT THEY HAVE THE SOFTWARE.</p> <p>17 SO, I MEAN, THERE'S -- I AM CERTAIN THAT WHEN YOU GO</p> <p>18 TO THESE CUSTOMERS, THEY ARE NOT SAYING, HEY, WE'RE GETTING</p> <p>19 GREAT SERVICE FROM TOMORROWNOW BECAUSE THEY HAVE ALL THESE</p> <p>20 GREAT THINGS THAT YOU THINK WE DON'T HAVE.</p> <p>21 SO THERE'S ALWAYS THIS THING THAT MR. JONES DOESN'T</p> <p>22 KNOW. SO, IT'S STILL A QUALITY ISSUE. IT'S AN ISSUE ABOUT</p> <p>23 WHAT THEY CAN DELIVER. NOT JUST GETTING A CONTRACT TO SWITCH,</p> <p>24 BUT CAN TOMORROWNOW, WITHOUT THE SOFTWARE, DELIVER ON THE</p> <p>25 CONTRACTED SERVICE, AND THEY WOULD NOT BE ABLE TO DO THAT.</p>	<p style="text-align: right;">Page 1163</p> <p>1 INSTEAD"?</p> <p>2 A. HE DOES WRITE THAT.</p> <p>3 Q. SO THIS WAS ONE OF THE 358 CUSTOMERS THAT TOMORROWNOW</p> <p>4 GOT -- ONE OF THE 358 CUSTOMERS THAT TOMORROWNOW GOT?</p> <p>5 A. I AGREE WITH THAT.</p> <p>6 Q. OKAY.</p> <p>7 AND THEN FINALLY, LET'S GO TO A451. YOU WILL SEE</p> <p>8 THIS IS ANOTHER E-MAIL FROM MR. ROTTLER. THIS ONE FROM</p> <p>9 FEBRUARY OF 2007 ON THE SUBJECT OF TOMORROWNOW.</p> <p>10 WOULD YOU LOOK AT THAT AND TELL ME IF YOU'VE</p> <p>11 CONSIDERED THAT AS PART OF YOUR REPORT HERE?</p> <p>12 A. (WITNESS REVIEWING EXHIBIT.)</p> <p>13 Q. SIR, JUST READING THAT FIRST PAGE, THAT IS ALL I AM GOING</p> <p>14 TO ASK YOU ABOUT.</p> <p>15 IN THE INTEREST OF TIME, THAT'S A DOCUMENT YOU</p> <p>16 RELIED ON OR CONSIDERED FOR YOUR REPORT, CORRECT?</p> <p>17 A. I BELIEVE I HAVE SEEN THIS BEFORE.</p> <p>18 Q. OKAY.</p> <p>19 MR. MITTELSTAEDT: YOUR HONOR --</p> <p>20 MR. PICKETT: SAME OBJECTION.</p> <p>21 THE COURT: IT'S NOT THE SAME THING. HE HAS SEEN IT</p> <p>22 BEFORE IS NOT QUITE THE SAME THING AS HE HAS CONSIDERED IT.</p> <p>23 ACTUALLY, I THINK IT'S TIME. IT'S TIME FOR US TO</p> <p>24 END. LET'S ADJOURN FOR TODAY. IT'S 1:30. WE CAN TAKE THIS</p> <p>25 UP. YOU OBVIOUSLY ARE NOT GOING TO FINISH WITH MR. MEYER</p>

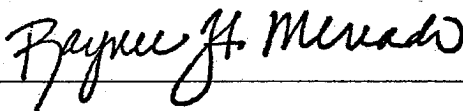
55 (Pages 1160 to 1163)

<p style="text-align: right;">Page 1168</p> <p>1 UNDERSTAND WHAT THE DOCUMENT IS, TO LEARN SOMETHING ABOUT IT.</p> <p>2 THESE DOCUMENTS DO NOT HAVE ANY OF THAT.</p> <p>3 THEY ARE COMING OUT OF LEFT FIELD. AND THE LEFT</p> <p>4 FIELD THEY ARE COMING OUT OF IS THAT MR. MEYER HAS HUNDREDS OF</p> <p>5 THOUSANDS OF DOCUMENTS THAT HE'S READ, CONSIDERED, BUT IT'S A</p> <p>6 VERY DIFFERENT THING FROM SAYING "I RELIED ON THIS DOCUMENT."</p> <p>7 BUT WE -- I LOST THAT OBJECTION, THAT'S FINE. I DON'T AGREE</p> <p>8 WITH IT, BUT I WILL SAY THIS: IT BETTER BE A TWO-WAY STREET</p> <p>9 WHEN WE CROSS-EXAMINE MR. CLARKE, THEIR EXPERT.</p> <p>10 I UNDERSTAND NOW THE RULES OF THE ROAD WITH RESPECT</p> <p>11 TO THIS TYPE OF EXHIBIT. I JUST WANT TO SAY THAT DESPITE MY</p> <p>12 DISAGREEMENT WITH IT, I DO THINK IT'S FAIR TO ALLOW US THE SAME</p> <p>13 LEEWAY.</p> <p>14 THE COURT: OF COURSE I WOULD GIVE YOU THE SAME</p> <p>15 LEEWAY. I DON'T IMAGINE YOU WOULD ARGUE OTHERWISE.</p> <p>16 MR. MITTELSTAEDT: NO, YOUR HONOR.</p> <p>17 MR. PICKETT: I UNDERSTOOD IT WAS ONLY WITH RESPECT</p> <p>18 TO THIS ONE REMAINING EXHIBIT, I WANTED TO MAKE SURE THAT WE</p> <p>19 ESTABLISHED A PRECEDENT.</p> <p>20 THE COURT: SINCE HE IS ALMOST FINISHED THEN AND</p> <p>21 THERE WERE, I BELIEVE, THREE EXHIBITS THAT WERE ADMITTED OVER</p> <p>22 OBJECTION, YOUR POSITION IS WITH RESPECT ALL THOSE THREE THE</p> <p>23 SAME, THAT THEY WERE -- CONTAINED ADMISSIONS OF SOME KIND?</p> <p>24 MR. MITTELSTAEDT: YES.</p> <p>25 THE COURT: AND/OR WERE BUSINESS RECORDS OF SOME</p>	<p style="text-align: right;">Page 1170</p> <p>1 OPPORTUNITY TO DO SO. OR WOULD YOU RATHER JUST HAVE A BLANKET</p> <p>2 RULE E-MAILS CAN COME IN?</p> <p>3 MR. PICKETT: AT THIS POINT I THINK -- I THINK IT</p> <p>4 WOULD ONLY BE FAIR TO HAVE A BLANKET RULE FOR BOTH SIDES.</p> <p>5 THE COURT: ALL RIGHT. SO WE'LL DO THAT. OKAY.</p> <p>6 (DEFENDANTS' EXHIBIT A451 RECEIVED IN</p> <p>7 EVIDENCE)</p> <p>8 THE COURT: COUPLE OF OTHER THINGS.</p> <p>9 MR. MEYER'S A PARTICULARLY DIFFICULT WITNESS. HE</p> <p>10 TALKS A LOT. AND HE HAS THIS, FOR ME, A LITTLE ANNOYING</p> <p>11 TENDENCY TO TAKE THE QUESTIONS AWAY FROM COUNSEL AND TO TURN</p> <p>12 THEM INTO HIS OWN QUESTIONS AND DIRECT MR. MITTELSTAEDT TO</p> <p>13 OTHER AREAS OF THE PAPER, OF THE DOCUMENT THAT HE IS EXAMINING.</p> <p>14 I DON'T GENERALLY VIEW IT AS MY RESPONSIBILITY TO</p> <p>15 STEP IN. AND, IN FACT, I TRY TO MAKE IT A PRACTICE NOT TO STEP</p> <p>16 IN AND TO DIRECT THE WAY THE QUESTIONING IS HANDLED. BUT I AM</p> <p>17 GETTING A LITTLE BIT ANNOYED WITH JUST HOW MUCH HE'S DOING</p> <p>18 THAT.</p> <p>19 SO, I AM JUST GOING TO PUT YOU ON NOTICE. I AM NOT</p> <p>20 SURE WHAT I WILL DO WHEN I SEE HIM THE NEXT TIME. BUT HE IS</p> <p>21 NOT DOING A TERRIBLY GOOD JOB OF JUST ANSWERING THE QUESTION</p> <p>22 DIRECTLY.</p> <p>23 I UNDERSTAND HE WANTS TO EXPLAIN. BUT IT DOES SEEM</p> <p>24 TO ME THAT HE OWES A DIRECT ANSWER TO A YES OR NO QUESTION</p> <p>25 BEFORE HE LAUNCHES OFF INTO AN EXPLANATION. AND IT'S UP TO</p>
<p style="text-align: right;">Page 1169</p> <p>1 KIND? I WANT TO MAKE SURE THE RECORD IS CLEAR EXACTLY WHAT</p> <p>2 EACH SIDE'S POSITION IS WITH RESPECT TO THESE KIND OF EXHIBITS.</p> <p>3 MR. MITTELSTAEDT: YES. BUSINESS RECORDS, PARTY</p> <p>4 ADMISSIONS.</p> <p>5 THE COURT: OKAY.</p> <p>6 MR. MITTELSTAEDT: ALL OF THEM ARE AT A HIGH ENOUGH</p> <p>7 LEVEL.</p> <p>8 THE COURT: OKAY. OR ADMISSIBLE TO EXPLAIN THE</p> <p>9 EXPERT'S TESTIMONY.</p> <p>10 MR. MITTELSTAEDT: YES.</p> <p>11 THE COURT: TO EVALUATE THE EXPERT'S TESTIMONY.</p> <p>12 MR. MITTELSTAEDT: YES.</p> <p>13 THE COURT: OKAY. AND YOU DON'T BELIEVE ANY THOSE</p> <p>14 APPLY --</p> <p>15 MR. PICKETT: CORRECT --</p> <p>16 THE COURT: BECAUSE HE HAS TO RELY UPON IT IN ORDER</p> <p>17 FOR IT TO BE USED TO EVALUATE HIS --</p> <p>18 MR. PICKETT: CORRECT. TO BE CLEAR, THEY ARE</p> <p>19 HEARSAY, THERE'S NO FOUNDATION FOR THE EXHIBITS BECAUSE A</p> <p>20 WITNESS HASN'T TOUCHED THEM, IF YOU WILL.</p> <p>21 THE COURT: OKAY. ALL RIGHT. I WILL, WITH REGARD</p> <p>22 TO THE THREE, I THINK THERE WERE JUST THREE THAT CAME IN, I AM</p> <p>23 NOT GOING TO CHANGE MY RULING, I WILL ALLOW THEM IN.</p> <p>24 WITH REGARD TO ANY FUTURE ONES, IF YOU WOULD LIKE TO</p> <p>25 ARGUE THEM INDIVIDUALLY, I WILL CERTAINLY PERMIT YOU AN</p>	<p style="text-align: right;">Page 1171</p> <p>1 COUNSEL TO CONTROL THAT. WHEN AN EXPLANATION IS APPROPRIATE, I</p> <p>2 HAVEN'T FOUND THAT IT IS, BUT MAINLY HE'S SAYING THE SAME THING</p> <p>3 OVER AND OVER AGAIN, WHICH IS WHAT I FIND TO BE A LITTLE</p> <p>4 DIFFICULT. HE'S JUST REPEATING THE SAME THING OVER AND OVER</p> <p>5 AND OVER AGAIN IN RESPONSE TO QUESTIONS THAT ASK FOR PRETTY</p> <p>6 DIRECT ANSWERS.</p> <p>7 MR. PICKETT: I GUESS TWO POINTS, YOUR HONOR. I</p> <p>8 APPRECIATE AND UNDERSTAND THE GUIDANCE. I WILL SAY THIS ISN'T</p> <p>9 THE FIRST TIME A WITNESS ON CROSS-EXAMINATION HAS FOUGHT THE</p> <p>10 QUESTIONING AND WE HAVE HAD TO GO OVER AND OVER AND OVER A</p> <p>11 SINGLE BULLET POINT REPEATEDLY.</p> <p>12 THE COURT: THAT'S KIND OF THE ART OF THE</p> <p>13 CROSS-EXAMINATION.</p> <p>14 MR. PICKETT: THAT'S MY POINT, THOUGH. COUNSEL CAN</p> <p>15 BE ARGUMENTATIVE WITH THE WITNESS, PARTICULARLY WITH AN EXPERT.</p> <p>16 I THINK THERE'S AN -- I DIDN'T JUMP UP AND DOWN WHEN THERE WERE</p> <p>17 ARGUMENTATIVE QUESTIONS BECAUSE EVEN THOUGH I THOUGHT THEY WERE</p> <p>18 OBJECTIONABLE, I UNDERSTOOD WHAT WAS GOING ON.</p> <p>19 THE COURT: I AM JUST TELLING YOU THAT I THINK HE'S</p> <p>20 REPEATING TOO MUCH INFORMATION. I HAVE NOT STEPPED IN, AND I</p> <p>21 DON'T GENERALLY DO THAT, BUT I THINK THAT HE'S SIMPLY BEATING A</p> <p>22 DEAD HORSE IN THE GUISE OF ANSWERING THESE QUESTIONS.</p> <p>23 AND, IN ANY EVENT, I DON'T KNOW WHAT I AM GOING DO</p> <p>24 ABOUT IT, BUT I WANTED TO TELL YOU ALL THAT I AM NOTICING IT.</p> <p>25 MR. PICKETT: I UNDERSTAND WHAT YOU ARE SAYING.</p>

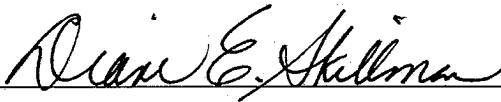
CERTIFICATE OF REPORTER

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

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



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



DIANE E. SKILLMAN, CSR, RPR, FCRR

WEDNESDAY, NOVEMBER 10, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL.	)	JURY TRIAL
)	
PLAINTIFFS,	)	NO. C 07-01658 PJH
)	
VS.	)	VOLUME 8
)	
SAP AG, ET AL.,	)	PAGES 1421 - 1511
)	
DEFENDANTS.)	OAKLAND, CALIFORNIA
)	MONDAY, NOVEMBER 15, 2010

TRANSCRIPT OF PROCEEDINGS

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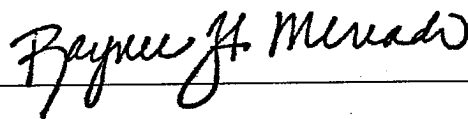
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<p style="text-align: right;">Page 1446</p> <p>1 JOO WAH LOW SAYS, "I WORRIED SOMEONE GETS THE 2 BLAME FOR ALL OF THIS." 3 "YEP, THEY GOT 50 MORE." 4 THEN SAYS, BY THE WAY, "BTW IS LESS ASTERISK, 5 ASTERISK, ASTERISK, ASTERISK, STILL V," THAT'S A 6 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 A 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."</p>	<p style="text-align: right;">Page 1448</p> <p>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.</p>
<p style="text-align: right;">Page 1447</p> <p>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.</p>	<p style="text-align: right;">Page 1449</p> <p>1 NOW, YOU HAVE HEARD TESTIMONY FROM FOUR OF THE FIVE 2 MEMBERS OF SAP AG'S EXECUTIVE BOARD AS IT WAS COMPRISED AT ALL 3 RELEVANT TIMES BETWEEN DECEMBER OF 2004 WHEN SAP AG FIRST 4 CONSIDERED ACQUIRING TOMORROWNOW AND MARCH 2007, WHEN THE 5 PLAINTIFFS INITIATED THIS LAWSUIT. 6 THE FIVE MEMBERS OF THE BOARD BETWEEN THESE -- THESE 7 YEARS WERE MR. KAGERMANN, MR. OSWALD, MR. BRANDT, MR. AGASSI 8 AND MR. APOTHEKER. NOW, SOME OF THESE WITNESSES, INCLUDING 9 MR. BRANDT, HAVE TESTIFIED THAT THEY EITHER, ONE, DID NOT KNOW 10 OR HAD REASON TO KNOW OF THE COPYRIGHT INFRINGEMENT AT ISSUE IN 11 THIS CASE; OR, TWO, KNEW OF THE INFRINGEMENT BUT DIRECTED OR PUT 12 PRESSURE ON TOMORROWNOW TO STOP THE INFRINGEMENT. 13 ANY TESTIMONY, QUESTION, OR ARGUMENT THAT STATES OR 14 SUGGESTS THAT SAP AG, INCLUDING MEMBERS OF ITS EXECUTIVE BOARD, 15 EITHER DID NOT KNOW OR HAVE REASON TO KNOW OF THE INFRINGEMENT 16 OR DID NOT INTENTIONALLY MATERIALLY CONTRIBUTE TO INFRINGEMENT 17 IS INCONSISTENT WITH SAP'S STIPULATION TO COPYRIGHT -- TO 18 CONTRIBUTORY COPYRIGHT INFRINGEMENT IN THIS CASE. 19 ALL RIGHT. 20 WE'LL NOW TURN TO THE DEFENSE CASE. THEY WILL BEGIN 21 TO PUT ON THEIR EVIDENCE. 22 MR. LANIER, WOULD YOU LIKE TO CALL YOUR FIRST 23 WITNESS. 24 MR. LANIER: WE WOULD. THANK YOU, YOUR HONOR. 25 GOOD MORNING. BEFORE WE GET TO SOME PEOPLE. WE'RE</p>

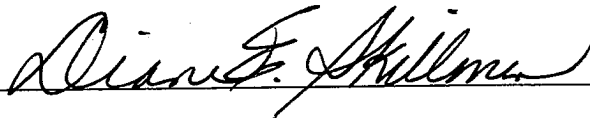
CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, MONDAY, NOVEMBER 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
<hr style="width: 40%; margin-left: 0;"/>)	TUESDAY, NOVEMBER 16, 2010

TRANSCRIPT OF PROCEEDINGS

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<p style="text-align: right;">Page 1521</p> <p>1 MR. McDONELL: HIS DEPOSITION WAS AFTER HIS MAY 7</p> <p>2 SUPPLEMENTAL REPORT, YES.</p> <p>3 THE COURT: OKAY.</p> <p>4 ALL RIGHT. IS THERE A PARTICULAR REASON WHY -- I</p> <p>5 MEAN, YOU RECEIVED THESE.</p> <p>6 MR. PICKETT: WELL, LET ME -- IF I COULD GO BACK TO</p> <p>7 THE DEMONSTRATIVE --</p> <p>8 (SIMULTANEOUS COLLOQUY.)</p> <p>9 THE COURT: HOLD ON. COULD I ASK MY QUESTION --</p> <p>10 (SIMULTANEOUS COLLOQUY.)</p> <p>11 THE COURT: IF, INDEED, YOU RECEIVED THESE AFTER THE</p> <p>12 DISCOVERY CUTOFF DATE AND HAD THEM IN ORDER TO USE THEM FOR ANY</p> <p>13 EXAMINATION ON DEPOSITION OF MR. CLARKE, WHY WAS NO MOTION FILED</p> <p>14 WITH RESPECT TO THESE?</p> <p>15 MR. PICKETT: THERE WAS A MOTION, YOUR HONOR. IT WAS</p> <p>16 OUR MOTION IN LIMINE AND --</p> <p>17 THE COURT: WITH RESPECT TO THESE?</p> <p>18 MR. PICKETT: YES, IT WAS INCLUDED IN THE MOTION TO</p> <p>19 EXCLUDE PORTIONS OF MR. CLARKE'S TESTIMONY, WHICH YOU DENIED</p> <p>20 OUTRIGHT, WITHOUT DEALING WITH THE SEPARATE ISSUES.</p> <p>21 THE COURT: IT WAS IN THE DAUBERT MOTION?</p> <p>22 MR. PICKETT: YES.</p> <p>23 THE COURT: OH, OKAY. AS OPPOSED -- DID YOU SPEAK</p> <p>24 SPECIFICALLY TO EACH --</p> <p>25 MR. PICKETT: EACH ONE OF THE FIVE. IT WAS THE LAST</p>	<p style="text-align: right;">Page 1523</p> <p>1 THE COURT: OKAY.</p> <p>2 MR. PICKETT: TWO QUICK POINTS. WE COULD NOT TAKE</p> <p>3 THESE CUSTOMERS DEPOSITIONS WITH THESE NEWLY FOUND INFORMATION</p> <p>4 BECAUSE DISCOVERY HAD CLOSED. UNLIKE THEIR ABILITY TO TAKE THE</p> <p>5 ORACLE EXECUTIVES ON PROJECT SPICE, WE COULDN'T TAKE THE</p> <p>6 CUSTOMERS' DEPOSITIONS TO SEE WHETHER THESE DECLARATIONS WERE</p> <p>7 TRUSTWORTHY, WHAT THE BACKGROUND WAS, WHETHER THERE WAS ANYTHING</p> <p>8 TO THEM.</p> <p>9 AND, SECONDLY, WE'RE IN A SITUATION WHERE HE SAYS,</p> <p>10 WELL, WE'RE NOT GOING TO SPECIFICALLY CALL THEM OUT. OUR EXPERT</p> <p>11 DIDN'T HAVE TO CALL OUT THE PROJECT SPICE, COULD HAVE TESTIFIED</p> <p>12 THAT THE DAMAGES WERE \$2.156 BILLION WITHOUT CALLING THEM OUT,</p> <p>13 AND YOUR HONOR DIDN'T PERMIT IT.</p> <p>14 MR. McDONELL: AGAIN, THAT'S DIFFERENT, YOUR HONOR.</p> <p>15 ONE SMALL POINT, IF YOU WANT A COMPLETE HISTORY, THEY</p> <p>16 TOO GOT CUSTOMER DECLARATIONS, MOST OF WHICH WERE PROVIDED TO US</p> <p>17 WITHIN DAYS OR A COUPLE OF WEEKS BEFORE THE CLOSE OF FACT</p> <p>18 DISCOVERY. SO THERE'S REALLY NOT THAT MUCH DIFFERENCE IN TERMS</p> <p>19 OF OPPORTUNITIES TO TAKE DEPOSITIONS OF THESE PEOPLE.</p> <p>20 MR. PICKETT: "BEFORE" THE FACT DISCOVERY CUTOFF.</p> <p>21 THIS WAS MONTH, MONTHS AFTER.</p> <p>22 THE COURT: OKAY. ALL RIGHT.</p> <p>23 HE CAN REFER TO THEM. THEY WILL NOT COME IN AS</p> <p>24 EVIDENCE.</p> <p>25 MR. McDONELL: THANK YOU.</p>
<p style="text-align: right;">Page 1522</p> <p>1 TWO PAGES OF THAT MOTION. AND AS TO -- THESE DOCUMENTS WERE NOT</p> <p>2 PART OF THE EXPERT REPORT. THEY CAME IN -- THE FIRST FOUR CAME</p> <p>3 IN -- MR. MEYER'S DEPOSITION WAS MAY 10TH. SO ONE OF THEM CAME</p> <p>4 IN A MONTH BEFORE. THREE OF THEM CAME IN THE WEEK OF HIS</p> <p>5 DEPOSITION. THE AUGUST 4 CAME IN AFTER BOTH OF THEM.</p> <p>6 BUT FOR EXAMPLE, THE -- THE SPICE -- PROJECT SPICE</p> <p>7 REPORT THAT YOUR HONOR HAS NOT PERMITTED OUR EXPERT TO RELY ON</p> <p>8 WAS PRODUCED IN 2009. THERE WAS PLENTY OF DEPOSITION</p> <p>9 OPPORTUNITY FOR THAT EVEN WITH THE FACT WITNESSES, SO I DON'T</p> <p>10 UNDERSTAND HOW THE STREET ISN'T A TWO-WAY STREET HERE.</p> <p>11 MR. McDONELL: THAT'S APPLES AND ORANGES ENTIRELY,</p> <p>12 YOUR HONOR. THAT THING HE'S TALKING ABOUT WAS SUBJECT OF</p> <p>13 LITIGATION BEFORE JUDGE LAPORTE.</p> <p>14 YOUR HONOR, FOR WHAT IT'S WORTH, WE WERE NOT PLANNING</p> <p>15 TO OFFER THESE DECLARATIONS INTO EVIDENCE WITH MR. CLARKE. BUT</p> <p>16 MR. CLARKE WOULD, CONSISTENT WITH RULE 703, DESCRIBE GENERALLY</p> <p>17 ALONG WITH HIS DESCRIPTION OF THE BODY OF INFORMATION THAT HE</p> <p>18 HAD AVAILABLE TO HIM IN FORMING HIS OPINIONS, TESTIFY TO THE</p> <p>19 FACT THERE WERE SWORN STATEMENTS OF CUSTOMERS THAT HE RELIED</p> <p>20 UPON. AND THEN THEY'D BE FREE TO CROSS-EXAMINE HIM ABOUT THAT</p> <p>21 IF THEY'D LIKE TO.</p> <p>22 THE COURT: OKAY.</p> <p>23 MR. McDONELL: BUT THERE'S NO REASON THIS EVIDENCE</p> <p>24 SHOULD NOT BE AT LEAST PART OF WHAT HIS RELIANCE MATERIALS</p> <p>25 INCLUDE.</p>	<p style="text-align: right;">Page 1524</p> <p>1 THE COURT: THAT'S MY RULING.</p> <p>2 WHAT'S THE NEXT ISSUE?</p> <p>3 MR. PICKETT: THANK YOU, YOUR HONOR.</p> <p>4 MR. BOIES: GOOD MORNING, YOUR HONOR.</p> <p>5 THE COURT: GOOD MORNING.</p> <p>6 MR. BOIES: THE NEXT ISSUE RELATES TO MR. CLARKE'S</p> <p>7 TESTIMONY AND SLIDES THAT HE INTENDS TO USE. AS BACKGROUND --</p> <p>8 AND THE COURT, IN LIGHT OF THE TIME, MAY WANT TO TAKE THIS UP AS</p> <p>9 THE INDIVIDUAL SLIDES COME UP. BUT AS BACKGROUND, WE GOT SUNDAY</p> <p>10 NIGHT A NEW SET OF SLIDES FROM THE DEFENDANTS FOR MR. CLARKE.</p> <p>11 THEY INCLUDED NEW DAMAGE CALCULATIONS WITH DIFFERENT NUMBERS AND</p> <p>12 DIFFERENT CUSTOMERS IN AND OUT.</p> <p>13 WE MADE CERTAIN OBJECTIONS. THEY'VE NOW GIVEN US</p> <p>14 ADDITIONAL SETS OF SLIDES LAST NIGHT THAT THEY -- THAT ARE</p> <p>15 ALTERNATIVE SLIDES DEPENDING ON WHAT THE COURT RULES WITH</p> <p>16 RESPECT TO OUR OBJECTIONS TO THE SLIDES THEY GAVE US SUNDAY</p> <p>17 NIGHT.</p> <p>18 AND THERE ARE A VARIETY OF -- OF OBJECTIONS THAT WE</p> <p>19 HAVE. THEY -- THEY BASICALLY RELATE TO THINGS THAT WERE JUST</p> <p>20 SIMPLY DONE TOO LATE, CHANGES THAT OCCURRED OBVIOUSLY AFTER THE</p> <p>21 END OF DISCOVERY, INDEED AFTER THE TRIAL STARTED.</p> <p>22 THE COURT: ARE THE SLIDES NOT AN ACCURATE DEPICTION</p> <p>23 OF THE UNDERLYING EVIDENCE?</p> <p>24 MR. BOIES: WE DON'T THINK THEY ARE, YOUR HONOR.</p> <p>25 AND, INDEED, THERE ARE OTHER OBJECTIONS AS WELL.</p>

<p style="text-align: right;">Page 1529</p> <p>1 SO YOUR REQUEST IS DENIED.</p> <p>2 MR. HOWARD: THANK YOU, YOUR HONOR.</p> <p>3 THE COURT: OKAY. LET'S BRING THE JURY.</p> <p>4 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE</p> <p>5 OF THE JURY:)</p> <p>6 THE COURT: ALL RIGHT. GOOD MORNING, LADIES AND</p> <p>7 GENTLEMEN.</p> <p>8 COUNSEL, EVERYONE, BE SEATED.</p> <p>9 MR. MITTELSTAEDT, CALL YOUR NEXT WITNESS.</p> <p>10 MR. MITTELSTAEDT: YES, YOUR HONOR.</p> <p>11 GOOD MORNING.</p> <p>12 THE COURT: GOOD MORNING.</p> <p>13 MR. MITTELSTAEDT: THE DEFENDANTS CALL MR. STEPHEN</p> <p>14 CLARKE.</p> <p>15 (PAUSE IN THE PROCEEDINGS.)</p> <p>16 THE CLERK: PLEASE STEP UP HERE. RAISE YOUR RIGHT</p> <p>17 HAND.</p> <p>18 STEPHEN K. CLARKE,</p> <p>19 CALLED AS A WITNESS FOR THE DEFENDANTS, HAVING BEEN DULY SWORN,</p> <p>20 TESTIFIED AS FOLLOWS:</p> <p>21 THE CLERK: PLEASE STATE YOUR FULL NAME AND SPELL</p> <p>22 YOUR LAST NAME FOR THE RECORD AND SPEAK CLEARLY INTO THE</p> <p>23 MICROPHONE.</p> <p>24 THE WITNESS: MY NAME IS STEPHEN CLARKE, C-L-A-R-K-E.</p> <p>25</p>	<p style="text-align: right;">Page 1531</p> <p>1 Q. AND HOW LONG DID YOU SERVE IN THE AIR FORCE AFTER COLLEGE?</p> <p>2 A. AFTER COLLEGE, IT WAS ABOUT TWO MORE YEARS.</p> <p>3 Q. AND AFTER THE AIR FORCE, WHAT DID YOU DO?</p> <p>4 A. I BECAME -- I WENT FROM THE SUBLIME TO THE RIDICULOUS. I --</p> <p>5 I BECAME A CHARTERED ACCOUNTANT IN LONDON.</p> <p>6 Q. AND WOULD YOU DESCRIBE TO US THE PROCESS OF BECOMING A</p> <p>7 CHARTERED ACCOUNTANT, AND ACTUALLY TELL US WHAT THAT IS, TOO.</p> <p>8 A. YES. THE -- A CHARTERED ACCOUNTANT IS A LOT LIKE A C.P.A.</p> <p>9 IT'S A SOMEWHAT MORE INTERNATIONAL QUALIFICATION. AND IT'S VERY</p> <p>10 DIFFICULT TO BECOME ONE. AND IT'S A THREE-YEAR TRAINING WHERE</p> <p>11 YOU'RE -- WE CALLED IT ARTICLED, SO YOU'RE -- YOU HAVE A LEADER</p> <p>12 WHO IS RESPONSIBLE FOR TAKING YOU THROUGH YOUR CAREER AND</p> <p>13 TEACHING YOU HOW TO BE AN ACCOUNTANT.</p> <p>14 Q. AND DURING THAT PERIOD, WHAT KIND OF WORK WERE YOU DOING?</p> <p>15 A. MY MAIN ROLE WAS TO -- AT FIRST TO DO ACCOUNTING FOR SMALLER</p> <p>16 COMPANIES. I WOULD TRAVEL AROUND LONDON AND SHOW UP FOR A DAY</p> <p>17 OR TWO HOURS AND DO THEIR ACCOUNTING. AND AT THE SAME TIME, I</p> <p>18 WAS LEARNING TO DO AUDIT WORK. SO LATER, ONCE I FIGURED OUT THE</p> <p>19 ACCOUNTING, I STARTED TO DO AUDITING, TRAVELING AROUND FROM ONE</p> <p>20 COMPANY TO ANOTHER TO SEE WHETHER THE BOOKS WERE BEING PROPERLY</p> <p>21 KEPT.</p> <p>22 Q. OKAY. AND WHAT WAS YOUR NEXT JOB?</p> <p>23 A. AFTER -- AFTER I BECAME A CHARTED ACCOUNTANT AND FULLY</p> <p>24 QUALIFIED, I JOINED A SMALL AIRLINE IN -- JUST NORTH OF LONDON</p> <p>25 AT STANSTED AIRPORT AND, AND I WAS THEIR CONTROLLER -- IT'S WHAT</p>
<p style="text-align: right;">Page 1530</p> <p>1 DIRECT EXAMINATION</p> <p>2 BY MR. MITTELSTAEDT:</p> <p>3 Q. MR. CLARKE, GOOD MORNING. WHAT IS YOUR ROLE IN THIS CASE?</p> <p>4 A. IT WAS TO CALCULATE THE DAMAGES THAT ORACLE HAD SUFFERED AS</p> <p>5 A RESULT OF COPYRIGHT INFRINGEMENT AND ALSO TO LOOK AT</p> <p>6 MR. MEYER'S ANALYSIS OF THAT SAME ISSUE AND COMMENT ON IT AS I</p> <p>7 SAW FIT.</p> <p>8 Q. BEFORE WE GET INTO THAT, LET'S GET SOME BACKGROUND ON YOU.</p> <p>9 COULD YOU TELL THE JURY WHEN AND WHERE YOU WERE BORN?</p> <p>10 A. I WAS BORN IN A SMALL TOWN CALLED WIGAN NEAR MANCHESTER IN</p> <p>11 ENGLAND. THE -- DID YOU JUST SAY WHEN, TOO?</p> <p>12 Q. YES.</p> <p>13 A. 1950.</p> <p>14 Q. AND WOULD YOU TELL US ABOUT YOUR EDUCATION BRIEFLY, PLEASE.</p> <p>15 A. I STARTED HIGH SCHOOL IN THAT -- IN THAT LITTLE TOWN IN</p> <p>16 1961. WE START WHEN WE'RE 11 YEARS OLD IN ENGLAND IN HIGH</p> <p>17 SCHOOL. I GRADUATED FROM THERE IN '69 AND WENT TO MANCHESTER</p> <p>18 UNIVERSITY, AND AT THE SAME TIME I WAS AT MANCHESTER, I ALSO</p> <p>19 JOINED THE ROYAL AIR FORCE. SO STRAIGHT OUT OF HIGH SCHOOL, I</p> <p>20 JOINED THE ROYAL AIR FORCE, SO I WENT THE COLLEGE WHILE I WAS IN</p> <p>21 THE ROYAL AIR FORCE AS A PILOT.</p> <p>22 Q. AND AFTER COLLEGE, WHAT DID YOU DO?</p> <p>23 A. I THEN WENT TO THE EQUIVALENT OF THE U.S. AIR FORCE ACADEMY.</p> <p>24 IT'S CALLED THE ROYAL AIR FORCE COLLEGE CRANWELL LEARNED TO BE</p> <p>25 AN OFFICER IN THE ROYAL AIR FORCE.</p>	<p style="text-align: right;">Page 1532</p> <p>1 WE WOULD CALL THE CONTROLLER IN THE UNITED STATES.</p> <p>2 Q. YOUR NEXT JOB?</p> <p>3 A. MY NEXT JOB WAS WITH 20TH CENTURY FOX. I ALWAYS WANTED TO</p> <p>4 WORK IN A FOREIGN COUNTRY, SO I STARTED APPLYING TO FOREIGN</p> <p>5 COMPANIES AND GOT A JOB WITH 20TH CENTURY FOX. AND THEY MOVED</p> <p>6 ME TO THE UNITED STATES IN 1980.</p> <p>7 Q. WHAT KIND OF WORK WERE YOU DOING FOR 20TH CENTURY FOX?</p> <p>8 A. I DID PREDOMINANTLY AUDIT WORK AGAIN, BUT VERY MUCH OF AN</p> <p>9 INTERNATIONAL NATURE. I TRAVELED TO MANY COUNTRIES TO SEE</p> <p>10 WHETHER SOMEONE WAS STEALING FROM THE COMPANY, AND THEY USUALLY</p> <p>11 WERE.</p> <p>12 AND IN THE PROCESS OF DOING THAT WORK, I OFTEN HAD TO</p> <p>13 APPROVE ROYALTY PAYMENTS, SO I WAS WORKING WITH THE CONTRACTS</p> <p>14 AND THE LICENSE AGREEMENTS TO COMPUTE HOW MUCH THE DIRECTORS AND</p> <p>15 THE STARS SHOULD BE PAID FOR THEIR -- THEIR WORK ON THE -- ON</p> <p>16 THE SHOWS.</p> <p>17 Q. AND WHEN DID YOU GET INTO THE CONSULTING BUSINESS?</p> <p>18 A. THAT WAS 1984 OR SO. MAYBE '85.</p> <p>19 Q. OKAY. AND CAN YOU TELL US WHAT KIND OF CONSULTING YOU DID</p> <p>20 AT THE START?</p> <p>21 A. YES, WHEN I FIRST STARTED CONSULTING, I WAS PREDOMINANTLY</p> <p>22 HELPING COMPANIES IMPROVE THEIR OPERATIONS, JUST TRYING TO MAKE</p> <p>23 THEM RUN BETTER, MORE EFFICIENTLY, MAKE MORE PROFIT, AND</p> <p>24 ADVISING THEM, IN MANY CASES, ON THEIR SYSTEMS, THEIR ACCOUNTING</p> <p>25 SYSTEMS AND COMPUTER SYSTEMS.</p>

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<p>1 Q. AND WHAT KIND OF CONSULTING DID YOU DO AFTER THAT?</p> <p>2 A. MY CLIENTS KEPT GETTING BIGGER AND BIGGER AS TIME WENT BY,</p> <p>3 SO I CONTINUED WITH THAT INITIAL WORK FOR ABOUT FIVE YEARS. BUT</p> <p>4 THEN, I SAW SOME OF MY COLLEAGUES DOING THIS KIND OF WORK, AND I</p> <p>5 THOUGHT IT WAS A VERY ATTRACTIVE PROPOSITION, SO I STARTED TO</p> <p>6 MARKET MYSELF TO DO EXPERT WITNESS WORK IN ECONOMICS AND</p> <p>7 ACCOUNTING AND BUSINESS GENERALLY.</p> <p>8 Q. AND IN THE COURSE OF BEING A CONSULTANT OR OTHERWISE, HAVE</p> <p>9 YOU ACTUALLY RUN ANY BUSINESSES YOURSELF?</p> <p>10 A. I'VE RUN MANY BUSINESSES OVER THE YEARS, SOME IN THE CONTEXT</p> <p>11 OF A BANKRUPTCY OR A RECEIVERSHIP WHERE I STEP INTO THE PLACE OF</p> <p>12 MANAGEMENT. I ENDED UP RUNNING SOME OF THESE SMALLER COMPANIES</p> <p>13 FOR A TIME.</p> <p>14 I HAD CLIENTS THAT JUST WANTED ME TO HELP THEM RUN</p> <p>15 THEIR OPERATIONS, SO I DID QUITE A LOT OF THAT, AS WELL AS</p> <p>16 RUNNING MY OWN COMPANY EVENTUALLY.</p> <p>17 Q. AND CAN YOU -- CAN YOU GIVE US AN IDEA OF SOME OF THE KINDS</p> <p>18 OF BUSINESSES THAT YOU'VE OPERATED?</p> <p>19 A. YES. THE MOST FUN I EVER HAD WAS RUNNING A PROFESSIONAL</p> <p>20 SPORTS FRANCHISE AND BEING INTERVIEWED ON A T.V. EVERY NIGHT.</p> <p>21 THAT WAS GREAT FUN.</p> <p>22 THERE WAS A VIDEO VENDING MACHINE COMPANY THAT I RAN.</p> <p>23 THESE DAYS YOU'D CALL IT RED BOX, BUT THESE MACHINES WERE MUCH</p> <p>24 BIGGER BECAUSE WE ONLY HAD VIDEOTAPES BACK THEN, SO THEY DIDN'T</p> <p>25 HOLD AS MANY -- AS MANY MOVIES.</p>	<p>1 Q. CAN YOU -- MANY TIMES?</p> <p>2 AND DO YOU HAVE ANY EXPERIENCE IN NEGOTIATING</p> <p>3 LICENSES?</p> <p>4 A. I DO.</p> <p>5 MR. BOIES: YOUR HONOR, WE OFFER MR. CLARKE AS AN</p> <p>6 EXPERT WITNESS.</p> <p>7 THE COURT: ALL RIGHT. DO YOU WISH TO -- WHO'S GOING</p> <p>8 TO BE EXAMINING? MR. BOIES?</p> <p>9 MR. BOIES: IS THERE A PARTICULAR AREA OF EXPERTISE?</p> <p>10 THERE ARE CERTAIN THINGS WE WOULD NOT OBJECT TO, BUT THERE WOULD</p> <p>11 BE CERTAIN --</p> <p>12 THE COURT: MR. MITTELSTAEDT, YOU'RE OFFERING HIM FOR</p> <p>13 EXPERT IN WHAT PARTICULAR AREA?</p> <p>14 MR. MITTELSTAEDT: DAMAGE CALCULATIONS ON THE</p> <p>15 HYPOTHETICAL NEGOTIATION AND ON CALCULATING LOST PROFITS AND</p> <p>16 INFRINGER'S PROFITS.</p> <p>17 MR. BOIES: ALL RIGHT. NO OBJECTION ON THAT BASIS.</p> <p>18 THE COURT: ALL RIGHT. DO YOU WISH TO VOIR DIRE?</p> <p>19 MR. BOIES: NOT AT THIS TIME.</p> <p>20 THE COURT: ALL RIGHT. HE WILL BE ACCEPTED AS AN</p> <p>21 EXPERT.</p> <p>22 BY MR. MITTELSTAEDT:</p> <p>23 Q. OKAY. LET'S TURN TO THIS CASE NOW. WOULD YOU DESCRIBE IN</p> <p>24 GENERAL WHAT WORK YOU DID ON THIS CASE.</p> <p>25 A. YES. THE FIRST THING I DID WAS TO START GATHERING</p>
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<p>1 IS THAT ENOUGH EXAMPLES?</p> <p>2 Q. YES. IN THE COURSE OF YOUR WORK, HAVE YOU ANALYZED ANY</p> <p>3 BUSINESSES -- THE VALUE -- HAVE YOU VALUED BUSINESSES,</p> <p>4 TRANSACTIONS, AND LICENSES?</p> <p>5 A. I HAVE.</p> <p>6 Q. AND CAN YOU GIVE US -- TELL US THE SCOPE OF WHAT YOU'VE</p> <p>7 DONE?</p> <p>8 A. YES. I'VE FIRST VALUED A BUSINESS IN, I THINK, 1969. IT</p> <p>9 WAS ONE OF THE THINGS ONE OF MY PROFESSORS WAS DOING ON THE</p> <p>10 SIDE. SO YOU KNOW MOST PROFESSORS WORK OUTSIDE THEIR</p> <p>11 PROFESSORSHIP. AND HE HAD A BUSINESS OF -- OF VALUING</p> <p>12 BUSINESSES AND IMPROVING THEM, WHICH IS WHAT GOT ME -- GOT ME</p> <p>13 STARTED ON THIS BUSINESS IMPROVEMENT APPROACH TO MY WORK.</p> <p>14 AND SO I FIRST DID A VALUATION IN '69, HELPED HIM TO</p> <p>15 DO IT. OF COURSE HE HAD TO SIGN IT. AND SINCE THEN, I'VE</p> <p>16 PROBABLY DONE -- PROBABLY BETWEEN A THOUSAND AND 1500</p> <p>17 VALUATIONS. I'VE NEVER COUNTED THEM, BUT IT WOULD BE WAY UP</p> <p>18 THERE.</p> <p>19 SO SOME OF THEM WERE RUN -- COMPANIES THAT WERE</p> <p>20 RUNNING. SOME OF THEM WERE COMPANIES THAT WERE SORT OF ALMOST</p> <p>21 DEAD, IF YOU LIKE. AND SOME OF THEM HAVE BEEN ASSETS, SUCH AS</p> <p>22 THE ASSETS THAT WE'RE TALKING ABOUT IN -- IN THIS PARTICULAR</p> <p>23 CASE.</p> <p>24 Q. HAVE YOU HAD EXPERIENCE VALUING INTELLECTUAL PROPERTY?</p> <p>25 A. YES. MANY TIMES.</p>	<p>1 DOCUMENTS. THE WORK IS BASED ALMOST ENTIRELY ON DOCUMENTS. AND</p> <p>2 IN THIS CASE, THERE WAS A MOUNTAIN OF -- OF DOCUMENTS THAT WE</p> <p>3 GATHERED, 12 AND A HALF MILLION PAGES OF DOCUMENTS, IS WHAT WE</p> <p>4 GOT, WHICH IS A PILE ABOUT A MILE AND A HALF HIGH IF YOU JUST</p> <p>5 STACK IT UP. AND WE STARTED TO ANALYZE THAT INFORMATION.</p> <p>6 LATER ON, WE GATHERED MORE INFORMATION FROM THE</p> <p>7 COMPANIES ABOUT THEIR OPERATIONS, THEIR FINANCIAL CONDITION, THE</p> <p>8 AMOUNT OF PROFIT THAT THEY MAKE. AND ALSO DURING THAT LATER</p> <p>9 TIME, DEPOSITIONS WERE BEING TAKEN WHERE SOMEBODY WOULD TELL</p> <p>10 EITHER WHAT THEY KNEW AND WHAT THEY'D SAID AND DONE, OR THEY</p> <p>11 WERE TESTIFYING ON BEHALF OF THE COMPANY AND SAYING THIS IS WHAT</p> <p>12 THE COMPANY DID. SO I READ THOSE. AND THERE WERE MANY OF</p> <p>13 THOSE, TOO.</p> <p>14 AND THEN THERE WERE CUSTOMERS' DECLARATIONS, SOME OF</p> <p>15 WHICH TALKED ABOUT HOW THEY MADE THE DECISION TO GO TO</p> <p>16 TOMORROWNOW OR MAKE SOME OTHER DECISION.</p> <p>17 IN ADDITION, I SHOULD POINT OUT THAT VIRTUALLY ALL OF</p> <p>18 THE INFORMATION I WAS LOOKING AT WAS REALLY FOCUSED ON THE 358</p> <p>19 TOMORROWNOW CUSTOMERS AND THE 86 SAP CUSTOMERS.</p> <p>20 Q. NOW, MR. CLARKE, WHY WERE YOU FOCUSING ON THE CUSTOMERS?</p> <p>21 A. THIS CASE IS ALL ABOUT CUSTOMERS.</p> <p>22 Q. WHEN YOU REFERRED TO THE 12 AND A HALF MILLION PAGES, DID</p> <p>23 YOU HAVE ANYONE HELP YOU REVIEW THAT INFORMATION?</p> <p>24 A. I DID.</p> <p>25 Q. AND HOW MANY STAFF MEMBERS DID YOU HAVE WORKING ON THIS FROM</p>

<p style="text-align: right;">Page 1537</p> <p>1 TIME TO TIME?</p> <p>2 A. AT ANY ONE TIME, THERE MIGHT HAVE BEEN 50 PEOPLE WORKING ON</p> <p>3 THIS ENGAGEMENT. OVERALL, JUST BEFORE MY DEPOSITION, WHICH WAS</p> <p>4 IN JUNE, I COUNTED THEM UP. AND THERE WERE 121 DIFFERENT PEOPLE</p> <p>5 WHO WORKED ON THE ENGAGEMENT. YOU CAN IMAGINE WITH THAT VOLUME</p> <p>6 OF INFORMATION TO LOOK AT, IT'S JUST VERY TIME-CONSUMING, SO WE</p> <p>7 HAD A LARGE TEAM OF PEOPLE.</p> <p>8 Q. OKAY. WANT TO TALK A LITTLE BIT MORE ABOUT WHY YOU WERE</p> <p>9 FOCUSING ON THE CUSTOMER INFORMATION. YOU MENTIONED 358</p> <p>10 TOMORROWNOW CUSTOMERS AND 86 SAP CUSTOMERS.</p> <p>11 WHY DIDN'T YOU JUST CALCULATE THAT THE DEFENDANTS</p> <p>12 OWED COMPENSATION TO ORACLE FOR ALL OF THOSE CUSTOMERS?</p> <p>13 A. BECAUSE WE SHOULD ONLY CALCULATE THE DAMAGES THAT AROSE AS A</p> <p>14 RESULT OF WHAT'S BEING ALLEGED IN THE CASE. NOW, IT'S NOT AN</p> <p>15 ALLEGATION ANY LONGER. IT'S AN ADMISSION, THAT THE COPYRIGHTS</p> <p>16 WERE INFRINGED.</p> <p>17 SO IT'S WHAT HAPPENED AS A RESULT OF THAT</p> <p>18 INFRINGEMENT THAT'S WHAT MATTERS. AND THE ONLY WAY TO DO THAT</p> <p>19 IS TO LOOK AT ONE CUSTOMER AT A TIME. YOU HAVE TO TRY AND</p> <p>20 DETERMINE WHY THEY DID WHAT THEY DID. IF THEY -- IF THEY WENT</p> <p>21 TO TOMORROWNOW OR WENT TO SAP FOR REASONS COMPLETELY UNRELATED</p> <p>22 TO THE INFRINGEMENT, THEN THERE WOULD BE NO DAMAGES, AND EACH</p> <p>23 CUSTOMER IS UNIQUE.</p> <p>24 SO THE ONLY WAY TO DO THAT IS TO GATHER THE</p> <p>25 INFORMATION ONE CUSTOMER AT A TIME AND TRY TO UNDERSTAND THAT</p>	<p style="text-align: right;">Page 1539</p> <p>1 YOU HEARD AT LENGTH FROM MR. MEYER ON THIS ISSUE. I'M GOING TO</p> <p>2 DEAL WITH IT, TOO. WE COME TO COMPLETELY DIFFERENT NUMBERS, AS</p> <p>3 YOU CAN SEE. BUT THIS IS AN ALTERNATIVE. SO YOU GET ONE AND</p> <p>4 TWO, OR THREE.</p> <p>5 Q. OKAY. NOW, THE LOST-SUPPORT PROFITS NUMBER OF 19 MILLION,</p> <p>6 THAT'S LOWER THAN THE 32 MILLION I TOLD THE JURY IN THE OPENING</p> <p>7 STATEMENT. CAN YOU EXPLAIN TO US WHY THAT NUMBER HAS NOW</p> <p>8 DROPPED TO 19 FROM 32?</p> <p>9 A. YES. THE -- THE PLAINTIFFS IN THE 32 MILLION WERE TWO</p> <p>10 COMPANIES, OIC THAT I KNOW YOU'VE HEARD ABOUT, AND OUSA, WHICH</p> <p>11 IS ORACLE -- ORACLE U.S.A. VERY LATE IN THE CASE, THE ORACLE</p> <p>12 U.S.A. -- THE OUSA PLAINTIFF WAS REMOVED FROM THE CASE, SO THE</p> <p>13 DAMAGES THAT RELATED TO OUSA HAD TO COME OUT OF CALCULATION.</p> <p>14 SO THE DIFFERENCE IS -- ALMOST EXACTLY THE DIFFERENCE</p> <p>15 BETWEEN THE 32 MILLION AND THIS NUMBER IS BECAUSE OF THAT OUSA</p> <p>16 REMOVAL FROM THE CASE.</p> <p>17 Q. OKAY. AND DID MR. MEYER ALSO LOWER HIS NUMBER FOR THE SAME</p> <p>18 REASON AS YOU UNDERSTAND IT?</p> <p>19 A. HE DID.</p> <p>20 Q. THE INFRINGER'S PROFITS, THAT'S SAP'S PROFITS ON SOFTWARE</p> <p>21 SOLD AS A RESULT OF TOMORROWNOW'S INFRINGEMENT. HOW MANY</p> <p>22 CUSTOMERS IS REFLECTED IN THE 8 MILLION?</p> <p>23 A. I'D JUST LIKE TO CORRECT THAT A LITTLE BIT. THE INFRINGER'S</p> <p>24 PROFITS IS BOTH TOMORROWNOW AND SAP.</p> <p>25 SO NOW GOING TO THE SECOND PART OF YOUR QUESTION,</p>
<p style="text-align: right;">Page 1538</p> <p>1 INFORMATION TO LET US KNOW WHY THEY DID WHAT THEY DID. SO IT'S</p> <p>2 A BEHAVIORAL ISSUE, WHY DID THEY DO WHAT THEY DID.</p> <p>3 Q. OKAY. WHAT CONCLUSIONS DID YOU REACH AS TO THE AMOUNT OF</p> <p>4 COMPENSATION THAT TOMORROWNOW AND SAP OWE TO ORACLE?</p> <p>5 AND, YOUR HONOR, WE HAVE A SLIDE ON THIS, AND THIS</p> <p>6 WOULD BE THE FIRST SLIDE.</p> <p>7 (DEMONSTRATIVE PUBLISHED TO JURY.)</p> <p>8 BY MR. MITTELSTAEDT:</p> <p>9 Q. IF YOU WOULD JUST EXPLAIN TO US, MR. CLARKE, WHAT THIS SLIDE</p> <p>10 IS AND WHAT IT MEANS.</p> <p>11 A. YES. THIS SLIDE SHOWS THAT THERE ARE REALLY THREE AREAS</p> <p>12 THAT WE CALCULATE THESE DAMAGES IN. AND TWO OF THEM GO TOGETHER</p> <p>13 AND ARE AN ALTERNATIVE TO THE THIRD WAY OF DOING IT, AND YOU'RE</p> <p>14 PROBABLY FAMILIAR WITH ALL OF THESE TERMS BY NOW.</p> <p>15 THE LOST SUPPORT PROFITS, THAT WILL BE THE PROFITS</p> <p>16 THAT ORACLE WOULD HAVE MADE IF THE CUSTOMERS AT ISSUE HAD NOT</p> <p>17 LEFT ORACLE. SO WE LOOK AT THE ONES THAT LEFT AS A RESULT OF</p> <p>18 THE INFRINGEMENT, CALCULATE THE PROFITS ORACLE WOULD HAVE MADE</p> <p>19 ON THOSE, AND THAT'S THIS \$19.3 MILLION NUMBER AT THE TOP.</p> <p>20 THE INFRINGER'S PROFITS IS THE PROFITS THAT SAP AND</p> <p>21 TOMORROWNOW MADE THAT THEY WOULDN'T HAVE MADE ABSENT THE</p> <p>22 INFRINGEMENT. AND THAT'S WHAT WE CALL THE INFRINGER'S PROFITS.</p> <p>23 THAT'S THE EIGHT-POINT -- ALMOST \$8.7 MILLION ON HERE.</p> <p>24 SO YOU GET TO AWARD EITHER THOSE TWO. OR ANOTHER WAY</p> <p>25 TO DO IT IS TO LOOK AT THIS REASONABLE ROYALTY CALCULATION. AND</p>	<p style="text-align: right;">Page 1540</p> <p>1 WHICH WAS THE -- THE SAP COMPONENT OF THAT IS BASED UPON FOUR</p> <p>2 CUSTOMERS, SO NOT 86, JUST FOUR.</p> <p>3 Q. OKAY. AGAIN, IN THE OPENING STATEMENT I THINK I SAID "TWO</p> <p>4 CUSTOMERS." WHY THE DIFFERENCE?</p> <p>5 A. WE WORK SO HARD TO DO THIS ANALYSIS, BUT IN THE -- THE</p> <p>6 RUN-UP TO THE TRIAL, YOU CAN IMAGINE THAT THE INTENSITY OF WORK</p> <p>7 GETS EVEN GREATER. AND I'VE BEEN OVER ALL OF THESE CUSTOMERS</p> <p>8 AGAIN TO SEE WHETHER I FELT GOOD ABOUT BRINGING WHAT I HAD</p> <p>9 LEARNED TO YOU.</p> <p>10 AND IN DOING THAT, I FOUND TWO CUSTOMERS THAT I</p> <p>11 DIDN'T THINK REALLY SHOULD BE EXCLUDED FROM THE DAMAGES. SO</p> <p>12 WHEN MR. MITTELSTAEDT SAID, IT'S "TWO CUSTOMERS," BACK THEN, IT</p> <p>13 STILL WAS TWO CUSTOMERS. BUT SINCE THEN, I'VE -- I'VE PUT THESE</p> <p>14 TWO OTHERS IN. SO IT'S NOW FOUR CUSTOMERS THAT WE ARE</p> <p>15 CALCULATING THE DAMAGES ON.</p> <p>16 Q. AND THAT INCREASED THE AMOUNT OF COMPENSATION OWED TO</p> <p>17 ORACLE?</p> <p>18 A. IT DOES.</p> <p>19 Q. NOW, WE'RE GOING TO GET INTO THIS IN MORE DETAIL, BUT IN A</p> <p>20 NUTSHELL, CAN YOU TELL US HOW YOU THINK MR. MEYER WENT WRONG IN</p> <p>21 THE HYPOTHETICAL NEGOTIATION REASONABLE ROYALTY CALCULATION THAT</p> <p>22 HE DID?</p> <p>23 A. WELL, I BELIEVE HE WENT WRONG IN MANY AREAS. BUT THE --</p> <p>24 THEY FALL INTO MAJOR CATEGORIES. THE FIRST IS THAT I THINK THE</p> <p>25 DOCUMENTS HE RELIED UPON TO CALCULATE HIS NUMBER DON'T SAY WHAT</p>

<p style="text-align: right;">Page 1549</p> <p>1 HAPPENED IN THAT DOCUMENT. THAT'S JUST AN ASSUMPTION. WELL,</p> <p>2 LET'S PUT 3,000 HERE. LET'S -- 2,000. 8,000.</p> <p>3 IT'S JUST AN ASSUMPTION THAT IF WE PUT THIS NUMBER</p> <p>4 HERE, THIS IS WHAT WILL HAPPEN TO THE REVENUES. GREAT. THAT</p> <p>5 MEANS NOTHING.</p> <p>6 Q. OKAY. WHAT ASSUMPTIONS DID MR. MEYER MAKE ABOUT THE</p> <p>7 COMPARISON BETWEEN BUYING A COMPANY LIKE PEOPLESOFT AND</p> <p>8 LICENSING SOME OF ITS SOFTWARE?</p> <p>9 A. AT THE END OF THE DAY, MR. MEYER DIDN'T REALLY DO VERY MUCH</p> <p>10 WITH THAT. THROUGHOUT THE TESTIMONY -- AND I'M SURE YOU WERE</p> <p>11 SICK OF HEARING IT -- HE MENTIONED THE ACQUISITION OF PEOPLESOFT</p> <p>12 FOR \$11 BILLION. AND I THINK THE REASON HE WAS DOING THAT WAS</p> <p>13 TO TRY AND EXTRACT FROM THAT \$11 BILLION SOME RATIO THAT RELATED</p> <p>14 TO THE 3,000 CUSTOMERS THAT WE WERE JUST TALKING ABOUT.</p> <p>15 PEOPLESOFT HAD ABOUT 10,000 CUSTOMERS, SO 3,000 WILL</p> <p>16 BE 30 PERCENT, AND 30 PERCENT OF 11 BILLION IS A VERY ATTRACTIVE</p> <p>17 NUMBER. BUT THE ACQUISITION OF A COMPANY HAS NO RELEVANCE TO</p> <p>18 WHAT WE'RE TALKING ABOUT HERE, WHICH IS THE VALUE OF THE -- THE</p> <p>19 USE THAT TOMORROWNOW MADE OF A PIECE OF THE INTELLECTUAL</p> <p>20 PROPERTY THAT WAS ACQUIRED IN THE -- IN THE PEOPLESOFT</p> <p>21 TRANSACTION.</p> <p>22 AND ALL OF THE INTELLECTUAL PROPERTY IN THE</p> <p>23 PEOPLESOFT TRANSACTION WAS A LOT LESS THAN \$11 BILLION. THERE</p> <p>24 WERE A LOT OF OTHER THINGS IN THIS \$11 BILLION. SO THE</p> <p>25 11 BILLION IS JUST -- IT'S LIKE -- IT'S LIKE A MAGICIAN, IF YOU</p>	<p style="text-align: right;">Page 1551</p> <p>1 YOUR VIEWS ON HIS WORK.</p> <p>2 THE WITNESS: THANK YOU.</p> <p>3 MR. MITTELSTAEDT: PLEASE PROCEED.</p> <p>4 THE WITNESS: I'M SORRY. I'VE FORGOTTEN THE</p> <p>5 QUESTION.</p> <p>6 BY MR. MITTELSTAEDT:</p> <p>7 Q. IN THE WAY THAT MR. MEYER DID HIS CONTEMPLATION, WHAT</p> <p>8 ASSUMPTION IS THERE ABOUT WHY CUSTOMERS WOULD GO FROM PEOPLESOFT</p> <p>9 TO SAP?</p> <p>10 A. THE ENTIRE BASIS OF THAT ANALYSIS IS THAT ALL OF THE</p> <p>11 CUSTOMERS THAT MR. MEYER IDENTIFIED WENT TO TOMORROWNOW OR SAP</p> <p>12 AS A RESULT OF THE INFRINGEMENT. AND HE DID NOT LOOK AT THE</p> <p>13 BEHAVIOR OF THE CUSTOMERS AT ALL. I DID THAT ANALYSIS. IT WAS</p> <p>14 VERY TIME-CONSUMING. IT WAS VERY EXPENSIVE FOR MY CLIENT. AND</p> <p>15 HE DIDN'T DO THAT ANALYSIS. WHAT HE KNOWS ABOUT THE CUSTOMERS'</p> <p>16 BEHAVIOR, HE LEARNED FROM ME.</p> <p>17 NOW, HIS CHART WITH THE ZIEMEN DOCUMENT AND THE 3,000</p> <p>18 HAS SOME OTHER NUMBERS, GOALS, TARGETS AND SO FORTH THAT HE</p> <p>19 CALLS EXPECTATIONS, BUT THAT CHART DID NOT HAVE THE LOWER</p> <p>20 NUMBERS IN THE SAP DOCUMENTS, THE 5 PERCENT NICHE OR HIGHER IN</p> <p>21 THE ZEPECKI DOCUMENT OR THE 370 OR SO CUSTOMERS FROM THE</p> <p>22 BUSINESS CASE.</p> <p>23 Q. WHAT -- WHAT'S THE SIGNIFICANCE OF THAT TO YOUR OPINION?</p> <p>24 A. THE -- THERE'S A CONCEPT IN ACCOUNTING CALLED A FORECAST.</p> <p>25 AND I DON'T WANT TO GET INTO TOO MUCH TECHNICAL ACCOUNTING, BUT</p>
<p style="text-align: right;">Page 1550</p> <p>1 LIKE, SAYING, LOOK AT THE 11 BILLION, TAKE 30 PERCENT OR</p> <p>2 20 PERCENT OF IT. BUT THAT IS NOT WHERE YOU SHOULD BE LOOKING.</p> <p>3</p> <p>4 YOU SHOULD BE LOOKING AT THE -- AT NOT A SHARE OF THE</p> <p>5 COMPANY, LOOKING AT THE VALUE OF WHAT WAS ACTUALLY INFRINGED AND</p> <p>6 THE WAY TOMORROWNOW USED IT.</p> <p>7 Q. OKAY.</p> <p>8 AND WHAT ASSUMPTIONS WAS MR. MEYER MAKING ABOUT THE</p> <p>9 REASONS THAT CUSTOMERS WOULD SWITCH FROM PEOPLESOFT TO SAP?</p> <p>10 MR. BOIES: YOUR HONOR, I'M GOING TO OBJECT TO HIS</p> <p>11 CHARACTERIZATIONS OF WHAT MR. MEYER'S TESTIFIED TO. I DON'T</p> <p>12 HAVE AN OBJECTION TO HIM TESTIFYING TO WHAT HE BELIEVES, BUT HE</p> <p>13 IS TESTIFYING AS TO WHAT WAS MR. MEYER'S MIND.</p> <p>14 THE COURT: WELL, HE'S REVIEWED MR. MEYER'S REPORT,</p> <p>15 SO TO THE EXTENT HE'S REVIEWED HIS REPORT AND LISTENED TO HIS</p> <p>16 TESTIMONY, HE CAN CERTAINLY INTERPRET IT IN HIS WAY. YOU'RE</p> <p>17 RIGHT, HE CAN'T SPECULATE AS TO WHAT WAS MR. MEYER'S MIND, BUT</p> <p>18 HE CAN CERTAINLY INTERPRET WHAT HE'S REVIEWED.</p> <p>19 MR. BOIES: AND AS LONG AS HE SAYS THIS IS WHAT</p> <p>20 MR. MEYER'S SAID, I DON'T HAVE AN OBJECTION TO IT. WHAT I WOULD</p> <p>21 ASK IS THAT HE REFER TO WHAT MR. MEYER'S ACTUALLY SAID, NOT HIS</p> <p>22 STATEMENT OR SUMMARY OF WHAT HE SAID.</p> <p>23 THE COURT: I THINK IT'S CLEAR THAT, MR. CLARKE,</p> <p>24 YOU'RE NOT TO SPECULATE AS TO WHAT MR. MEYER'S THOUGHT OR</p> <p>25 BELIEVED. BUT YOU CAN CERTAINLY REVIEW HIS WORK AND GIVE US</p>	<p style="text-align: right;">Page 1552</p> <p>1 A FORECAST IS THE BEST THE ACCOUNTANTS CAN DO. SO THEY -- THEY</p> <p>2 DO A LOT OF ANALYSIS. THEY -- THEY TALK TO THE PEOPLE WHO ARE</p> <p>3 GOING TO DO THE WORK. THEY GET THEIR INPUT TO WHAT THESE</p> <p>4 NUMBERS SHOULD BE. SO THE FORECAST IS THE BEST NUMBER THEY CAN</p> <p>5 COME UP WITH.</p> <p>6 THERE'S ONLY ONE DOCUMENT IN THIS WHOLE THING THAT</p> <p>7 YOU SAW -- AND I THINK IT WAS MR. MEYER'S SLIDE 21. THERE'S</p> <p>8 ONLY ONE DOCUMENT THAT WASN'T ON THERE THAT IS CALLED A</p> <p>9 FORECAST, AND THAT'S THE BUSINESS CASE. AND THAT BUSINESS CASE</p> <p>10 HAD -- I DON'T RECALL EXACTLY -- BUT SOMETHING LIKE 300 AND --</p> <p>11 310 IS MY RECOLLECTION, 306, TOTAL CUSTOMERS ON IT.</p> <p>12 AND THERE WAS THAT -- MR. ZEPECKI'S 5 PERCENT NUMBER,</p> <p>13 AND I'M NOT QUITE CLEAR WITHOUT LOOKING AT THE DOCUMENT WHAT THE</p> <p>14 5 PERCENT EXACTLY RELATED TO. BUT 5 PERCENT IS A WHOLE LOT LESS</p> <p>15 THAN 20 OR 30 PERCENT, WHICH IS WHAT MR. MEYER USED.</p> <p>16 SO THESE TWO DOCUMENTS, I THINK, SHOULD AT LEAST HAVE</p> <p>17 BEEN CONSIDERED. HE DIDN'T TALK ABOUT THEM IN HIS REPORT. HE</p> <p>18 DIDN'T DEAL WITH THEM IN ANY WAY. AND IT WOULD BE TOTALLY</p> <p>19 INAPPROPRIATE TO IGNORE THEM EVEN IF ULTIMATELY YOU DECIDE</p> <p>20 YOU'RE NOT GOING TO USE THEM. I THINK IT'S -- YOU STILL HAVE TO</p> <p>21 DEAL WITH THEM.</p> <p>22 AND IT'S VERY IMPORTANT TO LOOK AT THE ONE THING</p> <p>23 WHERE PEOPLE SAID, "THIS IS A FORECAST AND," AND THE FORECAST</p> <p>24 WAS OF A VERY LOW NUMBER, IN THE 3 -- 300 TO 350 CUSTOMERS.</p> <p>25 Q. YOU'RE REFERRING TO THE BUSINESS CASE.</p>

<p style="text-align: right;">Page 1569</p> <p>1 SELL ONE PRODUCT AND BECAUSE YOU'VE SOLD THAT, YOU SELL ANOTHER</p> <p>2 PRODUCT. AND SELLING A PIECE OF SOFTWARE, SUCH AS AT ISSUE IN</p> <p>3 THIS CASE, HAS A RELATED SALE TO IT. IF YOU SELL THE SOFTWARE,</p> <p>4 YOU USUALLY GET THE SUPPORT AND MAINTENANCE AGREEMENT TO GO</p> <p>5 ALONG WITH IT, SO THE MAINTENANCE AGREEMENT IS -- IS A RELATED</p> <p>6 SALE.</p> <p>7 Q. NOW, AS YOU LOOKED AT THIS AND ANALYZED IT, WERE THERE ANY</p> <p>8 INDIRECT BENEFITS TO SAP FROM THIS LICENSE?</p> <p>9 A. THERE WERE SOME BENEFITS, AT LEAST THEY THOUGHT THERE WERE</p> <p>10 GOING TO BE SOME. I'M NOT SURE THERE WERE ACTUALLY ANY AS A</p> <p>11 MATTER OF FACT. BUT THEY THOUGHT THERE WERE GOING TO BE</p> <p>12 BENEFITS BECAUSE TOMORROWNOW WOULD ALLOW THESE COMPANIES TO</p> <p>13 ESTABLISH A RELATIONSHIP WITH AN SAP OPERATION, AND THEN THEY</p> <p>14 WOULD BE ABLE, THEY THOUGHT, TO GO IN AND STRENGTHEN THAT</p> <p>15 RELATIONSHIP AND SUBSEQUENTLY SELL THEM SOME SOFTWARE AND MAYBE</p> <p>16 GET THEM TO SWITCH FROM ORACLE TO SAP.</p> <p>17 Q. AND IF IT WORKED OUT LIKE THAT FOR ANY PARTICULAR CUSTOMER,</p> <p>18 HOW DOES YOUR RUNNING ROYALTY ACCOUNT FOR THAT?</p> <p>19 A. WE -- WE CALCULATE THE RUNNING ROYALTY BASED UPON THE</p> <p>20 CUSTOMERS THAT -- THAT MIGRATED THEIR SYSTEMS TO SAP AS A RESULT</p> <p>21 OF OR ATTRIBUTABLE TO THE -- THE COPYRIGHT INFRINGEMENT. I</p> <p>22 CALCULATE THE ROYALTY ON THOSE.</p> <p>23 Q. SO PUTTING ALL THOSE --</p> <p>24 ACTUALLY, LET ME ASK YOU ABOUT ONE MORE. LET'S GO TO</p> <p>25 NO. 9, THE BENEFIT OF THE SUBJECT IP AND ALTERNATIVES.</p>	<p style="text-align: right;">Page 1571</p> <p>1 BY MR. MITTELSTAEDT:</p> <p>2 Q. NOW, COULD YOU JUST WALK US THROUGH IT, PLEASE. AND I</p> <p>3 SHOULD SAY THE -- THE PORTION THAT IS DIFFICULT TO SEE IS</p> <p>4 JD EDWARDS. WE'VE PERHAPS SHOULD HAVE PICKED A DIFFERENT COLOR.</p> <p>5 A. YES, WE SHOULD HAVE. WE TRIED ABOUT TEN DIFFERENT COLORS,</p> <p>6 BUT THESE ARE PROBABLY THE WORST.</p> <p>7 THE GREEN BITS, THE GREENY, KHAKI-COLORED STUFF IS</p> <p>8 JD EDWARDS; THE PURPLE IS PEOPLESFT. AND WHAT THIS IS TRYING</p> <p>9 TO SHOW IS A TIME LINE OF THE COMPANIES THAT WERE OFFERING</p> <p>10 THIRD-PARTY SUPPORT IN ANY PARTICULAR YEAR.</p> <p>11 SO IF YOU LOOK ON THE LEFT-HAND SIDE OF ANY OF THOSE</p> <p>12 ROWS, THAT IS WHEN THAT CUSTOMER -- OH, BEG YOUR PARDON -- THAT</p> <p>13 VENDOR CAME INTO THE MARKETPLACE. AND SO WE HAVE THE</p> <p>14 TOMORROWNOW TRANSACTION THERE AT THE BEGINNING OF '05. SO YOU</p> <p>15 CAN SEE AT THE BEGINNING OF '05, THERE REALLY WEREN'T THAT MANY</p> <p>16 ALTERNATIVES IN THIRD-PARTY VENDORS.</p> <p>17 Q. THANK YOU.</p> <p>18 A. RIGHT HERE (INDICATING). THERE WERE NOT VERY MANY</p> <p>19 ALTERNATIVES IN THE THIRD-PARTY MARKET, BUT OVER TIME, MANY</p> <p>20 OTHER COMPANIES JOINED IN. AND THEY OFFERED SERVICE FOR</p> <p>21 JD EDWARDS -- THAT'S WHAT THESE GREEN ONES ARE HERE.</p> <p>22 AND THE REASON KLEE STOPS RIGHT THERE IS THEY WENT</p> <p>23 OUT OF BUSINESS AT THAT POINT.</p> <p>24 THE OTHERS ARE ALL STILL IN BUSINESS.</p> <p>25 BUT THE IMPORTANT THING IS THIS PIECE DOWN HERE, AND</p>
<p style="text-align: right;">Page 1570</p> <p>1 DID YOU EVALUATE THAT?</p> <p>2 A. I DID.</p> <p>3 Q. AND WE HAVE A SLIDE ON THAT, WHICH IS SLIDE 4, PLEASE.</p> <p>4 (DEMONSTRATIVE PUBLISHED TO THE JURY.)</p> <p>5 BY MR. MITTELSTAEDT:</p> <p>6 Q. THIS SLIDE NEEDS SOME EXPLANATION, SO IF YOU WOULD WALK US</p> <p>7 THROUGH IT, PLEASE.</p> <p>8 A. THIS IS ONE UGLY SLIDE, BUT --</p> <p>9 MR. BOIES: YOUR HONOR, WE HAVE AN OBJECTION TO THE</p> <p>10 SLIDE, AND WE OUGHT TO TAKE IT DOWN.</p> <p>11 BEYOND THE WITNESS'S EXPERTISE. THIS DOES NOT RELATE</p> <p>12 TO THE AREAS IN WHICH HE'S QUALIFIED AS AN EXPERT.</p> <p>13 THE COURT: RESPONSE?</p> <p>14 MR. MITTELSTAEDT: THIS GOES TO THE HYPOTHETICAL</p> <p>15 LICENSE. IT'S ONE OF THE GEORGIA PACIFIC FACTORS, AND THIS</p> <p>16 INFORMATION HAS BEEN COMPILED BY THE WITNESS FROM THE TYPE OF</p> <p>17 MATERIALS EXPERTS RELY ON. IT'S A DEMONSTRATIVE AS WELL.</p> <p>18 MR. BOIES: IT DOES GO TO THE GEORGIA PACIFIC</p> <p>19 FACTORS. BUT THE WAY HE COMPILED IT WAS BY ASSESSING THESE</p> <p>20 THIRD-PARTY PROVIDERS, AND THAT IS BEYOND HIS EXPERTISE. ALL HE</p> <p>21 IS DOING IS WHAT THE LAW PRECLUDES HIM FROM DOING, WHICH IS</p> <p>22 SUMMARIZING A VARIETY OF INFORMATION THAT'S BEYOND HIS</p> <p>23 EXPERTISE, AND IT'S HEARSAY.</p> <p>24 THE COURT: I'M GOING TO ALLOW IT. OVERRULED.</p> <p>25 (DEMONSTRATIVE PUBLISHED TO THE JURY.)</p>	<p style="text-align: right;">Page 1572</p> <p>1 THIS IS WHY THIS ARROW GOES OFF ON THE LEFT-HAND SIDE</p> <p>2 (INDICATING). THESE ARE ALL ALTERNATIVE WAYS COMPANIES CAN DO</p> <p>3 WHAT THEY WERE DOING WITH THEIR ORACLE SOFTWARE.</p> <p>4 SO THE ALTERNATIVES WERE NOT JUST THIRD-PARTY</p> <p>5 VENDORS. THERE WERE MANY OTHER WAYS, AND YOU -- ON HERE, IN</p> <p>6 FACT, IT'S -- IT'S MISSING, IS -- SHOULD BE SELF-SUPPORT.</p> <p>7 SO CUSTOMERS COULD GO ON SELF-SUPPORT. THEY JUST</p> <p>8 HIRE THEIR OWN PEOPLE AND LOOK AFTER THEIR OWN SYSTEMS. SO THAT</p> <p>9 SHOULD BE ON THIS LIST. AND IT'S, OF COURSE, ALWAYS AVAILABLE</p> <p>10 TO THESE COMPANIES -- TO THESE CUSTOMERS.</p> <p>11 AND THEN THESE ARE ALL -- THESE GUYS OVER HERE</p> <p>12 (INDICATING), THESE ARE PEOPLE WHO, SAY, MANAGE PAYROLL. SO ONE</p> <p>13 OF THE THINGS THAT A PEOPLESFT-TYPE USER MIGHT USE -- MIGHT USE</p> <p>14 A SOFTWARE FOR IS TO PRODUCE A PAYROLL. WELL, YOU CAN GO TO ADP</p> <p>15 FOR PAYROLL AND HUMAN RESOURCE MANAGEMENT SERVICES. THEN YOU</p> <p>16 DON'T NEED A COMPUTER SYSTEM AT ALL. YOU JUST SEND THEM A PIECE</p> <p>17 OF PAPER, AND THEY INPUT THE DATA AND PRODUCE THE CHECKS.</p> <p>18 THAT'S TRUE OF ALL OF THOSE, ACCENTURE, DELOITTE, AND</p> <p>19 SO ON. THOSE ARE BIG WHAT WE CALL SYSTEMS INTEGRATORS. THESE</p> <p>20 ARE HUGE COMPANIES. AND THIS IS WHAT THEY DO. THEY HELP</p> <p>21 COMPANIES INSTALL SYSTEMS, SELECT THE SYSTEMS, TRAIN PEOPLE, DO</p> <p>22 CONSULTING FOR THEM WHEN IT GOES WRONG, AND SO ON.</p> <p>23 AND THEN INTERESTINGLY, WAY OVER -- EXCUSE ME -- MY</p> <p>24 POINTER SEEMS TO HAVE STOPPED POINTING -- WAY OVER HERE</p> <p>25 (INDICATING), YOU'VE GOT COMPANIES THAT SELL SOFTWARE THAT DOES</p>

16 (Pages 1569 to 1572)

Raynee H. Mercado, CSR, RMR, CRR, FCRR & Diane E. Skillman, CSR, RPR, FCRR

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<p>1 THE SAME THING. SO WE SAW COMPANIES THAT USED TO BE ON</p> <p>2 PEOPLESOF, AND WHAT THEY DID WAS THEY SIMPLY CLOSED THAT DOWN</p> <p>3 AND WENT TO GREAT LAKES FOR ACCOUNTING. THEY MAY HAVE GONE TO</p> <p>4 MICROSOFT FOR ERP. THAT'S ANOTHER VENDOR, MUCH CHEAPER, NOT SO</p> <p>5 CAPABLE. BUT FOR COMPANIES THAT WERE REALLY STRUGGLING TO PAY</p> <p>6 THE ORACLE MAINTENANCE FEE, A VIABLE OPTION SO THAT ALL THESE</p> <p>7 WAYS THAT THESE CUSTOMERS COULD HAVE ACHIEVED WHAT THEY HAD TO</p> <p>8 DO TO KEEP THEIR BUSINESS GOING, WITHOUT USING ORACLE, AND</p> <p>9 THAT'S VERY, VERY IMPORTANT.</p> <p>10 Q. OKAY. PUTTING ALL THOSE GEORGIA PACIFIC FACTORS TOGETHER,</p> <p>11 YOU CAME UP WITH A ROYALTY FOR TOMORROWNOW, CORRECT?</p> <p>12 A. CORRECT.</p> <p>13 Q. AND THAT'S 50 PERCENT OF TOMORROWNOW'S REVENUES.</p> <p>14 A. CORRECT.</p> <p>15 Q. REVENUES ON WHAT BASE?</p> <p>16 A. I -- I DID THE ROYALTY ON ALL OF THEIR REVENUES FOR</p> <p>17 TOMORROWNOW.</p> <p>18 Q. OKAY.</p> <p>19 A. I TOOK EVERY SINGLE DOLLAR AND CALCULATED THE ROYALTY ON</p> <p>20 THAT.</p> <p>21 Q. OKAY. AND LET'S LOOK AT SLIDE 5.</p> <p>22 (DEMONSTRATIVE PUBLISHED TO THE JURY.)</p> <p>23 BY MR. MITTELSTAEDT:</p> <p>24 Q. WHAT DOES THIS SHOW?</p> <p>25 A. THIS SHOWS THE TOMORROWNOW REVENUE BY YEAR, AND YOU CAN SEE</p>	<p>1 WITH A 50 PERCENT OF PROFIT RATE, WHICH IS A VERY HIGH RATE.</p> <p>2 AND I DID A DETAILED ANALYSIS OF THE CUSTOMER BEHAVIOR AND FOUND</p> <p>3 THAT 82 OF THE 86 CUSTOMERS HAD GONE TO SAP FOR OTHER REASONS,</p> <p>4 SO THERE ARE ONLY FOUR REMAINING CUSTOMERS.</p> <p>5 AND I FOUND THE REVENUE FROM SAP'S FINANCIAL</p> <p>6 INFORMATION FOR THOSE CUSTOMERS. I CALCULATED THE PROFIT. I</p> <p>7 HAD INFORMATION RELATED TO THE COMPANY'S COSTS, SO I</p> <p>8 SUBCONTRACTED THE COSTS FROM THE REVENUES. THAT GAVE ME THE</p> <p>9 PROFIT, AND THEN I TOOK 50 PERCENT OF THAT PROFIT. 50 PERCENT</p> <p>10 OF THAT IS THAT (INDICATING). ADDED THE 4 UP, CAME TO</p> <p>11 \$3.8 MILLION.</p> <p>12 Q. OKAY.</p> <p>13 NOW, TO WRAP UP THE HYPOTHETICAL LICENSE PART OF</p> <p>14 THIS, LET ME ASK YOU JUST FINALLY FOR YOUR RESPONSE TO SOME OF</p> <p>15 MR. MEYER'S CRITICISM.</p> <p>16 WHEN HE WAS TALKING ABOUT WHY IN HIS VIEW, ALL THE</p> <p>17 MONEY SHOULD BE PAID UP FRONT AND IT SHOULD BE A LARGER AMOUNT,</p> <p>18 HE SAID AT PAGE 910,</p> <p>19 "SAP WAS AWARE THAT BASICALLY ORACLE PAID</p> <p>20 UPFRONT."</p> <p>21 IN YOUR VIEW, IS THAT A JUSTIFICATION TO HAVE A</p> <p>22 PAID-UPFRONT LICENSE RATHER THAN A RUNNING ROYALTY?</p> <p>23 A. NO. THAT WOULDN'T MAKE ANY SENSE FOR ALL OF THE REASONS</p> <p>24 THAT I DESCRIBED TO YOU LATE -- EARLIER. ORACLE AND SAP WOULD</p> <p>25 HAVE BEEN TAKING A HUGE RISK IF THEY'D DONE THAT. AND YOU HAVE</p>
Page 1574	Page 1576
<p>1 ON THE LEFT-HAND SIDE HERE, WE HAVE THE YEARS. THE REVENUE IS</p> <p>2 IN THIS COLUMN. THIS WAS THE TOTAL REVENUE. WASN'T ACTUALLY</p> <p>3 THEIR ACTUAL REVENUE. I MADE SOME ADJUSTMENTS TO IT. I</p> <p>4 INCREASED THE REVENUES BECAUSE SAP WAS GETTING THEM TO DO</p> <p>5 DISCOUNTS FOR SOME CUSTOMERS. SO IF THEY DISCOUNTED IT HEAVILY,</p> <p>6 I ADDED BACK WHAT THEY REALLY SHOULD HAVE CHARGED 'CAUSE I FELT</p> <p>7 THAT WAS KIND OF LIKE A LOSS LEADER OPERATION FOR SAP.</p> <p>8 AND THEN ON THE ROYALTY COLUMN, THE COLUMN OVER ON</p> <p>9 THE RIGHT, I SIMPLY TOOK HALF OF THIS, THE 50 PERCENT, AND</p> <p>10 CALCULATED THAT ROYALTY. AND THEN BECAUSE THE ROYALTIES WOULD</p> <p>11 HAVE OR SHOULD HAVE BEEN PAID IN THOSE EARLIER YEARS, WHAT I DID</p> <p>12 WAS I ADDED INTEREST TO GET IT TO THE DATE OF TRIAL.</p> <p>13 SO THAT 298,000 IN 2002 WOULD HAVE GROWN TO SOMETHING</p> <p>14 MORE THAN THAT BY THE -- BY THE DATE OF TRIAL. AND SO I</p> <p>15 ESTIMATED THE DATE OF TRIAL FOR THE 10TH OF DECEMBER, ACTUALLY.</p> <p>16 SO WE MIGHT GET LUCKY AND FINISH BEFORE THAT. AND THAT'S THAT</p> <p>17 INTEREST CALCULATION THERE, THE 5.3 MILLION. AND ADD THOSE TWO</p> <p>18 TOGETHER, AND THE TOTAL IS 34.8 MILLION.</p> <p>19 Q. OKAY. AND THAT'S FOR TOMORROWNOW.</p> <p>20 LET'S TURN TO SAP. THAT'S THE NEXT SLIDE.</p> <p>21 (DEMONSTRATIVE PUBLISHED TO THE JURY.)</p> <p>22 BY MR. PICKETT:</p> <p>23 Q. AND WOULD YOU TELL US HOW YOU CALCULATED THE REASONABLE</p> <p>24 ROYALTY FROM THIS HYPOTHETICAL NEGOTIATION ON THE SAP SIDE?</p> <p>25 A. YES. AGAIN, USING THE GEORGIA PACIFIC FACTORS, I CAME UP</p>	<p>1 TO MAKE SURE THAT THOSE RISKS ARE BALANCED AND -- AND ACTUALLY</p> <p>2 RELATE TO THE ACTUAL USE. AND THE ONLY WAY TO DO THAT IS WITH A</p> <p>3 RUNNING ROYALTY.</p> <p>4 Q. IN YOUR EXPERIENCE, DOES THE OWNER OF A PATENT OR THE OWNER</p> <p>5 OF SOFTWARE OR INTELLECTUAL PROPERTY GENERALLY -- AS (SIC)</p> <p>6 GENERALLY ALREADY PAID FOR THE INTELLECTUAL PROPERTY THAT</p> <p>7 THEY'RE LICENSING?</p> <p>8 A. YES. IF -- IT DOESN'T REALLY MATTER WHETHER YOU BOUGHT IT</p> <p>9 IN A TRANSACTION OR YOU JUST PAID YOUR SOFTWARE ENGINEERS TO</p> <p>10 WRITE IT AND MIGHT TAKE YEARS TO DO IT AND COST A LOT OF MONEY.</p> <p>11 EITHER WAY, YOU'VE GOT A BIG INVESTMENT IN YOUR SOFTWARE. BUT</p> <p>12 SOFTWARE DEALS GET DONE ON RUNNING ROYALTIES, I THINK, FROM TIME</p> <p>13 TO TIME. AND APPROPRIATELY, AS WE FOUND WITH THE RESELL</p> <p>14 AGREEMENT.</p> <p>15 Q. OKAY. MR. MEYER ALSO SAID AT PAGE 911,</p> <p>16 "AND THE THIRD POINT IS THE MOST IMPORTANT. THE</p> <p>17 ONLY WAY -- THE ONLY WAY TO BALANCE THE RISK BETWEEN</p> <p>18 AT WHAT ORACLE PAID FOR THESE COMPANIES, THESE LARGE</p> <p>19 AMOUNTS OF MONEY AND SAP'S EXECUTION ON ITS PLAN IS</p> <p>20 TO HAVE IT UP FRONT."</p> <p>21 AND THEN HE SAYS, "SAP WOULD HAVE TO COME IN AND</p> <p>22 BALANCE THAT BY MAKING AN UPFRONT COMMITMENT TO TAKE</p> <p>23 THE LICENSE TO PAY UPFRONT. THEN THEIR RISK IS TO GO</p> <p>24 EXECUTE. THAT'S THE RISK ON THEIR MANAGEMENT THEY</p> <p>25 WOULD TAKE."</p>

<p style="text-align: right;">Page 1589</p> <p>1 SINCE YOU ASKED. THIS IS THE TOTAL AMOUNT OF THE LOST SUPPORT 2 PROFITS, THE 19.3 MILLION. 3 Q. YES. 4 OKAY. WHAT WAS YOUR APPROACH IN GENERAL IN 5 CALCULATING THE LOST PROFITS? 6 A. GENERALLY, WHAT I DID WAS -- AND WE REFERRED TO THIS A FEW 7 TIMES ALREADY. I LOOKED AT THE CUSTOMER INFORMATION THAT I HAD 8 TO TRY TO DETERMINE WHY THEY LEFT ORACLE. AND BY LOOKING AT 9 THIS INFORMATION, I WAS ABLE TO SAY THAT SOME OF THESE CUSTOMERS 10 LEFT FOR REASONS OTHER THAN THE ALLEGED ACTIONS, THE COPYRIGHT 11 INFRINGEMENT. AND SO IF THEY DID LEAVE FOR REASONS OTHER THAN 12 THE INFRINGEMENT, I TOOK THEM OUT OF MY ANALYSIS AND DID NOT 13 COMPUTE ANY LOST PROFITS ON THOSE. 14 Q. WHEN YOU LOOKED AT ALL THIS INFORMATION ABOUT CUSTOMERS AND 15 WHY THEY MADE THE DECISIONS THAT THEY DID, HOW DID YOU GO ABOUT 16 ORGANIZING THAT DATA FOR ALL THOSE CUSTOMERS? 17 MR. BOIES: YOUR HONOR, WE OBJECT TO HIM TESTIFYING 18 AS TO WHY CUSTOMERS LEFT ORACLE. THAT IS OUTSIDE HIS EXPERTISE. 19 SPECULATING AS TO WHAT WAS IN THE MINDS OF THE CUSTOMERS AND WHY 20 THEY LEFT IS NOT SOMETHING THAT'S PROPER FOR HIS TESTIMONY. 21 WE HAVE NO OBJECTION TO HIS TESTIFYING AS TO THE 22 CONSEQUENCES OF A PARTICULAR CUSTOMER LEAVING OR NOT LEAVING. 23 THAT IS DAMAGE CALCULATION WITHIN HIS EXPERTISE. 24 THE COURT: OKAY. ALL RIGHT. 25 RESPONSE?</p>	<p style="text-align: right;">Page 1591</p> <p>1 THAT GO TO THAT WHOLE QUESTION OF REASONS. 2 MR. BOIES: EXACTLY. AND I THINK THE JURY CAN 3 CONCLUDE FROM THAT THAT CUSTOMERS EITHER DID OR DID NOT LEAVE 4 BECAUSE OF TOMORROWNOW OR FOR SOME OTHER REASON. THAT'S A 5 DECISION FOR THE JURY TO MAKE BASED ON THE EVIDENCE THAT IS 6 ADMITTED. 7 WHAT I DON'T THINK HE CAN DO IS I DON'T THINK HE CAN 8 SPECULATE AS TO WHAT WAS IN THE CUSTOMERS' MINDS. IN OTHER 9 WORDS, WHAT THEY'RE ASKING HIM TO DO AND -- AND I THINK -- I 10 THINK COUNSEL PUT IT VERY DIRECTLY, HE -- HE AND THE STAFF 11 LOOKED AT LOTS OF DOCUMENTS. 12 HE'S NOW PURPORTING TO COME IN AND TELL THE JURY, 13 BASED ON LOOKING AT ALL THESE DOCUMENTS, THIS IS WHAT I CONCLUDE 14 IS THE REASON THAT THEY LEFT. THAT'S EXACTLY WHAT I THINK 15 EXPERTS ARE NOT PERMITTED TO DO, WHICH IS TO TAKE A LOT OF 16 HEARSAY EVIDENCE AND COME IN AND SAY, THIS IS WHAT I CONCLUDE A 17 CUSTOMER WOULD OR WOULD NOT HAVE DONE. HE'S NOT AN EXPERT -- 18 THE COURT: EXCEPT HE HAS MADE THE DETERMINATION THAT 19 A SIZABLE NUMBER OF CUSTOMERS WOULD HAVE LEFT FOR OTHER REASONS 20 THAT'S THE BASIS OF HIS ANALYSIS. OKAY? HE HAS TO BE ABLE TO 21 TESTIFY AS TO HOW HE KNOWS THAT THEY WOULD HAVE LEFT, EITHER 22 THROUGH INFORMATION THAT WAS PROVIDED, THROUGH DISCOVERY THAT 23 WAS PROVIDED -- HE HAS TO BE ABLE TO TESTIFY AS TO HOW HE WAS 24 ABLE TO COME TO HIS CONCLUSION. 25 WHILE I AGREE WITH YOU THAT THE ACTUAL REASONS CAN'T</p>
<p style="text-align: right;">Page 1590</p> <p>1 MR. MITTELSTAEDT: YES, HE HAS REVIEWED -- AND I CAN 2 LAY A BETTER FOUNDATION. 3 THE COURT: PLEASE. WELL, NO, MAKE AN OFFER OF PROOF 4 FIRST. 5 MR. MITTELSTAEDT: YEAH, THE OFFER OF PROOF IS THAT 6 HE REVIEWED, ALONG WITH HIS STAFF, ALL OF THESE RECORDS RANGING 7 FROM CUSTOMER STATEMENTS, CUSTOMER EMAILS, ORACLE DOCUMENTS, 8 TOMORROWNOW DOCUMENTS. HE LOOKED AT ALL OF THOSE DOCUMENTS AND 9 REACHED THE CONCLUSION -- REACHED AN OPINION ON WHICH CUSTOMERS 10 WOULD HAVE LEFT, WHICH ONES ARE WITHIN THE CAUSATION POOL, AND 11 REACHED AN OPINION ON THAT. 12 THE COURT: ALL RIGHT. AND I NEED TO SET SOME GROUND 13 RULES. I'D LIKE TO TALK TO BOTH COUNSEL AT SIDE BAR. 14 (THE FOLLOWING PROCEEDINGS WERE HEARD AT THE 15 SIDEBAR:) 16 THE COURT: OKAY. NOW, WITH REGARD TO THE FIVE 17 EXHIBITS THAT YOU OBJECTED TO EARLIER, OR YOU DIDN'T, BUT 18 MR. PICKETT DID, I'VE ALREADY INDICATED HE CAN REFER TO THOSE. 19 HE CAN REFER TO THE CALCULATIONS. 20 MR. BOIES: YES. 21 THE COURT: THOSE DECLARATIONS CONTAIN THE REASONS 22 WHY THEY LEFT, SO I DON'T QUITE UNDERSTAND HOW TO WORK AROUND 23 THAT. I MEAN, I'VE ALREADY MADE A RULING WITH REGARD TO THOSE 24 WITH REGARD TO COWLITZ -- I MEAN, THERE ARE ANY NUMBER OF PIECES 25 OF EVIDENCE THAT ARE ALREADY IN OR WHICH I'VE ALREADY APPROVED</p>	<p style="text-align: right;">Page 1592</p> <p>1 COME THROUGH HIS MOUTH, I MEAN, THOSE ARE THE AT-RISK REPORTS, 2 REASONS, ET CETERA. THE ACTUAL REASONS HE CANNOT TESTIFY ABOUT 3 BUT HE HAS TO BE ABLE TO TESTIFY AS TO THE FACT THAT HE HAD 4 EVIDENCE UPON WHICH TO MAKE A CONCLUSION THEY WOULD -- 5 (SIMULTANEOUS COLLOQUY.) 6 MR. BOIES: YEAH, AND I AGREE THAT HE CAN, FOR 7 EXAMPLE, SAY THAT IF THE JURY CONCLUDES THAT ALL OF THESE PEOPLE 8 EXCEPT FOR FOUR WOULD HAVE LEFT, THEN THE DAMAGE CONSEQUENCES 9 ARE THIS. I AGREE HE CAN TESTIFY TO THAT. THAT'S WHAT HE'S UP 10 HERE TO DO. 11 BUT WHAT I THINK HE CAN'T DO IS SAY ALL OF THESE 12 CUSTOMERS EXCEPT THESE FOUR WOULD HAVE LEFT BECAUSE THAT IS WHAT 13 IS REQUIRING HIM TO MAKE A JUDGMENT AS TO WHY THE CUSTOMERS HAVE 14 LEFT AND -- 15 THE COURT: BUT HE'S ALREADY TESTIFIED 84 OF THE 86, 16 RIGHT, LEFT FOR OTHER REASONS? UPON WHAT DOES HE -- DOES HE 17 BASE THAT CONCLUSION? IT'S OBVIOUSLY SOMETHING THAT'S BEEN 18 PROVIDED IN THE RECORD. IT'S WHAT HE'S RELIED UPON, AND HE HAS 19 TO BE ABLE TO TESTIFY TO THAT. 20 MR. BOIES: EXCEPT I'M -- I'VE ALWAYS BELIEVED -- 21 THIS WAS THE POINT I WAS MAKING THIS MORNING, IS THAT WHEN HE 22 GETS UP TO TESTIFY AS TO HOW MANY CUSTOMERS WOULD OR WOULD NOT 23 HAVE LEFT, THAT'S SOMETHING THAT'S WAY BEYOND HIS EXPERTISE AND 24 INAPPROPRIATE FOR AN EXPERT TO BE TESTIFYING TO. 25 THE COURT: BUT HE CAME TO THAT CONCLUSION.</p>

Page 1593	Page 1595
<p>1 MR. BOIES: I KNOW, BUT WHAT I'M SAYING IS HE DOESN'T</p> <p>2 HAVE A BASIS FOR COMING TO THAT CONCLUSION, AND HE CERTAINLY --</p> <p>3 THE -- THE FACT THAT HE READ ALL THESE DOCUMENTS -- I MEAN, SEE,</p> <p>4 THE THING IS WE NOW KNOW FROM THE OFFER OF PROOF THAT WAS JUST</p> <p>5 MADE THAT WHAT HE'S GOING TO DO IS HE'S GOING TO TESTIFY THAT HE</p> <p>6 READ ALL THESE DOCUMENTS, HIS STAFF READ ALL THESE DOCUMENTS,</p> <p>7 AND BASED ON ALL THESE DOCUMENTS, HE CONCLUDES THAT THESE PEOPLE</p> <p>8 WOULD HAVE -- CERTAIN PEOPLE WOULD HAVE LEFT.</p> <p>9 THE COURT: THAT'S WHAT HE'S GOING TO TESTIFY.</p> <p>10 MR. BOIES: I KNOW, BUT WHAT I'M SAYING IS I THINK</p> <p>11 THAT IS WHAT IS NOT POSSIBLE FOR AN EXPERT TO DO, PARTICULARLY</p> <p>12 AN EXPERT THAT DOESN'T HAVE ANY --</p>	<p>1 MR. MITTELSTAEDT: BUT IT'S STUFF THAT HE COULD RELY</p> <p>2 ON AS AN EXPERT --</p> <p>3 THE COURT: YES.</p> <p>4 MR. MITTELSTAEDT: -- TO HELP HIM FORM HIS OPINION.</p> <p>5 THE COURT: YES.</p> <p>6 MR. MITTELSTAEDT: WHICH IS -- I MEAN, IT MAY NOT</p> <p>7 COME IN FOR THE TRUTH OF THE MATTER, BUT I WANT TO ASK HIM</p> <p>8 WHAT'S THE BASIS FOR THAT CONCLUSION.</p> <p>9 MR. BOIES: THAT'S EXACTLY WHAT I -- I DON'T THINK HE</p> <p>10 CAN DO. HE CAN'T GIVE THE REASONS, WHETHER YOU TALK ABOUT IT</p> <p>11 FOR TRUTH OR FOR THE BASIS, HE DOESN'T HAVE EXPERTISE. THAT'S</p> <p>12 WHY I WANTED TO KNOW WHAT THE SCOPE OF THEIR -- SCOPE OF THEIR</p>
<p>13 THE COURT: I AM NOT GOING TO DISALLOW HIM FROM</p> <p>14 TESTIFYING TO THAT. I'M NOT GOING TO TELL -- I'M NOT GOING TO</p> <p>15 ORDER DEFENSE TO NOT ASK HIM THAT QUESTION. THAT IS THE ESSENCE</p> <p>16 OF THE DEFENSE CASE, AND I'VE ALREADY SAID THE UNDERLYING</p> <p>17 EVIDENCE CAN (SIC) COME IN, SUCH AS THE CUSTOMER STATEMENTS</p> <p>18 THEMSELVES. SO YOU'RE RIGHT, HE CANNOT TESTIFY AS TO THE</p> <p>19 REASONS. HE CAN ONLY TESTIFY AS TO HIS CONCLUSION THAT THEY</p> <p>20 WERE NOT RELATED TO THE INFRINGEMENT.</p> <p>21 THERE WERE OTHER REASONS WITH THE EXCEPTION OF FEW</p> <p>22 DOCUMENTS THAT I'VE SAID THAT YOU CAN GET IN AND THE FEW</p> <p>23 CUSTOMERS THAT WE'VE ALREADY HEARD TESTIFY, FOR INSTANCE.</p> <p>24 OKAY. SO HE CAN TESTIFY AS TO HIS CONCLUSIONS THAT</p> <p>25 THEY WOULD HAVE GONE -- I MEAN, THAT'S THE BASIS FOR YOUR</p>	<p>13 OFFER OF EXPERTISE WAS.</p> <p>14 THE COURT: HE CAN GIVE THE REASONS THAT THEY HAD</p> <p>15 NOTHING TO DO WITH TOMORROWNOW'S INFRINGEMENT. OKAY. BUT THE</p> <p>16 ACTUAL DETAILS OF IT, YOU KNOW, THE DETAILS THAT ARE THOSE</p> <p>17 THINGS THAT ARE INCLUDED IN THE AT-RISK REPORT, HE CAN'T GET</p> <p>18 INTO THOSE BECAUSE THAT'S JUST ANOTHER WAY OF GETTING THE</p> <p>19 HEARSAY IN.</p> <p>20 MR. MITTELSTAEDT: OKAY. THERE ARE THREE OR FOUR</p> <p>21 CUSTOMERS FOR WHICH WE HAVE ORACLE DOCUMENTS -- AND I'M JUST</p> <p>22 PREVIEWING THAT -- WITH SOME OF THOSE DEPENDING ON HOW THE</p> <p>23 EXAMINATION GOES, I MAY ASK HIM TO COMMENT ON THOSE, 'CAUSE I</p> <p>24 THINK THE DOCUMENT -- THE UNDERLYING DOCUMENT IS ADMISSIBLE</p> <p>25 MR. CUMMINS IS THE AUTHOR OF AT LEAST TWO OF THEM, AND HE'S A</p>
Page 1594	Page 1596
<p>1 CALCULATION. OKAY.</p> <p>2 MR. BOIES: YEAH, I UNDERSTAND WHAT THE COURT'S</p> <p>3 SAYING. I THINK -- ANOTHER POSSIBLE WAY TO DO IT WOULD BE TO</p> <p>4 ALLOW HIM TO TESTIFY TO HIS DAMAGE CONCLUSIONS SAYING THIS IS</p> <p>5 BASED ON THE ASSUMPTION THAT THESE MANY CUSTOMERS WOULD HAVE</p> <p>6 LEFT.</p> <p>7 THE COURT: I THINK HE CAN GO ONE STEP FURTHER THAN</p> <p>8 THAT AND SAY THAT HE CONCLUDED THAT THEY WOULD HAVE LEFT FROM</p> <p>9 OTHER REASONS, FOR REASONS THAT ARE CONTAINED IN ALL OF THE</p> <p>10 VOLUMINOUS DOCUMENTS THAT HE --</p>	<p>1 HIGH ENOUGH LEVEL, I THINK, THOSE COME IN AS ADMISSIONS.</p> <p>2 THE COURT: THOSE, I DON'T HAVE ANY PROBLEM WITH.</p> <p>3 IT'S THE CUSTOMER --</p> <p>4 MR. MITTELSTAEDT: UNDERSTOOD.</p> <p>5 THE COURT: IT'S THE CUSTOMER INFORMATION I HAVE --</p> <p>6 MR. MITTELSTAEDT: UNDERSTOOD.</p> <p>7 THE COURT: -- SOME LIMIT -- I KNOW I HAVEN'T BEEN</p> <p>8 EXACTLY PRECISE, BUT IT'S THE DETAILS THAT ARE CONTAINED ON</p> <p>9 SOMETHING LIKE THE AT-RISK REPORT. HE CANNOT TESTIFY TO THOSE,</p> <p>10 ALTHOUGH HE CAN TESTIFY TO THE CONCLUSIONS HE DREW FROM THOSE.</p>
<p>11 MR. BOIES: THAT'S IN EVIDENCE IN THE CASE.</p> <p>12 THE COURT: THAT'S RIGHT.</p> <p>13 MR. BOIES: BUT HE CAN'T GO INTO THE REASONS.</p> <p>14 THE COURT: YES, I AGREE WITH THAT, WITH THE</p> <p>15 EXCEPTION OF THE FEW DOCUMENTS THAT CAN BE EXAMINED SUCH AS THE</p> <p>16 DECLARATIONS, HE CANNOT GIVE THE REASONS EXCEPT OTHER THAN THEY</p> <p>17 WERE FOR REASONS OTHER THAN THE INFRINGEMENT OR WANTING TO GO TO 17</p> <p>18 TOMORROWNOW OR WHATEVER WAY YOU WANT TO FRAME IT.</p> <p>19 DO YOU UNDERSTAND THAT? HE CAN GIVE US HIS</p> <p>20 CONCLUSIONS THAT THE EVIDENCE THAT HE HAS BEEN GIVEN SUPPORTS</p> <p>21 HIS CONCLUSION THAT THEY WOULD HAVE GONE FOR OTHER REASONS.</p> <p>22 MR. MITTELSTAEDT: YEAH.</p> <p>23 THE COURT: OKAY. BUT THE ACTUAL REASONS, SUCH AS</p> <p>24 ALL OF THOSE REASONS THAT ARE GIVEN ON THE AT-RISK REPORT, HE</p> <p>25 CAN'T TESTIFY TO THOSE REASONS.</p>	<p>11 MR. MITTELSTAEDT: OKAY.</p> <p>12 MR. BOIES: THANK YOU.</p> <p>13 THE COURT: OKAY?</p> <p>14 (END SIDEBAR ON THE RECORD.)</p> <p>15 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE</p> <p>16 OF THE JURY:)</p> <p>17 BY MR. MITTELSTAEDT:</p> <p>18 Q. THE QUESTION WAS, WHEN YOU GATHERED AND REVIEWED ALL OF THIS</p> <p>19 INFORMATION, HOW DID YOU GO ABOUT ORGANIZING IT?</p> <p>20 A. EVENTUALLY, I DEVELOPED WHAT I CALLED POOLS OR BUCKETS INTO</p> <p>21 WHICH I WOULD PLACE THE CUSTOMERS THAT EXHIBITED THE SAME SORT</p> <p>22 OF STORY. SO I DIDN'T START OFF WITH THOSE, BUT AS I GATHERED</p> <p>23 INFORMATION ABOUT CUSTOMERS, I REALIZED THAT A LOT OF THEM HAD</p> <p>24 THE SAME -- THEY WERE SAYING THE SAME THINGS AND DOING THE SAME</p> <p>25 THINGS. SO I STARTED TO GROUP THEM -- EVENTUALLY CALLED THEM</p>

<p style="text-align: right;">Page 1597</p> <p>1 POOLS OR BUCKETS -- AND GAVE EACH BUCKET A NAME, AND I DON'T 2 KNOW HOW MUCH WE'RE GOING TO SPEND TALKING ABOUT THOSE. 3 Q. OKAY. 4 I'M JUST GOING TO GET TO YOUR CONCLUSION FIRST. IF 5 WE CAN GO TO THE NEXT SLIDE, SLIDE 11. 6 (DEMONSTRATIVE PUBLISHED TO THE JURY.) 7 BY MR. MITTELSTAEDT: 8 Q. WOULD YOU EXPLAIN YOUR CONCLUSION TO US ON THE AMOUNT OF 9 LOST SUPPORT PROFITS USING THIS CHART. 10 A. YES, HERE, I HAVE TWO COLUMNS WITH MR. MEYER'S NAME AT THE 11 TOP OF ONE, AND MY NAME AT THE TOP OF THE OTHER. AND YOU CAN 12 SEE THAT THE TOTAL CUSTOMERS THAT WE BOTH START WITH ARE THE 13 SAME, 358 THAT YOU'VE HEARD SO MUCH ABOUT. 14 AND THEN THERE WERE CERTAIN EXCLUSION POOLS OR 15 BUCKETS THAT MR. MEYER IDENTIFIED AND I IDENTIFIED, AND WE 16 AGREED ON THOSE. SO THERE'S NO DISPUTE AS TO THE NATURE OF THAT 17 PARTICULAR EXCLUSION. 18 AS YOU CAN SEE FROM THE -- THE DIFFERENCE IN THE 19 NUMBERS, THERE'S A SLIGHT DIFFERENCE IN -- IN WHO WE THINK 20 SHOULD BE IN THOSE POOLS, BUT THE PRINCIPLE OF THE POOLS IS 21 ESTABLISHED. 22 THEN THESE OTHER EXCLUSIONS ARE 63 OTHER CUSTOMERS 23 THAT I THINK LEFT ORACLE FOR REASONS OTHER THAN THE COPYRIGHT 24 INFRINGEMENT AND -- KNOW THAT WE'RE GOING TO TALK ABOUT AT LEAST 25 SOME OF THOSE.</p>	<p style="text-align: right;">Page 1599</p> <p>1 THE "NON-ASSOCIATION" IS 1, AND THAT MEANS THAT 2 IT'S -- IT'S A COMPANY AND WE'RE NOT QUITE SURE WHAT THE 3 RELATIONSHIP OF IT IS TO THE CASE. 4 AND THEN "CAUSATION," MR. MEYER HAS 3 THERE. I AGREE 5 WITH THOSE 3. BUT THERE ARE OTHERS THAT I THINK OUGHT TO GO 6 INTO THIS EXCLUSION POOL. AND MANY OF THEM ARE DEALT WITH ON 7 THIS NEXT SECTION, WHICH SAYS WE AGREE IN PRINCIPLE WITH THE 8 SERVICE GAP. SO IF THE CUSTOMER WAS OFF ORACLE SUPPORT FOR A 9 PERIOD OF TIME, IT COULDN'T HAVE BEEN TOMORROWNOW THAT CAUSED 10 THEM TO LEAVE. AND THERE WAS EXTENSIVE DEBATE BETWEEN 11 MR. MITTELSTAEDT AND MR. MEYER WHEN HE WAS TESTIFYING LAST WEEK 12 ABOUT THAT GAP AND HOW LONG THAT GAP SHOULD BE. 13 SO WE AGREE IN PRINCIPLE THAT IF THERE IS A GAP, THEY 14 SHOULD BE EXCLUDED, BUT WE -- WE DISAGREE ON THE LENGTH OF THAT 15 GAP. 16 AND THEN THESE OTHER POOLS, THE BOTTOM 4, WE DON'T 17 AGREE ON AT ALL. SO THIS IS MY VIEW OF WHAT OUGHT TO HAPPEN. 18 "SERVICE EVALUATION" MEANS THAT THE COMPANY WAS OUT 19 LOOKING AT OTHER VENDORS, OTHER WAYS TO GET ITS SUPPORT FOR ITS 20 ORACLE SYSTEMS. THERE WERE 41 OF THOSE. AND I EXCLUDED THEM 21 AND MR. MEYER DIDN'T EXCLUDE ANY OF THEM. 22 THE "PARENT MANDATE" MEANS THAT AN ACQUISITION HAD 23 OCCURRED, AND THE COMPANY WAS TOLD BY ITS NEW OWNER THAT -- TO 24 CHANGE ITS SOFTWARE SYSTEMS. SO IN MY VIEW, THAT CLEARLY COULD 25 NOT BE CAUSED BY TOMORROWNOW. MR. MEYER LEFT THAT ONE IN.</p>
<p style="text-align: right;">Page 1598</p> <p>1 Q. OKAY. LET'S GO TO THE NEXT SLIDE. AND THIS IS A LIST OF 2 YOUR EXCLUSION BUCKETS. 3 (DEMONSTRATIVE PUBLISHED TO THE JURY.) 4 BY MR. MITTELSTAEDT: 5 Q. AND WOULD YOU USE THIS TO DESCRIBE TO US IN MORE DETAIL THE 6 VARIOUS EXCLUSION BUCKETS OR POOLS THAT YOU USED, WHICH ONES 7 MR. MEYER AGREED WITH, AND WHERE YOU DIFFERED? 8 A. YES. THE -- THE TOP ONE, TWO, THREE, FOUR, FIVE -- THE TOP 9 SIX BUCKETS ON THAT -- ON THAT SCHEDULE, WE AGREE ON. THAT, WE 10 DON'T HAVE ANY DIFFERENCE ABOUT THOSE. 11 SO "REINSTATEMENT TO RELICENSE" MEANS THAT THE 12 CUSTOMER WENT BACK TO ORACLE OR RELICENSED ORACLE SOFTWARE, AND 13 SO ORACLE DIDN'T LOSE ANYTHING FOR THOSE CUSTOMERS. SO 14 MR. MEYER AND I EXCLUDED ALL 26 OF THOSE CUSTOMERS. 15 SOME CUSTOMERS NEVER EVEN LEFT ORACLE, SO ALTHOUGH 16 THEY WERE A TOMORROWNOW CUSTOMER, THEY DIDN'T STOP PAYING ORACLE 17 AT ANY TIME. SO THOSE WERE NOT LOST-PROFITS CUSTOMERS EITHER. 18 ORACLE DIDN'T LOSE ANYTHING ON THOSE. THERE WERE 54 OF THOSE. 19 THEN SOME OF THESE CUSTOMERS WEREN'T EVEN CUSTOMERS, 20 AND WE EXCLUDED -- WE BOTH EXCLUDED 3 OF THOSE. 21 AND THEN THE "PRODUCT MISMATCH," WHAT THAT MEANS IS 22 THEY WERE SUPPORTING ONE PRODUCT AT ORACLE AND THEN SUPPORTED A 23 DIFFERENT PRODUCT AT TOMORROWNOW. SO BECAUSE THERE WAS NO REAL 24 LINK BETWEEN THOSE -- THOSE PRODUCTS THAT WERE BEING SUPPORTED, 25 WE EXCLUDED THOSE.</p>	<p style="text-align: right;">Page 1600</p> <p>1 THE OTHER IS JUST -- I COULDN'T PUT THEM INTO -- INTO 2 BUCKETS BECAUSE THEY WERE ALL A LITTLE BIT DIFFERENT, SO THE 3 "OTHER" POOL CATCHES ALL OF THOSE. THERE ARE 8 OF THOSE. 4 AND THEN THIS "JOINT EXCLUDE" AT THE BOTTOM HERE 5 MEANS THAT SOME COMBINATION OF FACTORS INDICATED THAT THEY 6 SHOULD BE EXCLUDED. AND AGAIN, HE AND I DISAGREE ON THIS POOL 7 ENTIRELY. 8 Q. OKAY. LET'S GO TO "SERVICE GAP." IF WE CAN GO TO SLIDE 13. 9 (DEMONSTRATIVE PUBLISHED TO THE JURY.) 10 BY MR. MITTELSTAEDT: 11 Q. WHAT DOES THIS SLIDE SHOW? 12 A. THIS SLIDE SHOWS ALL OF THE CUSTOMERS THAT I'M EXCLUDING FOR 13 SERVICE GAP. AND YOU SEE THE DIFFERENT COLORS ON HERE. THE TWO 14 BRIGHT ORANGE ONES IN THE MIDDLE, THE LONG BARS THERE, WERE TWO 15 CUSTOMERS THAT MR. MEYER EXCLUDED. AND THEY WERE EVERDREAM AND 16 POWERWAY. AND THEY BOTH WERE OFF ORACLE SERVICE FOR ABOUT FOUR 17 YEARS OR SO. AND THEN WENT TO TOMORROWNOW. 18 IN MY VIEW AND IN HIS, SO WE AGREE ON THIS, IF YOU 19 HAVE A -- A GAP OF FOUR YEARS, TOMORROWNOW COULDN'T HAVE BEEN 20 THE CAUSE OF YOU LEAVING IN THE FIRST PLACE. SO THEY -- ORACLE 21 DIDN'T LOSE ANY LOST -- ANY PROFITS AS A RESULT OF THAT. 22 THE PALER ORANGE, THE LITTLE SHORT ONES, THOSE ARE 23 THE THREE COMPANIES THAT WERE LESS THAN A YEAR. SO THE VERY END 24 OF THIS SLIDE IS AT SIX MONTHS. SO EVERYTHING STARTS AT SIX 25 MONTHS. SO THESE WERE LESS THAN 12 MONTHS' GAPS. AND IF YOU</p>

Page 1601	Page 1603
<p>1 RECALL, MR. MEYER SAID TO YOU, 85 PERCENT OF MY CUSTOMERS WERE 2 WITHIN -- I THINK HE SAID SIX MONTHS, AND -- I BEG YOUR 3 PARDON -- A YEAR. 85 PERCENT OF HIS CUSTOMERS WERE WITHIN A 4 YEAR. AND I THINK YOU -- YOU MAY HAVE BEEN MISLED BY THAT IN 5 THAT CLEARLY THAT'S NOT 85 PERCENT OF THIS GROUP. I THINK WHAT 6 HE WAS REFERRING TO ISN'T QUITE CLEAR. 7 BUT YOU CAN SEE THAT THESE CUSTOMERS, THE GREEN 8 ARROW -- BARS HERE GO OUT WAY PAST 12 MONTHS FOR MANY OF THESE 9 CUSTOMERS, AND THERE ARE A COUPLE THAT ARE RIGHT AT 12 MONTHS. 10 SO WHAT I'M TRYING TO SHOW HERE IS HOW LONG THESE 11 CUSTOMERS HAVE BEEN OFF, AND MY CONCLUSION THAT IF THEY'VE BEEN 12 OFF FOR MORE THAN SIX MONTHS, AND THEY RUN WITH NO SUPPORT FROM 13 ORACLE AND NO SUPPORT FROM ANYONE ELSE FOR SIX MONTHS, 14 TOMORROWNOW COULD NOT HAVE BEEN THE CAUSE OF THEM LEAVING 15 ORACLE. 16 SO THEY EVENTUALLY WENT TO TOMORROWNOW. BUT THEY -- 17 THEY LEFT ORACLE, WHICH IS THE KEY THING, FOR SOMETHING OTHER 18 THAN THAT. 19 Q. OKAY. SO THE CUSTOMERS THAT YOU EXCLUDED ARE WHICH ONES? 20 ARE THEY SHOWN ON HERE? 21 A. THE ONES THAT I EXCLUDED ARE ALL OF THESE. 22 Q. OKAY. BECAUSE THEY LEFT ORACLE AND THEN WAITED SIX MONTHS 23 OR LONGER TO GO TO TOMORROWNOW? 24 A. CORRECT. 25 Q. AND, MR. MEYER, WHICH ONES OF THESE DID HE EXCLUDE?</p>	<p>1 TIME. 2 Q. OKAY. 3 LET'S GO TO SLIDE 18. 4 (DEMONSTRATIVE PUBLISHED TO THE JURY.) 5 BY MR. MITTELSTAEDT: 6 Q. YOU REFERRED TO THE SERVICE EVALUATION BUCKET OF CUSTOMERS 7 YOU EXCLUDED. DOES THIS SLIDE LIST THE CUSTOMERS THAT YOU 8 EXCLUDED ON THAT BASIS? 9 A. YES, IT DOES. 10 Q. AND THEN LET'S GO TO SLIDE 20. 11 (DEMONSTRATIVE PUBLISHED TO THE JURY.) 12 BY MR. MITTELSTAEDT: 13 Q. DOES THIS LIST OTHER COMPANIES THAT YOU EXCLUDED, ONE OF 14 THEM FOR PARENT MANDATE? 15 A. YES. 16 Q. AND I THINK YOU'VE DESCRIBED "PARENT MANDATE." THAT'S WHERE 17 THE PARENT TELLS THEM TO DO SOMETHING? 18 A. THAT'S CORRECT. 19 Q. THE -- NEW COMPANY THAT'S ACQUIRED THEM? 20 A. THAT'S CORRECT. 21 Q. OKAY. 22 AND THEN LET'S GO TO SLIDE 21. YOU MENTIONED THE 23 "JOINT EXCLUDE" BUCKET. COULD YOU WALK US THROUGH WHAT THAT 24 MEANS, USING THIS CHART? 25 A. YES. WHAT I REALIZED AS I WAS GATHERING THE INFORMATION WAS</p>
Page 1602	Page 1604
<p>1 A. JUST THE TWO BRIGHT ORANGE ONES IN THE MIDDLE THERE. 2 Q. OKAY. SO IN HIS TRIAL TESTIMONY AT PAGE 1061, HE SAID. 3 "SO IF THE GAP WAS YEAR OR LESS, I PUT THEM IN 4 LOST PROFITS." 5 IS THAT ACCURATE? 6 A. NO. 7 Q. LOOKING AT THIS, WHAT CUTOFF DOES IT LOOK LIKE HE USED? 8 A. IT LOOKED LIKE HE USED FOUR YEARS, ALTHOUGH HE SAID HE 9 DIDN'T HAVE A HARD CUTOFF. 10 Q. OKAY. 11 BUT HE CUT OFF THE TWO THAT WAITED FOUR YEARS TO 12 LEAVE, RIGHT? 13 A. CORRECT. 14 Q. AND HE LEFT ON ONE THAT WAITED 54 MONTHS. 15 A. THAT'S CORRECT. 16 Q. HE ALSO SAID AT PAGE 1062, 17 "SO I THINK FOR THE JURY TO KNOW IS THAT 18 BASICALLY 85 PERCENT OF MINE WERE A YEAR LESS GAP, 19 AND FROM MY PERSPECTIVE, THEY SHOULD STAY IN LOST 20 PROFITS." 21 DOES THAT HAVE ANYTHING TO DO WITH WHAT CUTOFF HE 22 ACTUALLY USED? 23 A. NO, IF I WAS GUESSING WHAT THAT MEANT, IT WAS REFERRING TO 24 ALL OF THE CUSTOMERS THAT WERE INCLUDED AND THAT THEY -- 25 85 PERCENT OF THEM WENT TO TOMORROWNOW WITHIN THAT PERIOD OF</p>	<p>1 THAT THERE WERE MANY POSSIBLE REASONS THAT COMPANIES MIGHT HAVE 2 LEFT ORACLE. BUT THEY WEREN'T SUFFICIENTLY ON POINT FOR ME TO 3 SAY, BASED UPON THAT, I'M GOING TO EXCLUDE THEM. 4 SO I TOYED WITH ALL KINDS OF WAYS OF DOING THIS, 5 TRYING TO MAKE AN APPROPRIATE JUDGMENT AS TO WHETHER THESE 6 CUSTOMERS WOULD HAVE LEFT. AND THE METHODOLOGY, I DECIDED UPON 7 AT THE END OF THE DAY WAS YOU SEE RIGHT AT THE TOP OF THE TOP 8 BOX THERE, THESE WERE CUSTOMERS THAT HAD A REASON TO LEAVE 9 ORACLE. 10 SO IF THEY HAD A REASON TO LEAVE -- AND THEN LOOK AT 11 THE NEXT BOX DOWN, SAYS, "EVALUATED EITHER SELF-SERVICE OR OTHER 12 THIRD-PARTY ALTERNATIVES. SO THEY -- WE KNEW THEY HAD A REASON 13 TO LEAVE, AND THEN THEY ACTED UPON THAT -- THAT REASON BY DOING 14 THIS EVALUATION. 15 AND, REMEMBER, THE THIRD LEG OF THIS, WE KNOW THEY 16 ALL ACTUALLY DID LEAVE. THEY ALL WENT TO TOMORROWNOW. SO IF 17 THEY DID ANY OF THESE THINGS IN THE TOP BOX, PLUS EITHER OF 18 THESE THINGS IN THE SECOND BOX, THEN I THINK THAT WAS EVIDENCE 19 ENOUGH FOR ME TO DECIDE THAT THEY SHOULD BE EXCLUDED FROM THE 20 LOST PROFITS ANALYSIS. AND THERE WERE 38 OF THEM IN TOTAL. 21 (CONTINUED NEXT PAGE; NOTHING OMITTED.) 22 23 24 25</p>

Page 1605	Page 1607
<p>1 BY MR. MITTELSTAEDT:</p> <p>2 Q. AND JUST GIVE US A FEW OF THE REASONS THAT YOU USED WHERE</p> <p>3 CUSTOMERS HAD REASON TO LEAVE ORACLE?</p> <p>4 A. THE ORACLE PEOPLE THEMSELVES MAINTAINED --</p> <p>5 Q. ACTUALLY, SIR, LET ME JUST ASK YOU, WITHOUT REFERRING TO</p> <p>6 DOCUMENTS, JUST TO -- I AM REALLY JUST ASKING YOU TO SAY SOME</p> <p>7 OF THOSE THAT ARE ON THE SCREEN.</p> <p>8 A. OKAY.</p> <p>9 IF YOU HAD NO INTENT TO UPGRADE, FOR EXAMPLE, ONE OF</p> <p>10 THE BIG THINGS YOU WERE BUYING WHEN YOU WERE PAYING FOR</p> <p>11 CONTINUING SUPPORT AT ORACLE WOULD BE WHEN AN UPGRADE TO YOUR</p> <p>12 SYSTEM CAME OUT, YOU WOULD GET THAT UPGRADE. SO IF YOU HAD NO</p> <p>13 INTENT TO UPGRADE, THAT MIGHT CAUSE YOU TO SAY, "WHY AM I</p> <p>14 PAYING ALL OF THIS MONEY? I AM HAPPY WITH THE SYSTEM I'VE GOT</p> <p>15 AND PAYING FOR SOMETHING I WILL NEVER GET." SO, THAT WILL BE</p> <p>16 ONE WAY THEY MIGHT HAVE A REASON TO LEAVE ORACLE.</p> <p>17 QUITE A NUMBER OF COMPANIES, AND SOME OF THEM WERE</p> <p>18 CITIES, WERE IN FINANCIAL DISTRESS. THEY DIDN'T HAVE THE MONEY</p> <p>19 ANY LONGER TO PAY FOR SUPPORT. AND SOME OF THESE COMPANIES</p> <p>20 SAID, "YOU KNOW, WE REALLY LIKE ORACLE. WE LIKE THE SYSTEM.</p> <p>21 WE SIMPLY CAN'T AFFORD IT ANYMORE." MAYBE SOME OF THEM EVEN</p> <p>22 WENT BANKRUPT. SO IF THEY WERE IN FINANCIAL DISTRESS, THAT'S</p> <p>23 VERY MUCH A REASON FOR THEM WANTING TO LEAVE.</p> <p>24 Q. OKAY.</p> <p>25 THE JURY LATER WILL HEAR TESTIMONY FROM A</p>	<p>1 (SLIDE DISPLAYED ON SCREEN.)</p> <p>2 ACTUALLY, GO BACK ONE. YOU HAVE LEXMARK</p> <p>3 INTERNATIONAL THERE.</p> <p>4 DO YOU SEE THAT?</p> <p>5 A. I DO.</p> <p>6 Q. OKAY. AND THE TESTIMONY OF MR. O'DONNELL WAS PLAYED</p> <p>7 YESTERDAY. LET'S GO TO THE NEXT SLIDE, SLIDE 25.</p> <p>8 (SLIDE DISPLAYED ON SCREEN.)</p> <p>9 THIS IS RESTATEMENT/RELICENSE. IS THIS A -- THIS</p> <p>10 SHOWS THE LIST OF CUSTOMERS IN THAT CATEGORY?</p> <p>11 A. IT DOES.</p> <p>12 Q. THIS IS A CATEGORY THAT IS AGREED TO BY ORACLE, RIGHT?</p> <p>13 A. CORRECT.</p> <p>14 Q. AND THE NEXT SLIDE, 26, THESE ARE CUSTOMERS THAT NEVER</p> <p>15 LEFT ORACLE?</p> <p>16 (SLIDE DISPLAYED ON SCREEN.)</p> <p>17 A. THAT'S RIGHT.</p> <p>18 Q. AGAIN, THIS IS A CATEGORY, AT LEAST, THAT IS AGREED TO BY</p> <p>19 ORACLE?</p> <p>20 A. CORRECT.</p> <p>21 Q. AND THEN SLIDE 27, IS ENTITLED "OTHER". AND THIS IS THE</p> <p>22 BUCKET YOU TALKED ABOUT WHERE CUSTOMERS, AS YOU REVIEWED THE</p> <p>23 RECORDS, HAD A VARIETY OF REASONS?</p> <p>24 (SLIDE DISPLAYED ON SCREEN.)</p> <p>25 A. YES.</p>
Page 1606	Page 1608
<p>1 REPRESENTATIVE OF A LAW FIRM BAKER & BOTTS ABOUT HOW THEY</p> <p>2 DECIDED TO GO TO TOMORROWNOW.</p> <p>3 FOR NOW, I JUST WANT YOU TO ASSUME SOME INFORMATION</p> <p>4 AND THEN I AM GOING TO ASK YOU WHETHER YOU THINK BAKER & BOTTS</p> <p>5 SHOULD BE INCLUDED OR EXCLUDED FROM THE COMPENSATION.</p> <p>6 I WANT YOU TO ASSUME THAT THEIR VIEW WAS THAT</p> <p>7 PEOPLESOFT SUPPORT WAS NOT GOOD, THEY DIDN'T HAVE ANY PLANS TO</p> <p>8 UPGRADE, THEY THOUGHT FUSION, ORACLE'S NEW PRODUCT, CAUSED</p> <p>9 CONCERN FOR THEM, THEY STARTED TOMORROWNOW SUPPORT IN AUGUST OF</p> <p>10 2006, THEY CONSIDERED OTHER THIRD PARTY PROVIDERS, AND AFTER</p> <p>11 TOMORROWNOW SHUT DOWN, THEY WENT TO CEDARCRESTONE FOR</p> <p>12 MAINTENANCE SUPPORT.</p> <p>13 AS YOU DECIDED WHICH COMPANIES TO PUT IN WHICH</p> <p>14 BUCKETS, WOULD YOU EXCLUDE OR INCLUDE BAKER & BOTTS?</p> <p>15 A. BAKER & BOTTS IS ALMOST A POSTER CHILD OF WHY YOU WOULD</p> <p>16 EXCLUDE A CUSTOMER. THEY HAD MANY REASONS TO LEAVE AND</p> <p>17 EVALUATED THIRD PARTY ALTERNATIVES. AND ABSENT TOMORROWNOW,</p> <p>18 WOULD HAVE LEFT ORACLE ANY WAY, IN MY VIEW.</p> <p>19 Q. LET'S GO TO SLIDE 24.</p> <p>20 (SLIDE DISPLAYED ON SCREEN.)</p> <p>21 DOES THIS LIST THE RESULTS OF YOUR REVIEW OF THE</p> <p>22 EVIDENCE AS TO WHICH COMPANIES FELL INTO WHAT YOU CALL THE</p> <p>23 "JOINT EXCLUDE" BUCKET?</p> <p>24 A. YES, IT DOES.</p> <p>25 Q. AND THEN LET'S GO TO SLIDE 25.</p>	<p>1 Q. WHAT IS INCLUDED IN THIS BUCKET, IF YOU WOULD?</p> <p>2 A. I AM SORRY, I HAD INTERMITTENT MICROPHONE THERE.</p> <p>3 THE REASON IS GIVEN ON THE LEFT AND THE CUSTOMER</p> <p>4 THAT THAT APPLIES TO IS GIVEN ON THE RIGHT.</p> <p>5 Q. OKAY. SO YOU HAVE ALREADY TALKED ABOUT THOSE CATEGORIES?</p> <p>6 A. YES.</p> <p>7 Q. THAT IS JUST THE LISTING OF THE CUSTOMERS?</p> <p>8 A. YES. THESE ARE ONES THAT ESSENTIALLY MR. MEYER AGREED</p> <p>9 WITH. AND THE CAUSATION CATEGORY AND NONASSOCIATION, THESE ARE</p> <p>10 HIS TERMS ACTUALLY.</p> <p>11 Q. OKAY.</p> <p>12 NOW, ONCE YOU DECIDED WHICH CUSTOMERS TO INCLUDE AND</p> <p>13 WHICH TO EXCLUDE, THEN YOU HAD TO DECIDE WHAT TIME PERIOD TO</p> <p>14 CALCULATE DAMAGES FOR, CORRECT?</p> <p>15 A. CORRECT.</p> <p>16 Q. AND WHAT TIME PERIOD DID YOU USE?</p> <p>17 A. FROM WHENEVER THEY WENT TO TOMORROWNOW TILL THE TIME THEY</p> <p>18 LEFT TOMORROWNOW. FOR MANY OF THEM THAT WOULD HAVE BEEN RIGHT</p> <p>19 AROUND 10/31/08.</p> <p>20 Q. WHEN TOMORROWNOW SHUT DOWN?</p> <p>21 A. CORRECT.</p> <p>22 Q. WHY DID YOU USE THAT TIME PERIOD?</p> <p>23 A. WELL, THE START OF THAT TIME PERIOD IS WHENEVER THEY WERE</p> <p>24 GETTING SERVICE FROM TOMORROWNOW INSTEAD OF ORACLE. SO WHEN</p> <p>25 ORACLE LAST GOT PAID AND THEIR SERVICE TERMINATED IS WHEN I</p>

<p style="text-align: right;">Page 1609</p> <p>1 BEGAN THE DAMAGES. AND I ENDED IT AT THE EARLIER OF WHENEVER</p> <p>2 THE CUSTOMER LEFT TOMORROWNOW OR THAT 10/31/08 DATE.</p> <p>3 Q. AND WHAT -- DID MR. MEYER ALSO USE THAT TIME PERIOD FOR</p> <p>4 ONE OF HIS CALCULATIONS?</p> <p>5 A. YES, HE DID.</p> <p>6 Q. AND THEN DID HE USE AN ALTERNATIVE OUT TO 2015?</p> <p>7 A. YES.</p> <p>8 Q. OKAY. LET'S GO TO SLIDE 28.</p> <p>9 (SLIDE DISPLAYED ON SCREEN.)</p> <p>10 AND DOES THIS SHOW HOW YOU DID YOUR CALCULATIONS FOR</p> <p>11 LOST PROFIT SUPPORT -- OR LOST SUPPORT PROFITS?</p> <p>12 A. YES, IT DOES.</p> <p>13 Q. CAN YOU WALK US THROUGH IT, PLEASE?</p> <p>14 A. SO, CALCULATING THE REVENUE AS I JUST DESCRIBED IT, WITH</p> <p>15 THE LAST REVENUE BEING IN OCTOBER OF '08, I THEN ADDED GROWTH</p> <p>16 TO THAT. GROWTH REALLY IS BECAUSE THE PRICES GO UP EVERY YEAR.</p> <p>17 SO THERE'S AN INCREASING PRICE OVER TIME. AND THAT'S TYPICALLY</p> <p>18 AROUND 3 PERCENT.</p> <p>19 AND THEN ATTRITION IS REFLECTING THE FACT THAT</p> <p>20 CUSTOMERS DON'T ALWAYS STAY. SO THERE IS A PROBABILITY THAT</p> <p>21 CUSTOMERS WILL LEAVE IN ANY PARTICULAR PERIOD. FOR THESE</p> <p>22 PARTICULARLY HIGH RISK CUSTOMERS, THAT PROBABILITY IS</p> <p>23 22.9 PERCENT.</p> <p>24 SO, AT 22.9 PERCENT OF THESE CUSTOMERS LEAVE EVERY</p> <p>25 YEAR. AND SO THAT HAS TO BE FACTORED INTO THE ANALYSIS.</p>	<p style="text-align: right;">Page 1611</p> <p>1 YEAR.</p> <p>2 AND THAT GIVES YOU TOTAL REVENUES. THE -- THIS IS</p> <p>3 THE REVENUE THAT ORACLE GENERATES DIRECTLY FROM THE CUSTOMER.</p> <p>4 BUT WHAT'S AT ISSUE IN THIS CASE IS ONLY THE</p> <p>5 COPYRIGHTS. AND THEY ARE ALL OWNED BY A COMPANY CALLED OIC.</p> <p>6 AND ONLY 39 PERCENT OF THAT \$226,000 FLOWS TO OIC. THE REST</p> <p>7 GOES FOR RUNNING THE COMPANY AND OTHER PURPOSES. BUT OIC, THE</p> <p>8 ONE PLAINTIFF IN THIS CASE NOW, GETS THAT 88,000, WHICH IS</p> <p>9 39 PERCENT OF THE 226.</p> <p>10 THEY MAKE A PROFIT OF 95 PERCENT. AND SO I</p> <p>11 MULTIPLIED THE 95 PERCENT BY THE 88,000 AND THAT GIVES ME</p> <p>12 83,000.</p> <p>13 AND THEN I DISCOUNT THAT TO ALLOW FOR THE TIME VALUE</p> <p>14 OF MONEY, AS WE TALKED ABOUT EARLIER, AND SOME RISK. AND</p> <p>15 THAT'S 71,000. AND THEN ADDING INTEREST AGAIN GETS US TO</p> <p>16 88,000 AS OF THE DATE OF TRIAL.</p> <p>17 Q. OKAY.</p> <p>18 AND THEN THE NEXT SLIDE SHOWS THE TOTAL WHEN YOU DO</p> <p>19 THAT FOR ALL 206 CUSTOMERS THAT YOU INCLUDED IN THE -- THIS</p> <p>20 DAMAGE CALCULATION, CORRECT?</p> <p>21 (SLIDE DISPLAYED ON SCREEN.)</p> <p>22 A. THAT'S CORRECT.</p> <p>23 Q. AND THE GRAND TOTAL IS 19.3 MILLION?</p> <p>24 A. CORRECT.</p> <p>25 Q. OKAY. THAT FINISHES LOST SUPPORT PROFITS.</p>
<p style="text-align: right;">Page 1610</p> <p>1 Q. MR. CLARKE, HOW DID YOU CALCULATE THAT 23 PERCENT?</p> <p>2 A. I USED A DOCUMENT CALLED THE "AT RISK REPORT," THE "ORACLE</p> <p>3 AT RISK REPORT," AND I DID SOME -- I EXCLUDED ANY EFFECT OF</p> <p>4 TOMORROWNOW IN THAT. SO I WAS ONLY LOOKING AT THE</p> <p>5 NONTOMORROWNOW CUSTOMERS. AND I CALCULATED HOW MANY OF THEM</p> <p>6 LEFT EACH YEAR.</p> <p>7 Q. AND THEN THE FINAL STEP IS PROFIT MARGIN?</p> <p>8 A. YES. THAT'S THE PROFIT MARGIN THAT THEY MAKE ON THESE</p> <p>9 COPYRIGHTS.</p> <p>10 Q. OKAY. AND LET'S WALK THROUGH JUST ONE EXAMPLE OF YOUR</p> <p>11 CALCULATION. IF WE CAN HAVE THE NEXT SLIDE.</p> <p>12 (SLIDE DISPLAYED ON SCREEN.)</p> <p>13 AND DESCRIBE THIS TO US, PLEASE.</p> <p>14 A. THIS IS A CALCULATION FOR THE CITY OF HUNTSVILLE. THE</p> <p>15 LAST YEAR AT ORACLE THEY PAID \$111,000. AND SO THAT WAS MY</p> <p>16 STARTING POINT.</p> <p>17 I ASSUME THAT HAD THEY STAYED AT ORACLE, THAT ORACLE</p> <p>18 WOULD HAVE KEPT ON GENERATING SOME INCOME. BUT THAT INCOME</p> <p>19 WOULD HAVE GONE UP BY 3 PERCENT EVERY YEAR. AND THERE WAS A</p> <p>20 PROBABILITY THAT THE CUSTOMER WOULD HAVE QUIT IN THAT YEAR,</p> <p>21 TERMINATED ITS SERVICE ANYWAY. SO THAT'S WHAT THE 3 PERCENT</p> <p>22 AND THE MINUS 22 PERCENT ARE.</p> <p>23 IF YOU JUST DO THE MATH THEN ON THE 111, IT BECOMES</p> <p>24 89,000 IN '05, 71,000 IN '06, 57,000 IN '07 AND 2008 IS A SHORT</p> <p>25 PERIOD, SO THAT'S WHY IT SAYS "PRORATED". IT WASN'T A WHOLE</p>	<p style="text-align: right;">Page 1612</p> <p>1 NOW WE ARE ON TO THE LAST CATEGORY WHICH IS</p> <p>2 INFRINGERS' PROFITS.</p> <p>3 AND LET'S START THE SAME WAY WE DID WITH A</p> <p>4 DEFINITION WHICH IS THE NEXT SLIDE.</p> <p>5 (SLIDE DISPLAYED ON SCREEN.)</p> <p>6 IS THIS HOW YOU UNDERSTAND WHAT YOU'RE TRYING TO</p> <p>7 CALCULATE FOR SAP'S PROFITS ON SOFTWARE THAT IT SOLD THAT'S</p> <p>8 ATTRIBUTABLE -- WHERE THE SALE IS ATTRIBUTABLE TO TOMORROWNOW'S</p> <p>9 INFRINGEMENT?</p> <p>10 A. THAT'S CORRECT. BUT JUST TO EXPAND ON YOUR STATEMENT</p> <p>11 THERE, IT IS NOT JUST SAP, IT'S TN AND SAP.</p> <p>12 Q. NOW YOU REALIZE -- WE WILL COME TO THAT.</p> <p>13 MR. MEYER DOESN'T PUT PROFITS FOR TOMORROWNOW IN HIS</p> <p>14 INFRINGERS' PROFITS CALCULATION, CORRECT?</p> <p>15 A. HE DOES NOT.</p> <p>16 Q. SO YOU'VE ADDED SOME DAMAGES OVER AND ABOVE WHAT MR. MEYER</p> <p>17 PROPOSED?</p> <p>18 A. YES.</p> <p>19 Q. AND YOUR UNDERSTANDING IS THAT THIS CALCULATION ALSO</p> <p>20 EXCLUDES PROFITS THAT EITHER OF THOSE WOULD HAVE MADE ANYWAY?</p> <p>21 A. CORRECT.</p> <p>22 Q. OKAY.</p> <p>23 AND DID YOU BASICALLY TAKE THE SAME APPROACH IN</p> <p>24 REVIEWING CUSTOMER INFORMATION AND PUTTING THE CUSTOMERS INTO</p> <p>25 BUCKETS, EITHER BUCKETS TO INCLUDE OR BUCKETS TO EXCLUDE?</p>

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<p>1 A. I DID.</p> <p>2 Q. OKAY.</p> <p>3 AND LET'S LOOK AT SLIDE 32 AND ASK YOU TO USE THIS</p> <p>4 SLIDE IN EXPLAINING TO US AS AN OVERVIEW OF THE APPROACH YOU</p> <p>5 TOOK.</p> <p>6 (SLIDE DISPLAYED ON SCREEN.)</p> <p>7 A. YES. THIS IS A SUMMARY OF THE EXCLUSIONS.</p> <p>8 IN THIS PARTICULAR CASE, MR. MEYER AND I AGREED</p> <p>9 PRECISELY ON THE 22 THAT YOU SEE THERE. BUT THEN HE HAD -- HE</p> <p>10 CHANGED HIS METHODOLOGY OVER THE SUMMER. HE HAD A PARTICULAR</p> <p>11 APPROACH AND DID HIS CALCULATIONS ORIGINALLY USING THAT</p> <p>12 APPROACH. AND THEN WHEN HE SAW MY REPORT, HE MADE A CHANGE TO</p> <p>13 THAT APPROACH.</p> <p>14 AND THE CHANGE WAS HE EXCLUDED CERTAIN CUSTOMERS</p> <p>15 THAT I HAD EXCLUDED FOR THE REASONS I EXCLUDED THEM. HE DIDN'T</p> <p>16 REALLY HAVE ANY OPTION BUT TO DO THAT, BUT THEN INTRODUCED THIS</p> <p>17 NEW ASSUMPTION.</p> <p>18 AND THE NEW ASSUMPTION WAS NO MATTER WHAT ELSE, NO</p> <p>19 MATTER WHAT OTHER REASON YOU MIGHT EXCLUDE A CUSTOMER, IF THAT</p> <p>20 CUSTOMER WAS SAFE PASSAGE, IT BECAME AN INCLUDE.</p> <p>21 AND I DON'T THINK THERE WAS EVER ANY RATIONALE</p> <p>22 EXPLAINED FOR THAT THAT I UNDERSTOOD, BUT I DON'T THINK THAT'S</p> <p>23 APPROPRIATE. I THINK IF THEY SHOULD BE EXCLUDED IF THEY WOULD</p> <p>24 HAVE GONE TO SAP ANYWAY, THEN THEY SHOULD HAVE BEEN EXCLUDED.</p> <p>25 THAT'S A DIFFERENCE BETWEEN HE AND I.</p>	<p>1 THOSE ARE CUSTOMERS THAT MR. MEYER HAD AGREED SHOULD BE</p> <p>2 EXCLUDED.</p> <p>3 LET'S TAKE AN EXAMPLE. HE AGREED A CUSTOMER SHOULD</p> <p>4 BE EXCLUDED FROM THIS CALCULATION IF THEY HAD DECIDED TO GO TO</p> <p>5 SAP BEFORE THEY DECIDED TO GO TO TOMORROWNOW, CORRECT?</p> <p>6 A. THAT'S CORRECT.</p> <p>7 Q. AND SO BOTH HE AND YOU REMOVED THOSE CUSTOMERS?</p> <p>8 A. INDEED.</p> <p>9 Q. AND HE REMOVED ABOUT 17 IN THAT CATEGORY, RIGHT?</p> <p>10 A. YES.</p> <p>11 Q. AND THAT WAS WHEN YOU GOT HIS FIRST REPORT?</p> <p>12 A. CORRECT.</p> <p>13 Q. AND THEN BECAUSE YOU'RE THE DEFENDANTS' EXPERT, YOUR</p> <p>14 REPORT CAME SECOND?</p> <p>15 A. CORRECT.</p> <p>16 Q. WHEN YOU LOOKED AT THAT, YOU SAID, "I AGREE THAT THOSE</p> <p>17 SHOULD BE EXCLUDED, BUT THERE ARE 17 OTHERS THAT FALL INTO THAT</p> <p>18 CATEGORY FOR A TOTAL OF 34"?</p> <p>19 A. YES.</p> <p>20 Q. AND THEN HE LOOKED AT THAT AND HE FOUND A WAY TO PUT SOME</p> <p>21 OF THEM BACK IN THE DAMAGE POOL, AND HIS WAY WAS TO SAY, "WELL,</p> <p>22 THEY WERE SAFE PASSAGE CUSTOMERS".</p> <p>23 A. YES.</p> <p>24 Q. NOW, AND I TAKE IT YOU DISAGREE WITH THAT, PUTTING</p> <p>25 SOMEBODY IN THE DAMAGE POOL JUST BECAUSE THEY ARE A SAFE</p>
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<p>1 THERE WERE 20 OF THEM, AND I AM DEDUCTING THEM. HE</p> <p>2 DID NOT DEDUCT THEM. SO THAT IS A DIFFERENCE.</p> <p>3 THEN THE OTHER EXCLUSIONS, THE 40 THERE, THAT IS A</p> <p>4 DIFFERENCE THAT -- THAT WE HAVE. AND THESE -- WE ARE GOING TO</p> <p>5 TALK ABOUT THESE OTHER EXCLUSIONS.</p> <p>6 I AM SORRY, THERE WAS A STRANGE SQUEAKY NOISE COMING</p> <p>7 FROM MY MACHINE, SO IT DISTURBED ME FOR A MOMENT.</p> <p>8 Q. WE WILL GET TO THAT IN A LITTLE BIT MORE DETAIL. BUT LET</p> <p>9 ME ASK YOU FIRST: YOU SAID BEFORE IT TOOK A LOT OF TIME TO</p> <p>10 REVIEW THESE CUSTOMER-BY-CUSTOMER INFORMATION, CORRECT?</p> <p>11 A. IT DID.</p> <p>12 Q. HAVE YOU CHARGED SAP ON AN HOURLY BASIS FOR THE WORK OF</p> <p>13 YOU AND YOUR STAFF?</p> <p>14 A. YES.</p> <p>15 Q. WHAT HAVE BEEN YOUR FEES TO DATE APPROXIMATELY?</p> <p>16 A. SOMETHING AROUND \$14 MILLION.</p> <p>17 Q. THAT'S CONSIDERABLY MORE THAN MR. MEYER HAS CHARGED?</p> <p>18 A. CORRECT.</p> <p>19 Q. HOW DO YOU ACCOUNT FOR THAT?</p> <p>20 A. WELL, HE DIDN'T DO THE WORK THAT WE DID. SO I CALCULATED</p> <p>21 ACTUALLY IN THE CAR ON THE WAY OVER HERE THIS MORNING. IT'S 36</p> <p>22 MAN YEARS IS HOW MUCH WORK WE PUT INTO THIS.</p> <p>23 AND HE DIDN'T DO MOST OF THAT ANALYSIS WHICH IS WHY</p> <p>24 HIS WORK WAS A LOT CHEAPER.</p> <p>25 Q. LET'S TALK A LITTLE BIT ABOUT THE SAFE PASSAGE INCLUSION.</p>	<p>1 PASSAGE CUSTOMER?</p> <p>2 A. VEHEMENTLY, YES.</p> <p>3 Q. WHAT DOES IT MEAN, AS YOU UNDERSTAND IT, TO BE A SAFE</p> <p>4 PASSAGE CUSTOMER?</p> <p>5 A. SAFE PASSAGE WAS A FUZZY KIND OF CONCEPT. IT HAD MULTIPLE</p> <p>6 DEFINITIONS OVER TIME AND MULTIPLE ITERATIONS OF WHAT WAS A</p> <p>7 SAFE PASSAGE CUSTOMER AND WHAT WASN'T.</p> <p>8 THE BEST THING I CAN SAY TO YOU IS IT WAS A SAFE</p> <p>9 PASSAGE CUSTOMER IF SAP SAID IT WAS A SAFE PASSAGE CUSTOMER.</p> <p>10 AND IN TOTAL, THERE WERE 853 SAFE PASSAGE CUSTOMERS. SO THIS</p> <p>11 IS WHERE SAP SAID, "YEP, THIS IS SAFE PASSAGE." THEY PAID</p> <p>12 HIGHER COMMISSIONS TO THEIR SALESPeOPLE IF THEY WERE SAFE</p> <p>13 PASSAGE. AND THE CUSTOMERS ON SAFE PASSAGE GOT ALL THESE</p> <p>14 BENEFITS OF THE REDUCED PRICES AND SUCH LIKE.</p> <p>15 SO, IF THEY ARE ON THAT LIST, IT'S 853 IN TOTAL.</p> <p>16 Q. OKAY.</p> <p>17 AND DOES THAT -- WHEN YOU LOOKED AT THAT</p> <p>18 INFORMATION, DOES IT BREAK DOWN HOW MANY CUSTOMERS THAT ARE</p> <p>19 CALLED SAFE PASSAGE CUSTOMERS ONLY WENT TO SAP AND NEVER BOUGHT</p> <p>20 ANYTHING FROM TOMORROWNOW?</p> <p>21 A. IT DOES.</p> <p>22 Q. LET'S SHOW SLIDE 33.</p> <p>23 (SLIDE DISPLAYED ON SCREEN.)</p> <p>24 AND IS THIS THE SLIDE THAT WAS PREPARED TO REFLECT</p> <p>25 THAT?</p>

1 ORACLE, SAID IT WAS TEN TO 20 TIMES AS MUCH.
2 SO, I'VE JUST ASSUMED TEN TIMES. SO THE 2 MILLION
3 BECOMES AN IMPLEMENTATION COST OF 20 MILLION. SO, THIS
4 CUSTOMER HAD TO GO AND SPEND \$22 MILLION AND PAY HIGHER SUPPORT
5 COSTS AT SAP. AND THE ARGUMENT YOU ARE BEING ASKED TO ACCEPT
6 IS THAT THEY DID THAT IN ORDER TO SAVE THE HUNDRED THOUSAND
7 DOLLARS ON SUPPORT COSTS AT TOMORROWNOW.

8 IT JUST DOESN'T MAKE ANY SENSE AT ALL. AND
9 MR. PHILLIPS, IF YOU WILL RECALL IN HIS TESTIMONY, ACTUALLY
10 REFERENCED THIS VERY HIGH COST OF IMPLEMENTATION.

11 Q. MR. CLARKE, IF YOU ASSUME THAT THE IMPLEMENTATION COST IS
12 ONLY FOUR TIMES AND SO YOUR 20 MILLION BECOMES 8 MILLION, IS
13 YOUR CONCLUSION CHANGED?

14 A. IT WOULDN'T CHANGE A THING BECAUSE YOU'D STILL BE OUT
15 10 MILLION IN ORDER TO SAVE A HUNDRED THOUSAND.

16 Q. OKAY. LET'S GO TO SLIDE 35.

17 (SLIDE DISPLAYED ON SCREEN.)

18 AND THIS IS LIKE THE CHART WE SAW ON THE SUPPORT

19 SIDE. THIS IS FOR THE SOFTWARE SIDE. AND COULD YOU WALK US
20 THROUGH THE EXCLUSION POOLS, BOTH THE ONES YOU AGREED WITH
21 MR. MEYER ON AND THE ONES WHERE YOU DISAGREED?

22 A. YES.

23 THEY DECIDED TO JOIN SAP BEFORE TOMORROWNOW. THE
24 LOGIC THERE IS, IF THEY WERE ALREADY GOING TO SAP LONG BEFORE
25 THEY WENT TO TOMORROWNOW, TOMORROWNOW COULDN'T HAVE BEEN THE

1 THE COMPETITOR EVALUATION MEANS THAT THEY WERE
2 ACTUALLY LOOKING FOR A DIFFERENT SOFTWARE VENDOR AND LOOKED AT
3 SAY MICROSOFT AND OTHER VENDORS OF ERP SYSTEMS, AS WELL AS SAP.
4 IF THEY DID THAT, THAT SEEMS TO ME VERY CLEAR
5 EVIDENCE THAT ABSENT THE COPYRIGHT INFRINGEMENT, THEY WOULD
6 STILL HAVE MADE A CHANGE AND NOT BE GOING TO SAP.

7 THE STANDARDIZATION IS WHERE A COMPANY HAS -- AND
8 THIS HAPPENS A LOT. THERE ARE COMPANIES THAT HAVE BOUGHT OTHER
9 COMPANIES. AND THEY -- WHEN THEY BUY THE COMPANY, THEY INHERIT
10 THAT SOFTWARE SYSTEM. AND THEY END UP WITH A WHOLE MISHMASH OF
11 SOFTWARE SYSTEMS. AND THEY DON'T TALK TO EACH OTHER VERY WELL,
12 SO RUNNING THE COMPANY BECOMES DIFFICULT.

13 THEY VERY OFTEN WILL ENTER INTO A STANDARDIZATION
14 WHERE THEY THROW ALL THAT OUT AND PUT NEW SOFTWARE IN THAT
15 EVERYBODY USES. CLEARLY A COMPANY THAT WAS GOING TO GO TO THAT
16 LENGTH AND SPEND ALL THAT MONEY AND SUFFER THE DISRUPTION THAT
17 A STANDARDIZATION WOULD CAUSE ISN'T DOING THAT BECAUSE OF
18 TOMORROWNOW.

19 SPECIFIC FUNCTIONALITY, THIS DIDN'T HAPPEN VERY
20 OFTEN, AS YOU SEE, BUT THERE ARE COMPANIES THAT ARE IN A
21 PARTICULAR INDUSTRY AND THEY NEED SOFTWARE FOR THAT INDUSTRY.
22 AND SOMETIMES ORACLE DIDN'T SUPPLY THAT; SAP DID. SO, THEY
23 WOULD BE EXCLUDED BECAUSE ORACLE DIDN'T HAVE A COMPETING
24 PRODUCT.

25 THE NONREPLACEMENT PRODUCTS, THESE ARE PRODUCTS THAT

1 CAUSE OF THAT.

2 SO, MR. MEYER IDENTIFIED THAT AS AN APPROPRIATE
3 THING. HE DIDN'T AGREE WITH ME ON ALL OF THE CUSTOMERS THAT
4 SHOULD BE IN THAT POOL. I THINK THERE ARE 33 OF THEM. HE
5 THOUGHT THERE WERE 17.

6 THE PRODUCT EXTENSIONS, THIS IS WHERE A CUSTOMER OR
7 LET'S SAY IT'S A PAYROLL SYSTEM. TYPICALLY PAYROLL SYSTEMS
8 GROW OVER TIME BECAUSE THE COMPANIES HIRE MORE PEOPLE. AND THE
9 LICENSES FOR THESE SYSTEMS OFTEN ARE SET BASED UPON A NUMBER OF
10 EMPLOYEES.

11 SO IF THEY GET TOO MANY EMPLOYEES, THAT LICENSE NO
12 LONGER WORKS. THEY HAVE TO GO AND GET SOME MORE LICENSES.
13 THEY HAVE TO GET A LICENSE TO HANDLE MORE EMPLOYEES.

14 SO, THAT SALE COULDN'T POSSIBLY BE A RESULT OF
15 TOMORROWNOW. THEY WERE -- THE COMPANY WAS GROWING PERHAPS AND
16 SIMPLY WANTED TO MAKE THAT CHANGE TO ITS LICENSING IN ORDER TO
17 STAY PROPERLY LICENSED. SO THE CAUSE OF THAT WAS NOT
18 TOMORROWNOW.

19 SO, HE AGREED WITH ME ON PRODUCT EXTENSIONS. HE
20 THOUGHT THAT WAS AN APPROPRIATE POOL.

21 THESE OTHERS HE DID NOT AGREE WITH ME ON. THE
22 PARENT MANDATE POOL IS THE ONE WHERE THE PARENT COMPANY COMES
23 ALONG AND SAYS, "YOU HAVE TO CHANGE." TO ME, THAT'S THE
24 EASIEST ONE FOR ANYONE TO UNDERSTAND THAT THEY SHOULD ALL HAVE
25 BEEN EXCLUDED.

1 THE COMPANY BOUGHT AT SAP THAT WERE NOT REPLACING WHAT THEY HAD
2 AT ORACLE. SO, AGAIN, THE INFRINGEMENT WOULDN'T BE THE CAUSE
3 OF THAT.

4 THE RESELLER AND BPO. BPO IS BUSINESS PROCESS
5 OUTSOURCER. THIS IS COMPANIES THAT DO THE PROCESSING FOR OTHER
6 COMPANIES.

7 IF YOU HAVE A RELATIONSHIP WITH A BPO, THEY'RE DOING
8 YOUR WORK. SO ALTHOUGH THERE IS A SAP COMPONENT TO THAT,
9 TOMORROWNOW DIDN'T CAUSE YOU TO GO TO THE BPO.

10 SAME WITH A RESELLER. AND OTHER -- THIS IS JUST A
11 GROUP OF CUSTOMERS THAT THEY DON'T FIT INTO ANY OF THESE
12 BUCKETS, BUT I THINK THEY OUGHT TO BE EXCLUDED.

13 Q. OKAY. LET'S JUST TAKE A COUPLE OF EXAMPLES.

14 AND THE NEXT ONE IS ON SLIDE 36, WHICH IS BASED ON
15 AN ORACLE DOCUMENT.

16 (SLIDE DISPLAYED ON SCREEN.)

17 THIS IS HONEYWELL. AND YOU PUT THIS INTO THE
18 EXCLUSION FOR A COMPANY THAT DECIDED TO JOIN SAP BEFORE JOINING
19 TOMORROWNOW?

20 A. I DID.

21 MR. MITTELSTAEDT: YOUR HONOR, THIS IS -- THE
22 UNDERLYING DOCUMENT IS A5193, AND I MOVE THAT INTO EVIDENCE.

23 THE COURT: A5?

24 MR. MITTELSTAEDT: A5193.

25 THE COURT: ANY OBJECTION?

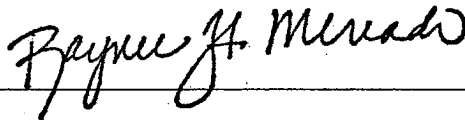
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<p>1 MR. BOIES: YES, YOUR HONOR. WE DON'T THINK THERE'S</p> <p>2 ANY FOUNDATION WITH THIS WITNESS.</p> <p>3 THE COURT: WITH REGARD TO THIS PARTICULAR CUSTOMER?</p> <p>4 MR. BOIES: YES, OR WITH RESPECT TO THE DOCUMENT OR</p> <p>5 THE FACTS THAT ARE INVOLVED WITH THIS CUSTOMER.</p> <p>6 MR. MITTELSTAEDT: IT'S AUTHORED BY MR. CUMMINS. HE</p> <p>7 TESTIFIED TO THE SCOPE --</p> <p>8 THE COURT: RIGHT. OVERRULED.</p> <p>9 (DEFENDANTS' EXHIBIT A5193 RECEIVED IN</p> <p>10 EVIDENCE)</p> <p>11 BY MR. MITTELSTAEDT:</p> <p>12 Q. AND WOULD YOU EXPLAIN TO US WHY YOU EXCLUDED HONEYWELL?</p> <p>13 A. YES.</p> <p>14 ON 3/03, THAT IS, MARCH OF 2003, HONEYWELL BOUGHT</p> <p>15 SOMETHING FROM SAP. ON MARCH OF '05, THEY BOUGHT SOME MORE AT</p> <p>16 SAP. SO THAT'S AFTER THE TOMORROWNOW TRANSACTION.</p> <p>17 BUT THIS COMPANY DIDN'T GO ON TO TN SUPPORT UNTIL</p> <p>18 DECEMBER OF '06. SO, TOMORROWNOW COULD NOT POSSIBLY BE THE</p> <p>19 CAUSE OF THOSE SALES AT SAP. SO THEY SHOULD BE EXCLUDED FOR</p> <p>20 THAT PURPOSE.</p> <p>21 Q. SLIDE 37, THE NEXT ONE, THIS IS YOUR LIST OF CUSTOMERS</p> <p>22 THAT FALL INTO THAT SAME CATEGORY?</p> <p>23 (SLIDE DISPLAYED ON SCREEN.)</p> <p>24 A. YES.</p> <p>25 Q. IS THAT RIGHT?</p>	<p>1 AND IT TOO IS BASED ON AN ORACLE E-MAIL BY MR. CUMMINS. IT'S</p> <p>2 A5199.</p> <p>3 MR. MITTELSTAEDT: AND I MOVE THE UNDERLYING</p> <p>4 DOCUMENT INTO EVIDENCE.</p> <p>5 MR. BOIES: NO OBJECTION.</p> <p>6 THE COURT: ALL RIGHT. ADMITTED.</p> <p>7 (DEFENDANTS' EXHIBIT A5199 RECEIVED IN</p> <p>8 EVIDENCE)</p> <p>9 BY MR. MITTELSTAEDT:</p> <p>10 Q. WHY DID YOU EXCLUDE BASF?</p> <p>11 A. ACTUALLY BASF BOUGHT A COMPANY CALLED ENGLEHARD AND BASF</p> <p>12 HAS BEEN WITH SAP FOR THE LONGEST TIME. IT IS A HUGE</p> <p>13 INTERNATIONAL COMPANY. IT'S A VERY LARGE COMPANY WITH LOTS OF</p> <p>14 SUBSIDIARIES, AND THEY ALL RUN SAP.</p> <p>15 SO, WHEN BASF BOUGHT ENGLEHARD, THEY SAID YOU NOW</p> <p>16 HAVE TO GO TO SAP. AND SO TOMORROWNOW, THE INFRINGEMENT</p> <p>17 COULDN'T POSSIBLY BE THE CAUSE OF ENGLEHARD BECOMING A SAP</p> <p>18 CUSTOMER. IT WAS BECAUSE BASF, THE NEW OWNER FORCED THEM TO DO</p> <p>19 IT.</p> <p>20 INTERESTINGLY ABOUT THIS COMPANY, THIS WAS THE FIRST</p> <p>21 PIECE OF INFORMATION I EVER SAW WHERE I WENT AH, THIS IS VERY</p> <p>22 INTERESTING. HERE'S A REASON WHY A COMPANY LEFT ORACLE AND</p> <p>23 WENT TO SAP THAT COULDN'T BE RELATED TO THE INFORMATION THAT WE</p> <p>24 ARE DEALING WITH IN THIS CASE.</p> <p>25 SO, THIS REALLY WAS THE VERY FIRST COMPANY THAT I</p>
Page 1626	Page 1628
<p>1 A. YES.</p> <p>2 Q. AND YOU WILL SEE SARA LEE IS ONE OF THEM?</p> <p>3 A. YES.</p> <p>4 Q. AND THE JURY HEARD YESTERDAY THAT SARA LEE ACQUIRED -- WAS</p> <p>5 ACQUIRED BY A COMPANY -- EXCUSE ME.</p> <p>6 SARA LEE ACQUIRED EARTH GRAINS AND SARA LEE HAD BEEN</p> <p>7 WITH SAP FOR A NUMBER OF YEARS AND HAD DECIDED TO MOVE TO SAP</p> <p>8 IN 2005 AND 2006, NEVER PLANNED TO UPGRADE, NEVER HEARD OF SAFE</p> <p>9 PASSAGE, HAD A STABLE AND CUSTOMIZED PEOPLESFT INSTALLATION.</p> <p>10 BASED ON THAT TESTIMONY, DO YOU THINK THEY ARE</p> <p>11 PROPERLY EXCLUDED?</p> <p>12 A. I DO.</p> <p>13 Q. THE JURY ALSO HEARD FROM MR. O'DONNELL AT LEXMARK THAT</p> <p>14 LEXMARK CHOSE SAP OVER ORACLE BECAUSE SAP SCORED HIGHER ON A</p> <p>15 300-POINT TEST AND THAT TOMORROWNOW WAS NOT EVEN A DATA POINT</p> <p>16 BASED ON THAT, IS IT YOUR VIEW THAT LEXMARK SHOULD</p> <p>17 ALSO BE EXCLUDED?</p> <p>18 A. YES.</p> <p>19 Q. LET'S GO TO SLIDE 39.</p> <p>20 (SLIDE DISPLAYED ON SCREEN.)</p> <p>21 IS THIS A LIST OF THE CUSTOMERS THAT YOU EXCLUDED</p> <p>22 BECAUSE THEY WERE BUYING A PRODUCT EXTENSION, AS YOU DESCRIBED</p> <p>23 BEFORE?</p> <p>24 A. YES.</p> <p>25 Q. THE NEXT SLIDE IS AN EXAMPLE OF THE PARENT COMPANY MANDATE</p>	<p>1 SAW AND IT PROMPTED A LOT OF OTHER THINKING WHEN I SAW IT.</p> <p>2 Q. LET'S GO TO SLIDE 43.</p> <p>3 (SLIDE DISPLAYED ON SCREEN.)</p> <p>4 IS THIS A LIST OF THE CUSTOMERS YOU EXCLUDED BASED</p> <p>5 ON EVALUATING COMPETITORS LIKE LEXMARK?</p> <p>6 A. YES.</p> <p>7 Q. LET'S GO TO SLIDE 44.</p> <p>8 (SLIDE DISPLAYED ON SCREEN.)</p> <p>9 THIS IS ALSO BASED ON A CUMMINS' E-MAIL.</p> <p>10 MR. MITTELSTAEDT: I MOVE THE UNDERLYING DOCUMENT</p> <p>11 A5193 INTO EVIDENCE.</p> <p>12 THE COURT: ANY OBJECTION?</p> <p>13 MR. BOIES: MAY I HAVE ONE MOMENT, YOUR HONOR?</p> <p>14 (PAUSE IN THE PROCEEDINGS.)</p> <p>15 MR. BOIES: NO OBJECTION, YOUR HONOR.</p> <p>16 THE COURT: ALL RIGHT. ADMITTED.</p> <p>17 (DEFENDANTS' EXHIBIT A5193 RECEIVED IN</p> <p>18 EVIDENCE)</p> <p>19 BY MR. MITTELSTAEDT:</p> <p>20 Q. IS THIS AN EXAMPLE OF YOUR STANDARDIZATION BUCKET?</p> <p>21 A. YES. EXACTLY.</p> <p>22 Q. COULD YOU JUST EXPLAIN IT QUICKLY?</p> <p>23 A. YES.</p> <p>24 THIS HONEYWELL HAD BEEN A SAP USER FOR A WHILE AND</p> <p>25 HAD ORACLE SYSTEMS IN HALF THE COMPANY, AND HAD MADE A DECISION</p>

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<p>1 TO STANDARDIZE, THIS PROCESS WHERE THEY GO ALL ON TO ONE TYPE</p> <p>2 OF SOFTWARE.</p> <p>3 SO, AGAIN, THAT DECISION IS INCREDIBLY EXPENSIVE FOR</p> <p>4 THE COMPANY. VERY DIFFICULT, TIME-CONSUMING, DISRUPTIVE. AND</p> <p>5 THEY WOULDN'T MAKE THAT DECISION WITHOUT -- SIMPLY BECAUSE OF</p> <p>6 TOMORROWNOW AND THE INFRINGING ACTS.</p> <p>7 Q. LET'S GO TO SLIDE 44.</p> <p>8 (SLIDE DISPLAYED ON SCREEN.)</p> <p>9 IS THIS A LIST OF THE CUSTOMERS THAT YOU EXCLUDED</p> <p>10 FOR A SIMILAR REASON, THE STANDARDIZATION?</p> <p>11 A. IT IS.</p> <p>12 Q. OKAY.</p> <p>13 SPECIFIC FUNCTIONALITY WAS ANOTHER ONE OF YOUR</p> <p>14 BUCKETS. AND THIS NEXT ONE, SLIDE 46, IS BASED ON AN ORACLE</p> <p>15 E-MAIL A6028.</p> <p>16 MR. MITTELSTAEDT: AND I MOVE THAT INTO EVIDENCE.</p> <p>17 THE COURT: ANY OBJECTION?</p> <p>18 (COUNSEL CONFER.)</p> <p>19 MR. BOIES: NO OBJECTION, YOUR HONOR.</p> <p>20 THE COURT: ADMITTED.</p> <p>21 (DEFENDANTS' EXHIBIT A6028 RECEIVED IN</p> <p>22 EVIDENCE)</p> <p>23 BY MR. MITTELSTAEDT:</p> <p>24 Q. WILL YOU EXPLAIN TO US --</p> <p>25 THE COURT: I DON'T KNOW WHERE THE NOISE IS COMING?</p>	<p>1 WOULD WALK US THROUGH HOW YOU ACTUALLY DID THE CALCULATION ONCE</p> <p>2 YOU DETERMINED THE NUMBER OF CUSTOMERS?</p> <p>3 A. YES.</p> <p>4 WHEN I LOOKED AT THE CUSTOMERS, I FOUND THAT THE</p> <p>5 TOTAL REVENUE WAS THE 703 MILLION, THE NUMBER RIGHT AT THE TOP</p> <p>6 THERE. THAT'S 703 MILLION IS THAT TOTAL. SO THIS IS REVENUE</p> <p>7 OF SAP AFTER THE TOMORROWNOW START DATE. SO THAT'S IMPORTANT.</p> <p>8 WE ARE ONLY LOOKING AT THE REVENUE THAT THEY GENERATED AFTER</p> <p>9 THE TOMORROWNOW START DATE.</p> <p>10 AND IF THAT WAS A CONTINUATION, IF THERE WAS SOME</p> <p>11 CONTINUATION OF WHAT THEY WERE DOING BEFORE THEN, SO THEY WERE</p> <p>12 ALREADY ON MAINTENANCE FOR A NUMBER OF PRODUCTS AND PAYING</p> <p>13 LET'S SAY HALF A MILLION DOLLARS A YEAR IN MAINTENANCE, AND</p> <p>14 THAT WOULD JUST CONTINUING, THAT SHOULDN'T BE ATTRIBUTED TO</p> <p>15 THIS BECAUSE THE SALE WAS MADE PRIOR. SO IT WOULD NOT BE</p> <p>16 AFFECTED BY WHAT WE ARE DOING HERE.</p> <p>17 SO, THAT 703 MILLION REFLECTS THE ADJUSTMENT FOR</p> <p>18 AFTER THE TOMORROWNOW START DATE AND NOT INCLUDING ANY OF THAT</p> <p>19 ONGOING REVENUE.</p> <p>20 Q. MR. CLARKE, LET ME JUST STOP YOU FOR A MINUTE.</p> <p>21 THE END DATE FOR THIS CALCULATION IS, I AM NOT SURE</p> <p>22 IF YOU SAID IT, IT'S THE SAME END DATE THAT MR. MEYER USES?</p> <p>23 A. ACTUALLY, I THINK THIS IS MORE LIKE 12/31/08. I AM PRETTY</p> <p>24 SURE THAT'S THE DATE WE USED.</p> <p>25 Q. IN ANY EVENT, THE TWO OF YOU, YOU AND MR. MEYER, HAVE</p>
Page 1630	Page 1632
<p>1 BY MR. MITTELSTAEDT:</p> <p>2 Q. WE ARE ALMOST DONE. WOULD YOU EXPLAIN TO US WHY YOU</p> <p>3 EXCLUDED THIS CUSTOMER?</p> <p>4 A. I WILL.</p> <p>5 ABITIBI IS A PAPER, PULP AND PAPER COMPANY. THERE</p> <p>6 WAS A PLAN FOR J.D. EDWARDS TO CREATE THAT FUNCTIONALITY, THE</p> <p>7 SOFTWARE SPECIFIC TO PULP AND PAPER OPERATIONS. IT WAS</p> <p>8 PROMISED, AS YOU CAN SEE, J.D. EDWARDS COMMITTED, BUT THEY</p> <p>9 NEVER DID IT.</p> <p>10 AND SO ABITIBI WAS CONCERNED THAT THEY WERE RUNNING</p> <p>11 LONGER AND LONGER ON THIS NONSPECIFIC SOFTWARE, DIDN'T DEAL</p> <p>12 WITH PULP AND PAPER OPERATIONS, AND THAT HE WAS LOOKING TO PULL</p> <p>13 ALL OF THAT OUT AND GO WITH SAP. AGAIN, COULD NOT BE RELATED</p> <p>14 TO TOMORROWNOW.</p> <p>15 Q. OKAY.</p> <p>16 SO BASED ON ALL THIS WORK, ALL THE REVIEW OF THE</p> <p>17 CUSTOMER INFORMATION, AND PLACING THE CUSTOMERS INTO VARIOUS</p> <p>18 BUCKETS, EITHER EXCLUSION OR INCLUSION, YOU REACHED SOME</p> <p>19 CONCLUSIONS ABOUT THE AMOUNT OF COMPENSATION SAP OWED TO -- SAP</p> <p>20 AND TOMORROWNOW OWED TO ORACLE, RIGHT?</p> <p>21 A. CORRECT.</p> <p>22 Q. AND LET'S LOOK FINALLY AT TWO SLIDES, SLIDE 53 TO START</p> <p>23 WITH.</p> <p>24 (SLIDE DISPLAYED ON SCREEN.)</p> <p>25 AS YOU DID FOR THE LOST SUPPORT PROFITS, IF YOU</p>	<p>1 CALCULATED THE INFRINGERS' PROFITS FOR THE SAME TIME PERIOD?</p> <p>2 A. YES. WE BOTH USE THE SAME TIME PERIOD. IT'S JUST THREE</p> <p>3 MONTHS LONGER, THAT'S ALL.</p> <p>4 Q. GO AHEAD.</p> <p>5 A. THE UNRELATED REVENUES, THAT WAS AN ACQUISITION THAT SAP</p> <p>6 MADE THAT'S NOT INCLUDED IN THIS CASE, SO I TOOK THAT OUT.</p> <p>7 AND SO THE REVENUES FOR THE EXCLUDED CUSTOMERS,</p> <p>8 THESE ARE ALL THE PEOPLE, ALL THE CUSTOMERS I EXCLUDED WERE</p> <p>9 675 MILLION. SO I SUBTRACT THAT BECAUSE THEY ARE NO LONGER</p> <p>10 INCLUDED. SO THE SUBTOTAL IS 13.7 MILLION.</p> <p>11 AND I GET TO DEDUCT THE EXPENSE; THAT'S THE</p> <p>12 APPROPRIATE THING TO DO. SO THAT'S THE REVENUE. YOU TAKE AWAY</p> <p>13 THE EXPENSE. THAT WILL BE THE PROFIT THAT THE INFRINGERS MADE.</p> <p>14 THE EXPENSES WERE 6 MILLION. THAT LEAVES SAP</p> <p>15 PROFITS TO BE DISGORGED OF 7.6 MILLION. AND TOMORROWNOW</p> <p>16 PROFITS WERE \$1 MILLION. YOU ADD THE 7.6 AND THE 1 MILLION AND</p> <p>17 YOU GET \$8.6 MILLION AS THE INFRINGERS' PROFITS.</p> <p>18 Q. AND FINALLY, LET'S END WHERE WE STARTED, SLIDE 54. AND IF</p> <p>19 YOU WOULD WALK US THROUGH THIS, PLEASE.</p> <p>20 (SLIDE DISPLAYED ON SCREEN.)</p> <p>21 A. THIS IS SIMPLY A SUMMARY OF EVERYTHING WE HAVE TALKED</p> <p>22 ABOUT SO FAR.</p> <p>23 SO IF YOU LOOK AT THE TOP, THIS IS -- IF YOU</p> <p>24 REMEMBER THE FIRST SLIDE THAT I SHOWED YOU, HAD TWO WAYS OF</p> <p>25 DOING IT AT THE TOP OR THE REASONABLE ROYALTY AT THE BOTTOM.</p>

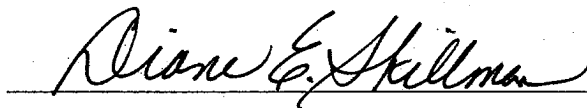
CERTIFICATE OF REPORTER

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