

# EXHIBIT S

C-07-1658 PJH (EDL)

ORACLE CORP. V. SAP AG, et al.

TRANSCRIPT OF AUDIO RECORDING OF CONFERENCE

DATED NOVEMBER 17, 2009, HELD BEFORE  
MAGISTRATE JUDGE ELIZABETH D. LAPORTE

Transcribed by: Freddie Reppond

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1 MS. HANN: What Mr. Cowan just said is  
 2 actually more detailed than we had previously heard,  
 3 particularly the specific request to de-designate the  
 4 damages amount from HC to C. The protective order has a  
 5 procedure for exactly this issue. If you have something  
 6 you think the other side should de-designate, it --  
 7 THE COURT: Well, I think I've indicated in  
 8 the pas t-- I know I've said [inaudible] in this one  
 9 [inaudible] all the decision-makers know the amount of  
 10 damages. And, furthermore, now you're getting close to  
 11 trial. I think you know that Judge Hamilton [inaudible]  
 12 MS. HANN: We're definitely familiar with the  
 13 change.  
 14 THE COURT: [inaudible]  
 15 MS. HANN: No, we're definitely familiar with  
 16 it, Your Honor, but this is literally the first time  
 17 that we've heard specifically that they want the number  
 18 de-designated. So I think we can talk about that  
 19 off-line.  
 20 THE COURT: I'm inclined to give it to you,  
 21 but why don't you meet and confer about it. There might  
 22 be some nuances I don't -- I don't know exactly  
 23 [inaudible].  
 24 MR. COWAN: Right. We're fine with it being  
 25 confidential. We just need to be able to communicate it

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1 to a broader audience within our clients.  
 2 MS. HANN: Thank you.  
 3 MR. HOWARD: Hi, Your Honor. I think the next  
 4 issue is ours, which is on November 3rd, we learned from  
 5 Defendant's counsel that they had uncovered seven new  
 6 customers who we were not previously aware of. And they  
 7 appear to fall within the definition of the agreed  
 8 relevant customers which were involving SAP sales to  
 9 TomorrowNow customers after acquisition of TomorrowNow.  
 10 Since then, we've followed up. We've tried to  
 11 learn more about these and really have not received much  
 12 information about them and appears they're refusing to  
 13 provide the financial backup regarding those customers.  
 14 And so we would just ask that they be required to live  
 15 up to the agreement between the parties and produce all  
 16 the information about these customers. And, further, I  
 17 think we'll probably need to address that at some point  
 18 in our expert reports, because they were due yesterday.  
 19 And so, obviously, this information has not been built  
 20 into that.  
 21 MR. MCDONNEL: Your Honor, the broader  
 22 background of this is early in the case there was a  
 23 discussion and an effort by Plaintiffs to get discovery  
 24 of the so-called safe-passage customers. There's been a  
 25 lot of discussion about the fact that there was a

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1 safe-passage program pursuant to which SAP was looking  
 2 to recruit Oracle customers to leave Oracle and come to  
 3 SAP. But through a lot of discussion, that got reduced  
 4 down to a smaller category of those customers that  
 5 actually made a purchase of SAP software, you know -- as  
 6 something to do with the safe-passage program and they  
 7 were also a TomorrowNow customer at the time.  
 8 So we put a lot of work into this. And it's  
 9 very difficult. They're large companies. A lot of  
 10 changes in the ownership, a lot of affiliates. And  
 11 you'd be surprised at how the records the company keeps  
 12 aren't just pull off the shelf and it tells you the  
 13 whole story immediately. So we made very -- very strong  
 14 good-faith efforts to try to come up with this list --  
 15 THE COURT: Okay. Let me say -- I think I  
 16 read the -- and what I understand is that these  
 17 additional people are people you don't know whether they  
 18 took one of the -- out of the bundle of licenses the  
 19 company had bought for its subsidiaries or affiliates,  
 20 et cetera, whether they used [inaudible]  
 21 MR. MCDONNEL: Our belief is that the  
 22 TomorrowNow customer, a corporation, did not purchase  
 23 SAP software. But there were some hints in the  
 24 custodian documents produced by Oracle that maybe some  
 25 of these customers went on a parent's license, without

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1 buying it, you know, but just piggy-backed on a parent's  
 2 license. We raise this to be transparent, because it's  
 3 an issue we don't think we should have to produce this.  
 4 It's going to be burdensome if we have to go further --  
 5 THE COURT: -- in other words, my question was  
 6 for Oracle. There would be no new purchase. Now, I  
 7 guess you could argue that if they hadn't given it to  
 8 this subsidiary, they'd give it somebody else. But  
 9 presumably they purchased the total number they were  
 10 going to get and they were only going to be allowed that  
 11 number. So I think --  
 12 MR. HOWARD: Right. But we lost that  
 13 customer, right? So those are lost profits to us  
 14 regardless of whether they have a new purchase with SAP  
 15 or not. If TomorrowNow -- and the reason why they left  
 16 Oracle was because of TomorrowNow and then they end up  
 17 at SAP, we've still lost that, correct?  
 18 MR. MCDONNEL: But they lost -- they lose  
 19 customers every day anyway; and the question here is how  
 20 far are we going to go down this road of tangential,  
 21 immaterial.  
 22 THE COURT: Well, I guess my answer to this it  
 23 seems much less directly relevant, because you could  
 24 have lost them for a different reason here. It's not as  
 25 clearly relevant and I don't [inaudible]. That's the

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1 issue. I mean it's only -- it's a fairly small number  
 2 of additional, so I'm not -- seven customers -- I guess,  
 3 you know, I don't have -- I mean I can see requiring you  
 4 to produce some more information.  
 5 MR. MCDONNEL: It does implicate, then, a  
 6 whole -- everybody's fighting over what it all means.  
 7 In our view you should draw the -- you got to cut it off  
 8 somewhere. And we feel we've gone way past the extra  
 9 mile on this one. And we're surfacing this. We did  
 10 want to get it out on the table. We did want --  
 11 THE COURT: Well, the most I can tell you is  
 12 that I think it's -- I agree with the Defendant that  
 13 it's of a lot less relevance than the original list  
 14 because I don't think it's as damaging. It's arguably  
 15 -- arguably slightly damaging. I think it's getting  
 16 into a more nebulous category. And so I probably  
 17 wouldn't -- I mean if it's going to be very burdensome,  
 18 I wouldn't order very much discovery on it. And that's  
 19 the most I can say. So I mean I'm not saying you  
 20 should -- you automatically get nothing. I feel there's  
 21 a proportionality thing, which I don't have enough. But  
 22 I can tell you I view it as less important and less  
 23 relevant than the others.

24 MR. HOWARD: And, Your Honor, I appreciate  
 25 that guidance. Our problem is we -- they haven't given

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1 us any information for us to even evaluate how damaged  
 2 we've been or anything like that.  
 3 MR. MCDONNEL: But we have. We've told them  
 4 we've searched. And we were unable to determine from  
 5 central records, which is what we're all looking at on  
 6 these targeted search requests, that this customer --  
 7 the TomorrowNow customer -- made any additional purchase  
 8 and that there was this evidence that maybe they had  
 9 piggy-backed on an affiliate's license. But if the  
 10 affiliate had already made the purchase, we think it's  
 11 just going beyond the line. We've got so much other  
 12 stuff to do, as we're all talking about here today.  
 13 THE COURT: Well, as I say, I tend to agree --  
 14 I just don't see it as a bright line, as you're arguing  
 15 it. It's a relationship proportionality. I don't think  
 16 it has a whole lot of relevance, but it doesn't have  
 17 zero. So I don't know whether there's something that  
 18 could be different that would matter. I mean you've  
 19 given them the names. And I guess -- I don't why  
 20 someone can't just call them up and find out if they --  
 21 you know -- informally. I don't know who they are, but  
 22 I'm not going to spend any more time.  
 23 I'm going to take a five-minute recess and,  
 24 number one, try to figure out how many issues are left.  
 25 And it's already after 3:00 o'clock. [inaudible] And

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1 I'm not going to let you file a motion on everything, so  
 2 you should also be thinking about that.  
 3 MR. HOWARD: Do we still have twenty minutes,  
 4 Your Honor, remaining?  
 5 THE COURT: You know, roughly that. You know.  
 6 If you can eliminate issues, I'm willing to give you a  
 7 half hour. I just want to -- but I'm not ruling then to  
 8 [inaudible]. I want you to be able to take the guidance  
 9 I've been giving you and resolve these things.  
 10 MR. COWAN: Your Honor, to help us in the  
 11 conversation we're going to have while you're out, I  
 12 interpret what you said as, at least as from the Court's  
 13 perspective, being the volume of materials that you need  
 14 to resolve once we've filed these motions but in terms  
 15 of the quantity. Is it also the number of issues?  
 16 THE COURT: Yes, the number of issues  
 17 primarily. I mean I don't -- you can shrink the ratio  
 18 to where you're ready to tell me anything about the  
 19 dispute and I still have to decide it and then I can't  
 20 do it.  
 21 MR. COWAN: Fair enough.  
 22 THE COURT: Which is somewhat what this filing  
 23 looks like, you know. So, as you know, I like to know a  
 24 fair amount of the dispute before I decide it in a  
 25 formal way. And if I'm going to do that, there's going

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1 to be a limited number of things I will decide, because  
 2 I can't decide them all in time. Otherwise, I hold you  
 3 up. So, you know, if you want ten minutes to talk about  
 4 them -- how much time do you want? I'm happy to take a  
 5 longer recess, if you think --  
 6 MR. HOWARD: Five minutes is fine with us,  
 7 Your Honor.  
 8 THE COURT: Okay.  
 9 MR. COWAN: Okay. I think we have made some  
 10 progress. We have agreed that on the motions that are  
 11 due on December 11th that each party would have,  
 12 assuming the Court agrees, three issues, thirty pages.  
 13 Two of those issues have to be identified today; and  
 14 then the one remaining issue could be identified among  
 15 counsel and included in that motion before December  
 16 11th.  
 17 That leaves us kind of a placeholder for those  
 18 things that are still hanging that we can't articulate  
 19 the nature of the problem yet, if any. And I think the  
 20 Court's agreeable to that. We really have one open  
 21 issue.  
 22 THE COURT: So one open issue among --- but  
 23 that's something that's in this --  
 24 MR. COWAN: Well, we've put a placeholder, for  
 25 example, for what we call future discovery disputes

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STATE OF CALIFORNIA )  
COUNTY OF SAN FRANCISCO )

CERTIFICATE OF REPORTER/TRANSCRIBER

I, the undersigned, a Shorthand Reporter and licensed Notary Public, do hereby certify that the above referenced recording was transcribed by me and that this transcript is a true record of that recording.

IN WITNESS WHEREOF I have hereunto set my hand on this 20<sup>th</sup> of November 2009 .



FREDDIE REPPOND