

EXHIBIT 2

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

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

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

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TEXT REMOVED - NOT RELEVANT TO MOTION

4 MR. McDONELL: THERE IS ONE NEW DEVELOPMENT, YOUR
5 HONOR, WHICH IS OVER THE WEEKEND, THE PLAINTIFFS PRODUCED
6 DEMONSTRATIVE SLIDES FOR THEIR DAMAGES EXPERT ALONG WITH CERTAIN
7 BACKUP MATERIALS FOR THEM. AND WHAT PLAINTIFFS HAVE DONE NOW IS
8 PRESENTED ALTERNATIVE APPROACHES TO MEASUREMENT OF THE
9 HYPOTHETICAL LICENSE VALUE OF DAMAGES, ONE THAT INCLUDES UPSELL
10 AND CROSS-SELL COMPUTATIONS THAT PRODUCES ONE NUMBER, AND AN
11 ALTERNATIVE SET OF SLIDES THAT EXCLUDES THE UPSELL AND
12 CROSS-SELL AND PRODUCES A -- A DIFFERENT AND LOWER NUMBER.

13 WE THINK THIS JUST CONFIRMS WHAT WE'VE BEEN SAYING
14 ALL ALONG, THAT THESE CROSS-SELL AND UPSELL SALE OPPORTUNITIES
15 HAVE BEEN INCLUDED IN THEIR FAIR MARKET VALUE LICENSE APPROACH
16 ALL ALONG, IN CONTRAVENTION OF YOUR ORDER THAT THEY SHALL NOT
17 USE THIS EVIDENCE IN SUPPORT OF ANYTHING, INCLUDING THE FAIR
18 MARKET VALUE MEASURE OF DAMAGES.

19 MR. PICKETT: WE DON'T.

20 THE COURT: OKAY. GO AHEAD.

21 MR. PICKETT: HERE -- HERE IS -- HERE IS WHY I SAY
22 THAT. AND LET ME BE CLEARER THAN I WAS FRIDAY AFTERNOON. WE
23 ARE NOT SEEKING ANY CHANGE IN ANY PRIOR ORDER. WE ARE COMPLYING
24 WITH ALL OF YOUR ORDERS REGARDING THE EVIDENCE OF LOST PROFITS
25 ON SOFTWARE SALES, ALSO KNOWN AS LOST CROSS-SELL/UPSELL SALES,

1 BOTH FOR THE LOST PROFIT MEASURES AND FOR THE FAIR MARKET VALUE
2 OF USE MEASURE.

3 HOWEVER -- AND THAT RULING, AS YOUR HONOR KNOWS, IS
4 BASED ON A FINDING THAT ORACLE -- WE DISAGREE WITH IT -- BUT
5 THAT ORACLE FAILED TO PRODUCE TIMELY THAT EVIDENCE.

6 HOWEVER, WE ARE INTENDING TO RELY ON THE BOARD MODEL
7 THAT MR. ELLISON JUST TESTIFIED ABOUT AS MR. LANIER WAS ASKING
8 QUESTIONS ON CROSS. SPECIFICALLY, IT'S DATA THAT'S CONTAINED
9 WITHIN PLAINTIFFS' EXHIBIT 615, AND I HAVE TWO PAGES -- OR THREE
10 PAGES, RATHER, FROM THAT. IT'S DATA. FRANKLY, IT'S NOT
11 TERRIBLY LEGIBLE, BUT I THINK IT WILL GIVE YOU A SENSE OF WHAT
12 I'M TALKING ABOUT.

13 (EXHIBIT PUBLISHED TO JURY.)

14 MR. PICKETT: AND I HAVE A COPY FOR COUNSEL.

15 YEAH, YOU CAN PUT THAT UP IF YOU WISH.

16 (EXHIBIT PUBLISHED TO JURY.)

17 MR. PICKETT: WHAT THIS IS, IS THIS IS GOING TO BE --
18 THIS IS, IN A SENSE, AN OFFER OF PROOF. BUT THIS IS A DOCUMENT
19 THAT MS. CATZ WILL BE TESTIFYING ABOUT. IT'S A DOCUMENT THAT
20 WAS PRODUCED TIMELY. IT WAS PRODUCED BEFORE THE DEPOSITIONS OF
21 MR. ELLISON, MR. PHILLIPS, MS. CATZ. FULLY PRODUCED, NO ISSUE
22 WITH RESPECT TO TIMELINESS AND WHAT IT SHOWS.

23 IT SHOWS THE DATA THAT WAS PRESENTED IN THAT BOARD
24 MODEL TO SUPPORT THE PEOPLESOFT ACQUISITION. AND THERE ARE
25 CERTAIN ASSUMPTIONS, NOT BASED, BY THE WAY, ON ANY INTERNAL DATA

1 BECAUSE IT WAS A HOSTILE TAKE-OVER, YOUR HONOR WILL RECALL. SO
2 THERE'S NO INSIDE INFORMATION. IT'S JUST PUBLICLY AVAILABLE
3 INFORMATION.

4 BUT IT IS THE BEST -- AND OUR EXPERT WILL SAY VERY,
5 VERY GOOD EVIDENCE OF WHAT WAS IN THE MINDS OF ORACLE IN LATE
6 2004 WITH RESPECT TO THE PEOPLESOFT ACQUISITION AND, THEREFORE,
7 WHAT WOULD HAVE BEEN IN THE MIND A FEW WEEKS LATER WHEN THERE
8 WAS A -- IN THE HYPOTHETICAL A NEGOTIATION IN JANUARY 2005 ABOUT
9 THIS PROPERTY.

10 NOW, THIS DOCUMENT IS NOT OBJECTED TO BY PLAINTIFFS
11 (SIC), EXCEPT FOR ONE LIMITED USE. THEY AGREE THAT THE
12 DOCUMENT.

13 THE COURT: BY DEFENDANTS.

14 MR. PICKETT: WHAT DID I SAY?

15 THE COURT: "OBJECTED TO BY PLAINTIFFS."

16 MR. PICKETT: IT'S TOO OFTEN I'M ON THE OTHER SIDE.

17 NOT OBJECTED TO BY SAP. THEY ACKNOWLEDGE THAT IT'S A
18 BUSINESS RECORD. THEY ACKNOWLEDGE THAT THE ASSUMPTIONS WITH
19 RESPECT TO THE MAINTENANCE REVENUES ARE -- ARE LEGITIMATE, CAN
20 BE USED BY OUR EXPERT, CAN BE USED BY THEIR EXPERT FOR THAT
21 MATTER. THAT'S ALL IN.

22 WHAT THEY DO OBJECT TO ARE FOUR LINES OF THIS THAT
23 HAVE TO DO WITH THE ADDITIONAL SALES OF APPLICATIONS -- OF
24 APPLICATION SOFTWELL (SIC) -- THE UPSELL IN THE VERNACULAR OF
25 THE CASE THAT ARE IN THIS DOCUMENT AND THAT ARE -- THE ONLY

1 THING USED BY OUR EXPERT BECAUSE WE'RE TALKING ABOUT
2 EXPECTATIONS.

3 THE ACTUAL SALES -- THE THING THAT STARTED THIS WHOLE
4 THING, THAT WASN'T PRODUCED ARE NOT RELEVANT. AND THAT'S THE
5 HANSON CASE AND OTHERS. THE -- THE NEGOTIATION'S NOT TO BE
6 BASED ON A HINDSIGHT EVALUATION OF WHAT HAPPENED. IT'S TO BE
7 BASED ON WHAT'S IN THE MIND OF THE PARTIES AT THE TIME OF
8 NEGOTIATION.

9 AND TO BE SORT OF CRYSTAL CLEAR ABOUT IT, YOUR HONOR,
10 THIS TYPE OF DATA WAS PRECISELY THE DATA THAT WE PUT IN TO THE
11 DECLARATION OF PAUL MEYER OUR DAMAGE EXPERT BACK WHEN THE
12 FIRST -- THE FIRST PARTIAL SUMMARY JUDGMENT MOTION WAS PRESENTED
13 TO YOUR HONOR. AND HE SAID I'VE GOT --

14 YOU KNOW, THERE'S A PROJECTION. AND A PROJECTION IS
15 DIFFERENT THAN ACTUAL SALES AFTER THE FACT. AND I'M GOING TO,
16 YOU KNOW, RELY ON PROJECTIONS. AND YOUR HONOR -- AND THEY WERE
17 CHALLENGING THIS WHOLE HYPOTHETICAL LICENSE NEGOTIATION
18 APPROACH, YOU'LL RECALL. YOUR HONOR SAID NO, THE HYPOTHETICAL
19 NEGOTIATION IS A VALUE OF USE. IT'S A LEGITIMATE MEASURE OF
20 DAMAGES, AND YOU REITERATED THAT IN AN ORDER, AUGUST 17, AS WELL
21 AND ACTUALLY OVERRULED THEIR OBJECTIONS TO THIS VERY EVIDENCE.

22 YOU OVERRULED AN OBJECTION LAST YEAR IN YOUR
23 JANUARY 28TH, 2010 RULING ON THIS WITH RESPECT TO THESE
24 PROJECTIONS. THIS IS WHY YOU CAN, I THINK ABSOLUTELY
25 LEGITIMATELY, GET INTO IT.

1 AND -- ONE LAST POINT -- IF THERE ARE ANY DOUBT ABOUT
2 THIS, DEFENDANTS HAVE REPEATEDLY OPENED THE DOOR TO THIS VERY
3 ISSUE OF WHAT WOULD BE IN THE MINDS OF ORACLE WITH RESPECT TO
4 UPSELL, NOT THE ACTUAL SALES AFTER THE FACT. WHAT'S IN THEIR
5 MIND WHEN THEY COME TO THE NEGOTIATION TABLE.

6 THEY DID IT IN THEIR OPENING STATEMENT IN TWO MAJOR
7 WAYS. FIRST, THEY PUT FORWARD OUR -- WE HAVE A -- BE VERY CLEAR
8 ABOUT IT. IF THE UPSSELL IS IN THE MIND OF ORACLE, OUR EXPERT
9 WEIGHS ALL THE INDICATIONS OF VALUE AND COMES OUT WITH A VALUE
10 FOR THE PEOPLESOFT LICENSE OF AT LEAST \$2 BILLION.

11 IF THE UPSSELL IS TAKEN OUT, AND IT'S ONLY
12 MAINTENANCE, THEN THE VALUE OF THE LICENSE IS DECREASED. IT
13 DECREASES ALL THE WAY DOWN TO 1.5 -- AT LEAST 1.5 BILLION. SO
14 KNOWING THAT THE \$2 BILLION FIGURE -- OUR \$2 BILLION FIGURE WAS
15 BASED ON THIS -- THE PROJECTION IN -- IN THE DOCUMENT 615,
16 KNOWING THAT IT INCLUDED UPSSELL, THE -- THE DEFENDANTS TELL THE
17 JURY THAT ORACLE'S GOING TO ASK FOR \$2 BILLION, QUOTE, BECAUSE
18 THEY SUPPOSEDLY THOUGHT A REALLY LARGE PERCENTAGE OF THEIR
19 PEOPLESOFT CUSTOMERS WERE GOING TO GO TO TOMORROWNOW AND THEN TO
20 SAP. AND THEN TO SAP. THAT'S THE CROSS-SELL. THAT'S AT
21 PAGE 412, LINE 13 TO 17 OF THE TRANSCRIPT.

22 AND SO THAT ALONE SHOULD BE ENOUGH. BUT IT GOT
23 WORSE. BECAUSE EVEN LATER IN THE OPENING STATEMENT, THERE WAS A
24 REFERENCE TO MR. HENLEY, ORACLE'S CHAIRMAN, ABOUT WHICH THEY
25 SAID THE EVIDENCE WAS GOING TO BE ABOUT SWITCHING FROM

1 PEOPLESOFT TO SAP AND THE -- AND THE HIGH EXPECTATIONS -- THIS
2 IS A QUOTE -- HIGH EXPECTATIONS THAT TOMORROWNOW IS GOING TO
3 TAKE AWAY A LOT OF VALUABLE BUSINESS, MEANING THE SWITCH -- IT'S
4 CALLED UPSWITCH OR UPSELL -- FROM PEOPLESOFT TO -- TO SAP.

5 AND THEN EVEN TODAY -- EVEN TODAY, WE GET IT AGAIN.
6 WE HAVE EXHIBIT 4089 FROM MR. HENLEY TO MS. CATZ. AND THE
7 QUESTION WAS, WHAT WAS THE CHAIRMAN'S THINKING AT THE TIME.
8 THEY GET THE ISSUE. THEY UNDERSTAND THAT IT'S ABOUT WHAT'S IN
9 ORACLE'S MIND WHEN IT COMES TO THE NEGOTIATION TABLE. AND THE
10 QUESTION WAS, WHAT WAS MR. HENLEY'S THINKING AT THE TIME WITH
11 RESPECT TO, QUOTE, A SWITCH FROM PEOPLESOFT TO SAP.

12 THAT'S OUT OF THE MOUTHS OF SAP'S LAWYERS, REPEATED
13 QUESTIONS ABOUT HOW MANY CUSTOMERS SAP COULD GET, NOT
14 TOMORROWNOW.

15 AND THEN FINALLY, REFERENCE TO THE BOARD MODEL ITSELF
16 IN WHICH MR. ELLISON TESTIFIED THAT WE PREPARED TO THE BOARD A
17 MODEL TO JUSTIFY OUR \$11 BILLION. WE HAVE TO -- WE HAVE CERTAIN
18 EXPECTATIONS ABOUT THE PEOPLESOFT ACQUISITION. THOSE VERY SAME
19 EXPECTATIONS ARE WHAT IS IN THE MIND OF SAP -- OF ORACLE WHEN IT
20 COMES TO THAT NEGOTIATING TABLE. AND, AGAIN, IT HAS NOTHING TO
21 DO WITH AFTER-THE-FACT SALES THAT YOUR HONOR AND MAGISTRATE
22 JUDGE LAPORTE FOUND DIDN'T COME IN.

23 IT'S JUST WHAT'S IN THEIR MIND LATE 2004,
24 JANUARY 2005. THAT'S ALL WE'RE RELYING ON, THIS SINGLE SET OF
25 DATA.

1 MR. McDONELL: YOUR HONOR, COUPLE OF THINGS. FIRST
2 OF ALL IN TERMS OF THE MENTION OF THESE VARIOUS THINGS COUNSEL
3 JUST TALKED ABOUT, THOSE WERE GENERIC; NONE OF THEM WERE IN THE
4 CONTEXT OF THIS PRECISE ISSUE, UPSELL AND CROSS-SELL. THEY
5 REALLY DID NOT PRESENT THAT ISSUE IN ANY WAY, SHAPE, OR FORM.

6 THERE CERTAINLY IS EXPECTATION EVIDENCE ON BOTH SIDES
7 THAT IS APPROPRIATE IN THIS CASE. WHAT WE'RE TALKING ABOUT HERE
8 NOW IS ENFORCING THE CONSEQUENCE OF THE SANCTIONS ORDER THAT
9 RESULTED IN YOUR ORDER ADOPTING IT AND RESULTED IN THE ORDERS ON
10 MOTIONS IN LIMINE.

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

15 (EXHIBIT PUBLISHED TO JURY.)

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

17 (EXHIBIT PUBLISHED TO JURY.)

18 MR. McDONELL: NO.

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

21 (EXHIBIT PUBLISHED TO JURY.)

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

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

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

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

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

18 MAY I USE YOUR MICROPHONE, MR. PICKETT?

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

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

1 ACQUISITIONS.

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

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

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

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

13 MR. McDONELL: YES. SO --

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 THE COURT: AFTER THE INFRINGEMENT BEGAN.

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

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

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

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

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

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

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

7 THE COURT: OKAY.

8 MR. McDONELL: WE HAD NEITHER.

9 THE COURT: OKAY. MR. --

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

12 THE COURT: -- SHAKING HIS HEAD.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

6 MR. McDONELL: NO.

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

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

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

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

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

1 TWO.

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

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

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

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

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

19 MR. PICKETT: I NEED TO CORRECT --

20 THE COURT: EXCUSE ME. EXCUSE ME.

21 MR. PICKETT: SORRY.

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

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

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

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

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

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

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

1 AGAIN.

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

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

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

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

TEXT REMOVED - NOT RELEVANT TO MOTION

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CERTIFICATE OF REPORTER

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

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



DIANE E. SKILLMAN, CSR, RPR, FCRR

TUESDAY, NOVEMBER 9, 2010