

EXHIBIT I

1 ONE CONCRETE FACT ABOUT THE VALUE OF IT. YOU DON'T HEAR A
 2 MENTION OF A NUMBER, YOU DON'T HEAR MENTION OF A VALUATION.
 3 THE SECOND POINT IS EXACTLY WHAT YOUR HONOR
 4 FORESHADOWED IN OUR CONFERENCE LAST WEEK, THAT PLAINTIFFS WOULD
 5 TAKE THIS TOO FAR. IT MAY BE THAT YOUR HONOR NEEDS TO SEE THE
 6 OPENING AND SEE WHAT THEY DO TO UNDERSTAND THIS, TO APPRECIATE
 7 IT. OF THESE 81 SLIDES, 79 OF THEM RELATE TO SAP STATE OF
 8 MIND, WHEN SAP STATE OF MIND IS NOT A DISPUTED ISSUE IN THIS
 9 CASE.
 10 SO IT MAY JUST BE THAT WE ARE ALERTING YOUR HONOR TO
 11 A VERY SIGNIFICANT ISSUE HERE BECAUSE THEY WILL BE TAKING THIS
 12 TOO FAR.
 13 THIRDLY, THEIR PRESENTATION OF IT FOR AN OPENING
 14 STATEMENT IS EXTRAORDINARILY ARGUMENTATIVE. THEY ARE GOING TO
 15 SAY THAT SAP'S CHOICE TO STEAL, WHEN WHAT WE HAVE STIPULATED TO
 16 IS COPYRIGHT INFRINGEMENT, AN ACTION THAT HAS NO INTENT ELEMENT
 17 AT ALL REQUIRED, OR IT CAN BE PROVEN WITHOUT PROVING INTENT AS
 18 YOUR HONOR DETERMINED ON SUMMARY JUDGMENT.
 19 SO WHAT SAP STIPULATED TO WAS THAT VICARIOUS
 20 LIABILITY OWNERSHIP CONTROL; NO STATE OF MIND. IT STIPULATED
 21 TO CONTRIBUTORY LIABILITY. UNDER YOUR HONOR'S RULING ON
 22 SUMMARY JUDGMENT, THEY SHOULD HAVE KNOWN, THEY DIDN'T STOP IT.
 23 THIS IS NOT A CASE OF INTENTIONAL CONDUCT AS FAR AS SAP GOES.
 24 THERE'S ACTUALLY NO DISPUTES IN THIS CASE FOR TRIAL ABOUT
 25 INTENT.

1 NO, THEY CAME UP WITH A PHRASE -- THEY ATTACHED IT TO THEIR
 2 PURPORTED STIPULATION: REASONABLY SHOULD HAVE KNOWN. THAT'S
 3 NOT YOUR HONOR'S RULING. THAT'S NOT THE NINTH CIRCUIT MODEL
 4 INSTRUCTION.
 5 THE COURT: IT IS KNEW OR SHOULD HAVE KNOWN.
 6 MR. PICKETT: IT'S KNOW OR HAD REASON TO KNOW.
 7 THE COURT: HAD REASON TO KNOW.
 8 MR. LANIER: TO KNOW OF SOMEONE ELSE'S CONDUCT --
 9 THE COURT: LOOK, I AM GOING TO GIVE A LOT OF LEEWAY
 10 TO BOTH SIDES TO TRY THE CASE AS LONG AS YOU DON'T RUN AFOUL OF
 11 ANY OF MY PRETRIAL RULINGS.
 12 WE TALKED ABOUT THIS LAST WEEK. I THINK THAT ORACLE
 13 IS ENTITLED TO USE SOME OF THIS EVIDENCE IN ARGUMENT FOR
 14 CONTEXT. MOREOVER, I TOTALLY AGREE THAT THERE IS NO PREJUDICE
 15 TO SAP GIVEN THAT SAP HAS NOW STIPULATED TO LIABILITY.
 16 THE JURY HAS ALREADY BEEN TOLD THAT -- I THINK
 17 MR. MITTELSTAEDT USED THE WORD "WRONGFUL CONDUCT". THEY DID
 18 THIS WRONG. WHAT I AM CONCERNED ABOUT, THOUGH, IS THE JURY
 19 BEING CONFUSED ABOUT WHETHER OR NOT THERE WAS CRIMINAL CONDUCT.
 20 I THINK THAT THAT IS VERY IMPORTANT GIVEN WHAT I
 21 KEEP READING IN THE NEWSPAPERS THAT THAT IS CLEAR THROUGHOUT
 22 THE COURSE OF THIS TRIAL. AND I THINK THAT'S PROBABLY WHAT YOU
 23 WERE SPEAKING TO WITH REGARD TO MY USE OF THE WORD "VIOLATION"
 24 AND I THINK FROM SOME OF THE THINGS THAT WE READ AND HEARD FROM
 25 THE JURORS THAT THAT'S SOMETHING WE NEED TO BE CONCERNED ABOUT.

1 THIS ENTIRE PRESENTATION CHARACTERIZING IT AS
 2 STEALING, THE CHOICE TO VIOLATE THE LAW, ALL OF THAT TALKS
 3 ABOUT AN ISSUE THAT IS NO LONGER IN DISPUTE. THAT'S
 4 FUNDAMENTALLY OUR ISSUE. IT DOES IT IN A HIGHLY ARGUABLE WAY.
 5 IT MIGHT BE APPROPRIATE FOR CLOSING IF THERE'S EVIDENCE, IT'S
 6 NOT APPROPRIATE FOR OPENING.
 7 MR. PICKETT: FIRST OF ALL, AS TO INTENT, LET'S GET
 8 THAT ONE TEED UP NOW. YOUR HONOR ISSUED AN ORDER ON THIS. YOU
 9 SAID AN ELEMENT WAS KNOWLEDGE OR HAD REASON TO KNOW. AND THAT
 10 IS THE SCIENTER ELEMENT THAT WE ARE RELYING ON. AND WE, I
 11 THINK, ARE FREE TO --
 12 THE COURT: IS KNOWLEDGE AND HAVING REASON TO KNOW
 13 TANTAMOUNT TO INTENT TO STEAL?
 14 MR. PICKETT: YES. IT'S KNOWING INFRINGEMENT.
 15 THE COURT: IS IT THE SAME AS INTENTIONAL THEFT?
 16 AND HAVE YOU INDEED USED THAT CHARACTERIZATION OF THEFT?
 17 MR. PICKETT: I THINK -- PROBABLY. IT IS CERTAINLY
 18 A WORD I USE WHEN I TALK ABOUT THE CASE BECAUSE IF YOU
 19 KNOWINGLY TAKE SOMEONE'S PROPERTY AND YOU HAVE THE SCIENTER
 20 ELEMENT IN THERE, IT STRIKES ME THAT IT IS NOT ONLY A UNLAWFUL
 21 TAKE, IT'S AN UNLAWFUL KNOWING TAKING WHICH EQUATES TO STEALING
 22 SOMEONE'S PROPERTY, THEFT OF SOMEONE'S PROPERTY.
 23 IT IS, IN A COLLOQUIALLY WAY, I THINK EXACTLY WHAT'S
 24 GOING ON. WHEN THEY SAY THERE IS NO INTENT ELEMENT, YOUR HONOR
 25 HAS ALREADY RULED ON THIS. THERE IS INTENT. THEY WANT TO SAY,

1 MY ONLY CONCERN IN THIS IS THE USE OF THE WORD
 2 "THEFT". THIS IS NOT A THEFT CASE. THIS IS AN INFRINGEMENT
 3 CASE. THE WORDS ARE TERMS OF ART. AND I AGREE THAT THAT'S
 4 MORE ARGUMENTATIVE THAN ACCURATE.
 5 SO, I AM GOING TO -- I DON'T WANT YOU TO USE THE
 6 WORD "THEFT" THROUGHOUT THE COURSE OF THE OPENING STATEMENT.
 7 BUT OTHERWISE, I AGREE WITH THE THREE CATEGORIES. I THINK YOU
 8 CAN PUT ON SOME EVIDENCE AS LONG AS IT GOES TO THE QUESTIONS
 9 THAT YOU'VE RAISED WITH RESPECT TO HOW THE DAMAGES ARE TO BE
 10 VALUATED AND PROVIDE SOME CONTEXT. AND I THINK THAT THAT'S --
 11 SAP'S IN THAT POSITION AND THAT'S HOW IT IS GOING TO HAVE TO
 12 BE.
 13 MR. LANIER: WE UNDERSTAND, YOUR HONOR.
 14 THE COURT: TAKE THE WORD "THEFT" OUT AND I'M FINE
 15 WITH WHAT YOU'RE DOING.
 16 MR. LANIER: THE SECOND OBJECTION WE HAD TO WHAT
 17 THEY PRESENTED, AND AGAIN, IT MIGHT MATTER MORE IF THEY PRESENT
 18 WITNESSES SUCH AS THEIR EXPERT PAUL PINTO, ET CETERA. AGAIN,
 19 IT SEEMS CLEAR WE HAVEN'T HEARD IT YET, BUT IT SEEMS CLEAR THEY
 20 INTEND TO PRESENT EVIDENCE ABOUT DEVELOPMENT COSTS AND COSTS
 21 THAT WERE AVOIDED, AN ISSUE THAT WE THINK YOUR HONOR'S RULINGS
 22 NOW REPEATEDLY HAVE PRETTY WELL FORECLOSED. WE DON'T THINK WE
 23 NEED TO HEAR THE EXPERT ON SAY DEVELOPMENT COSTS OR OUR TWO
 24 RESPONSIVE EXPERTS. THEY SHOULDN'T BE IN THIS CASE.
 25 THE COURT: IT'S NOT PART OF THE CASE.

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:

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A P P E A R A N C E S (CONT'D.)

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MICHAEL A. PHARO
ALAN RUFFIER
DAVID SCHLAIFER

--000--

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1 (PROCEEDINGS ON PAGES 297 THROUGH 312 ARE UNDER SEAL.
2 THE UNSEALED TRANSCRIPT RESUMES ON PAGE 313.)
3
4 * * * * *
5 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE
6 OF THE JURY IN OPEN COURT:)
7 THE COURT: ALL RIGHT. BE SEATED.
8 ALL RIGHT. GOOD MORNING, LADIES AND GENTLEMEN OF THE
9 JURY.
10 PLEASE BE SEATED.
11 (OFF-THE-RECORD DISCUSSION.)
12 THE COURT: ALL RIGHT. WE'RE READY TO BEGIN OUR
13 FIRST DAY OF TRIAL THIS MORNING. AND NOW THAT YOU ARE THE JURY

14 IN THE CASE, IT IS MY DUTY TO INSTRUCT YOU ON THE LAW.
15 THERE ARE PRELIMINARY INSTRUCTIONS THAT I AM ABOUT TO
16 GIVE YOU THAT YOU WILL NEED IN ORDER TO BE ABLE TO APPRECIATE
17 THE EVIDENCE THAT YOU'RE GOING TO BE RECEIVING OVER THE NEXT
18 COUPLE OF DAYS.
19 NOW YOU MUST NOT INFER FROM THE INSTRUCTIONS OR FROM
20 ANYTHING THAT I MIGHT SAY OR DURING THE COURSE OF THE TRIAL AS
21 INDICATING THAT I HAVE AN OPINION REGARDING THE EVIDENCE OR WHAT
22 YOUR VERDICT SHOULD BE.
23 IT IS YOUR DUTY TO FIND THE FACTS FROM ALL OF THE
24 EVIDENCE IN THE CASE, AND TO THOSE FACTS, YOU WILL APPLY THE LAW
25 AS I GIVE IT TO YOU. YOU MUST FOLLOW THE LAW AS I GIVE IT TO

I N D E X

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E X H I B I T S

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1 YOU, WHETHER YOU AGREE WITH IT OR NOT. AND YOU MUST NOT BE
2 INFLUENCED BY PERSONAL LIKES, OR DISLIKES, OPINIONS, PREJUDICES,
3 OR SYMPATHY. THAT MEANS THAT YOU MUST DECIDE THE CASE SOLELY ON
4 THE EVIDENCE BEFORE YOU. YOU WILL RECALL THAT YESTERDAY, YOU
5 TOOK AN OATH TO DO EXACTLY THAT.
6 AND IN FOLLOWING MY INSTRUCTIONS, YOU MUST FOLLOW ALL
7 OF THEM AND NOT SINGLE OUT SOME AND IGNORE OTHERS. THEY ARE ALL
8 EQUALLY IMPORTANT.
9 NOW, TO HELP YOU FOLLOW THE EVIDENCE, I WILL GIVE YOU
10 A BRIEF SUMMARY OF WHO THE PARTIES ARE AND WHAT THEIR POSITIONS
11 ARE.
12 AS I EXPLAINED YESTERDAY, THERE ARE THREE PLAINTIFFS,
13 ORACLE U.S.A., INCORPORATED, WHICH I REFER TO AS "ORACLE
14 U.S.A."; ORACLE INTERNATIONAL CORPORATION, WHICH WE WILL REFER
15 TO AS "ORACLE INTERNATIONAL"; AND SIEBEL SYSTEMS, INCORPORATED,
16 WHICH WE WILL REFER TO AS "SIEBEL SYSTEMS."
17 TOGETHER, THESE THREE ENTITIES COLLECTIVELY WILL BE
18 REFERRED TO AS EITHER "ORACLE" OR "THE PLAINTIFFS." THERE ARE
19 THREE DEFENDANTS IN THIS CASE. SAP AG, WHICH WILL BE REFERRED
20 TO BY THAT NAME; SAP AMERICA, INCORPORATED, WHICH I WILL REFER
21 TO AS "SAP AMERICA"; AND TOMORROWNOW, INCORPORATED, WHICH I WILL
22 REFER TO AS SIMPLY "TOMORROWNOW."
23 COLLECTIVELY, THESE DEFENDANTS WILL BE REFERRED TO AS
24 EITHER DEFENDANTS OR "SAP" -- WILL COLLECTIVELY BE REFERRED TO
25 SIMPLY AS "DEFENDANTS."

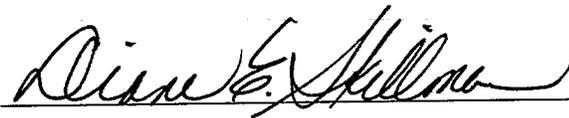
CERTIFICATE OF REPORTER

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.



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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.)	
)	
SAP AG, ET AL.,	)	PAGES 480 - 640
)	
DEFENDANTS.	)	OAKLAND, CALIFORNIA
	)	THURSDAY, NOVEMBER 4, 2010

(PAGES 485 THROUGH 491 ARE UNDER SEAL AND BOUND SEPARATELY)

TRANSCRIPT OF PROCEEDINGS

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1 OF BUSINESS, THEY STAY WITH YOU.
 2 Q. LET'S GO TO THE SECOND REASON THAT YOU LISTED TO THE
 3 INVESTORS AND ANALYSTS, "LARGER APPLICATIONS, R&D BUDGET AND
 4 ACCELERATED INNOVATION." WHAT DID YOU MEAN BY THAT?
 5 A. SO THESE CUSTOMERS ARE PAYING YOU EACH YEAR TO MAINTAIN THE
 6 SOFTWARE AND INVEST IN IT. SO LIKE I SAID EARLIER, THE MORE
 7 CUSTOMERS YOU HAVE, THAT MEANS MORE MONEY COMING IN BECAUSE
 8 THEY'RE PAYING ON A EITHER -- YEARLY BASIS.
 9 NORMALLY YOU TAKE THAT, AND THAT'S WHAT YOU USE TO
 10 IMPROVE THE PRODUCT. SO THE MORE CUSTOMERS YOU HAVE, THE BIGGER
 11 R & D BUDGET YOU CAN HAVE, THE MORE DEVELOPERS YOU CAN HAVE.
 12 THE MORE DEVELOPERS, THE MORE INNOVATION. SO THAT'S ANOTHER WAY
 13 TO CATCH UP WITH A LARGE COMPETITOR IF YOU HAVE MORE MONEY
 14 COMING IN TO PUT IN RESEARCH AND DEVELOPMENT. BECAUSE OF ALL
 15 THOSE CUSTOMERS, YOU CAN THINK OF THINGS AND FUND DEVELOPMENT IN
 16 A WAY YOU COULDN'T BEFORE.
 17 Q. THIRD REASON FOR THE PEOPLESOFT ACQUISITION STRONGER,
 18 "COMPETITIVE POSITIONING." WHAT DID YOU MEAN BY THAT?
 19 A. WELL, WHEN THESE CUSTOMERS ARE MAKING A DECISION ON A
 20 SOFTWARE PARTNER TO PUT IN A NEW FINANCIAL ACCOUNTING SYSTEM,
 21 FOR INSTANCE, OR MANUFACTURING SYSTEM, THIS IS A CAREER BET.
 22 YOU DON'T PUT THESE SYSTEMS IN AND CHANGE YOUR MIND SIX MONTHS
 23 LATER. IT MAY TAKE YOU TWO TO THREE YEARS TO GET THEM FULLY
 24 INSTALLED, AND THEN YOU WILL BE LIVING WITH THAT SOFTWARE
 25 PARTNER FOR THE NEXT 15, 20 YEARS.

1 MONEY IS COMING INTO US EVERY YEAR. AND YOU TAKE THAT MONEY,
 2 AND THAT'S WHAT YOU USE TO PUT IN RESEARCH AND DEVELOPMENT TO
 3 FIGURE OUT WAYS TO MAKE THE PRODUCT BETTER.
 4 SO LONG AS THAT'S IMPROVING AND INCREASING, THAT'S
 5 HOW THE PRODUCTS GET BETTER.
 6 Q. FIFTH REASON, "ACCRETIVE TRANSACTION FROM OPERATIONS TO
 7 ORACLE'S SHAREHOLDERS." WHAT DOES THAT MEAN?
 8 A. SO WHAT THE "ACCRETIVE" MEANS, IN THIS CONTEXT ANYWAY, IS
 9 THAT THERE ARE SOME ACQUISITIONS THAT ON DAY ONE WHEN YOU BUY
 10 THEM, BECAUSE YOU'RE LOSING MONEY, THEY ACTUALLY YOU MAKE LESS
 11 MONEY OVERALL. AND THEY ARE WHAT'S CALL DILUTIVE TO YOUR
 12 EARNINGS.
 13 BUT THIS ONE WAS ACCRETIVE, WHICH MEANS BECAUSE IT
 14 PROFITABLE AND BECAUSE IT'S A LARGE CUSTOMER BASE WITH ALL THAT
 15 RECURRING REVENUE, ON DAY ONE, WE ACTUALLY MAKE MONEY WITH THIS
 16 COMPANY. THEY ADD TO OUR EARNINGS. SO THE NUMBER YOU REPORT TO
 17 THE PUBLIC, TO YOUR SHAREHOLDERS, WILL BE HIGHER NOW ON DAY ONE.
 18 SO IT'S ACCRETIVE TO YOUR EARNINGS, ADDS TO YOUR EARNINGS, AND,
 19 YOU KNOW, INVESTORS AND RATING AGENCIES LIKE TO SEE THAT.
 20 THEY DON'T LIKE ACQUISITIONS WHERE, OKAY. YOU'RE
 21 BUYING IT, BUT YOU'RE ACTUALLY GOING TO MAKE LESS MONEY FOR THE
 22 FIRST YEAR OR TWO. THEY DON'T LIKE THAT.
 23 Q. NOT SO MUCH?
 24 A. NOT SO MUCH.
 25 Q. THEN FINALLY, "LOW-RISK ACQUISITION BASED ON PLANNED

1 SO YOU WANT TO MAKE SURE THAT THEY'RE LARGE; THEY
 2 HAVE A LOT OF CUSTOMERS; FUNDING THE DEVELOPMENT, AS I MENTIONED
 3 BEFORE; THEY'RE GOING TO BE IN THE BUSINESS FOR A VERY LONG TIME
 4 AND NOT THINKING ABOUT GETTING OUT OF IT BECAUSE, YOU KNOW, IT'S
 5 NOT WORKING FOR THEM.
 6 SO HAVING MORE CUSTOMERS MAKES YOU ACTUALLY MORE
 7 COMPETITIVE BECAUSE PEOPLE NOW ARE HAVE COMFORT THAT YOU WILL BE
 8 THERE IN 20 YEARS.
 9 Q. AND YOUR COMPETITION AT THE TIME?
 10 A. WELL, THE COMPETITION WAS MUCH LARGER. THERE WAS NO
 11 QUESTION ABOUT SAP'S STAYING POWER AND COMMITMENT TO THE
 12 BUSINESS. THAT WAS THEIR BUSINESS. AND THEY HAD, YOU KNOW,
 13 THOUSANDS AND THOUSANDS OF CUSTOMERS. SO WE WOULD SOMETIMES
 14 LOSE TO SAP BECAUSE THEY WERE VIEWED AS THE SAFE DECISION
 15 BECAUSE THEY HAVE THE MOST CUSTOMERS. THEY BEEN DOING THIS A
 16 LONG TIME.
 17 THERE'S NO ONE JUST GOING TO CATCH THEM. SO IF YOU
 18 WERE A CONSERVATIVE DECISION-MAKER, YOU DIDN'T WANT TO TAKE ANY
 19 RISK, THEY WERE THE SAFE PURCHASE AT THAT TIME.
 20 Q. NOW, MR. PHILLIPS, THE FOURTH REASON ON YOUR SLIDE, "MORE
 21 HIGH-MARGIN RECURRING REVENUE." CAN YOU EXPLAIN TO THE JURY
 22 WHAT YOU MEANT BY THAT?
 23 A. WELL, THE SUPPORT REVENUE IS PROFITABLE REVENUE, AND YOU
 24 TAKE THAT SUPPORT DOLLARS THAT THEY'RE PAYING EACH YEAR. IT'S
 25 KIND OF LIKE A -- ALMOST LIKE A MAGAZINE SUBSCRIPTION. THAT

1 INTEGRATION." WHAT'S THAT LAST REASON MEAN?
 2 A. WELL, WE THOUGHT WE HAD PLANNED THIS OUT VERY WELL. WE
 3 UNDERSTOOD THE COMPANY. THEY WERE RIGHT DOWN THE STREET FROM
 4 US. WE HAD COMPETED WITH THEM FOR YEARS. WE HIRED MANY
 5 EMPLOYEES OVER THE YEARS AND BECAUSE OF ALL THAT RECURRING
 6 REVENUE, BECAUSE THEY'VE ALREADY BEEN SUCCESSFUL, THEY WERE
 7 ALREADY HAD 10,000 CUSTOMERS, YOU HAD ALL THOSE 10,000 CUSTOMERS
 8 PAYING YOU EVERY YEAR, IT'S NOT LIKE BUYING SOMETHING UNKNOWN
 9 WITH NO REVENUE COMING IN.
 10 SO WE THOUGHT RELATIVE TO OTHER THINGS WE HAD BEEN
 11 DOING OR COULD HAVE DONE, RATHER, THIS WAS LOW RISK, AND WE WERE
 12 TRYING TO ADDRESS PEOPLE'S CONCERN ABOUT THIS WILD NEW STRATEGY
 13 AT THE TIME. IT LOOKED A LITTLE SCARY TO PEOPLE. WE SAID,
 14 WELL, LOOK THE REVENUE'S COMING IN ON A ANNUAL BASIS. THESE ARE
 15 SUBSCRIPTIONS, SO IT WAS LOWER RISK IN OUR MIND.
 16 Q. WHEN YOU AND MS. CATZ MADE THIS PRESENTATION IN
 17 JANUARY 2005, DID YOU KNOW THAT SAP AND TOMORROWNOW WERE
 18 DOWNLOADING AND INFRINGING AND USING COPIES OF PEOPLESOFT
 19 SOFTWARE WITHOUT AUTHORIZATION?
 20 A. I DID NOT, NO.
 21 Q. NOW, LET ME ASK YOU TO GO BACK TO THE ASSUMPTION. LET'S SAY
 22 YOU HAD TO SELL A LICENSE TO SAP IN JANUARY 2005 TO ALLOW THEM
 23 ACCESS TO THE PEOPLESOFT SOFTWARE, THE -- FOR MAINTENANCE.
 24 HOW WOULD THAT AFFECT THE REASONS THAT YOU'D GIVEN
 25 THE FINANCIAL ANALYSTS AND THE INVESTORS? HOW WOULD THAT

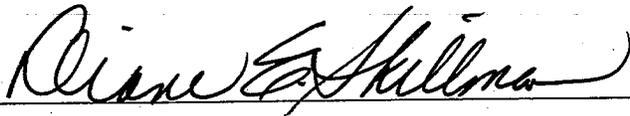
CERTIFICATE OF REPORTER

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, THURSDAY, NOVEMBER 4, 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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FRIDAY, NOVEMBER 5, 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 5
)	
SAP AG, ET AL.,	)	PAGES 754 - 946
)	
DEFENDANTS.)	OAKLAND, CALIFORNIA
)	MONDAY, NOVEMBER 8, 2010

TRANSCRIPT OF PROCEEDINGS

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1 MAKING ABOUT, YOU KNOW -- ABOUT ALL SORTS OF THINGS, INCLUDING
 2 OBVIOUSLY, THE TOP LINE IS ALL ABOUT CUSTOMERS. THAT -- THAT'S
 3 WHAT THOSE 9,000-TYPE NUMBERS ARE.
 4 BY MS. HOUSE:
 5 Q. OKAY. AND DID YOU BELIEVE THAT THE ASSUMPTIONS THAT YOU
 6 USED IN THIS MODEL WERE REASONABLE?
 7 A. OH, YEAH. I MEAN, I BELIEVED THEY WERE CONSERVATIVE. WE
 8 WENT REALLY -- WE REALLY TRIED TO MAKE THEM CONSERVATIVE BECAUSE
 9 WE COULD NOT -- I MEAN, WE KNEW WE WERE PAYING 11.1 BILLION.
 10 WE NEEDED TO KNOW WE WERE GOING TO BE ABLE TO PAY FOR
 11 IT, AND WE DIDN'T WANT TO HAVE NUMBERS WHERE THEY WERE HOPEFUL
 12 OR SOMETHING LIKE THAT. THAT WOULDN'T MAKE SENSE BECAUSE THEN
 13 WE MIGHT BE DISAPPOINTED AND PAYING WAY TOO MUCH FOR PEOPLESOFT.
 14 Q. AND HOW MUCH TIME WAS SPENT IN MAKING -- IN TWEAKING THIS
 15 MODEL MAKING SURE THAT IT WAS SOMETHING YOU FELT WAS REASONABLE?
 16 A. I KNOW IT SOUNDS NUTS, BUT I WOULD SAY THOUSANDS OF HOURS.
 17 WHEN YOU ADD UP ALL OF US, LITERALLY THOUSANDS OF HOURS.
 18 Q. NOW, ON THE FIRST PAGE, YOU HAD MENTIONED THE REFERENCE TO
 19 CUSTOMERS. THERE'S A LINE THAT SAYS "INSTALLED CUSTOMER BASE"
 20 AND THEN THERE'S A NUMBER, 9,920.
 21 WHAT IS THAT?
 22 (EXHIBIT PUBLISHED TO JURY.)
 23 THE WITNESS: THAT'S ACTUALLY THE -- THE NUMBER OF
 24 CUSTOMERS. THE "BOP" MEANS "BEGINNING OF PERIOD." SO THAT'S
 25 9,920 CUSTOMERS. THAT'S WHAT WE BELIEVED TO BE THE PEOPLESOFT

1 BY MS. HOUSE:
 2 Q. NOW, MOVING TO THE NEXT PAGE OF THE MODEL. IT SAYS AT THE
 3 TOP "MAINTENANCE REVENUE BUILDUP."
 4 CAN YOU SHOW -- THERE YOU GO.
 5 (EXHIBIT DISPLAYED ON SCREEN.)
 6 AND CAN YOU EXPLAIN TO THE JURY WHAT THIS SECTION OF
 7 THE MODEL IS DOING?
 8 A. OKAY.
 9 THIS SECTION SORT OF FEEDS OFF THE LINE WE WERE
 10 TALKING ABOUT JUST NOW. AND THIS IS HOW YOU FIGURE OUT HOW
 11 MUCH MAINTENANCE, THIS IS THE SUPPORT, THE RENEWALS, THE
 12 SUBSCRIPTIONS, YOU CAN USE ALL THESE DIFFERENT WORDS, BUT THIS
 13 IS HOW YOU BUILD UP AND FIGURE OUT THE DOLLARS AND CENTS
 14 NUMBERS THAT COME FROM THE CUSTOMER NUMBERS.
 15 Q. NOW, AS YOU WERE DOING THIS MODELING, YOU WERE -- DID YOU
 16 HAVE ANY ASSUMPTIONS ABOUT THE CUSTOMERS STAYING WITH YOU? HOW
 17 LONG THEY WOULD STAY?
 18 A. YEAH. I MEAN, THE MODEL HAS US LOSING LIKE .8 A QUARTER,
 19 SOMETHING LIKE THAT. SO BASICALLY GETTING MOST OF THE
 20 CUSTOMERS. AND, YOU KNOW, WE WANTED TO HAVE A NUMBER IN THERE
 21 THAT WOULD SHOW THAT, YOU KNOW, THAT GAVE US A LOT OF ROOM IF
 22 WE WERE TO LOSE A LITTLE BIT MORE THAN THAT. BUT WE WERE
 23 EXPECTING TO KEEP MOST OF THE CUSTOMERS. I THINK WHAT WE WERE
 24 EXPECTING, I THINK IT MIGHT BE EVEN ON THE PREVIOUS PAGE, IS
 25 LIKE LOSING MAYBE THREE PERCENT, SOMETHING LIKE THAT.

1 CUSTOMER BASE AT THAT POINT.
 2 SO LET'S SAY 10,000 ALMOST.
 3 (CONTINUED NEXT PAGE, NOTHING OMITTED.)
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1 Q. NOW, WHAT IS ORACLE'S EXPERIENCE WITH A LIFETIME OF ITS
 2 RELATIONSHIP WITH A CUSTOMER?
 3 A. WELL, THE REALITY IS THAT UNLESS A CUSTOMER GOES OUT OF
 4 BUSINESS OR MERGES THEIR SYSTEM OUT OF EXISTENCE, OR SOMETHING
 5 LIKE THAT, THEY STAY WITH US FOR REALLY ALMOST, I WOULD SAY
 6 FOREVER, BUT DOZENS OF YEARS.
 7 I MEAN, I BET YOU WE STILL HAVE OUR ORIGINAL
 8 CUSTOMERS FROM ORACLE DATABASE VERSION FIVE AND WE ARE ON 1G
 9 RIGHT NOW. SO THEY STAY REALLY FOREVER.
 10 Q. AND WAS THAT ONE OF THE ATTRACTIVE OF THE DEAL?
 11 A. YEAH, OF COURSE. HAVING A CUSTOMER BASE THAT RENEWS
 12 SUPPORT AND THAT STAYS WITH YOU OVER TIME IS A HUGE VALUE.
 13 Q. WHAT ROLE DO YOU UNDERSTAND SUPPORT PLAYS IN KEEPING A
 14 CUSTOMER?
 15 A. IF YOU DO A GOOD JOB SUPPORTING A CUSTOMER, YOU HAVE THEM
 16 FOREVER. THEY ARE VERY HAPPY. THEY DO A LOT OF THINGS INCLUDE
 17 BUY OTHER THINGS.
 18 Q. AND GIVEN ORACLE'S REAL WORLD EXPERIENCE WITH CUSTOMER
 19 RETENTION, IS A TEN-YEAR RELATIONSHIP WITH A SUPPORT CUSTOMER A
 20 REASONABLE ASSUMPTION?
 21 A. OH, YEAH. TEN YEARS IS CONSERVATIVE.
 22 Q. WE HAVE SEEN FROM SAP BOARD TESTIFY, FOR INSTANCE FROM
 23 MR. SHAI AGASSI, THAT SAP THOUGHT THAT THE PEOPLESOFT
 24 MAINTENANCE CUSTOMERS WHOSE CONTRACTS ORACLE ACQUIRED, HE
 25 THOUGHT THEY WERE IN PLAY DUE TO THIS WHAT THEY CALL FEAR,

1 SOLUTIONS."
 2 SO THAT'S THEIR TOP ANALYSIS. IT GOES ON AND SAYS,
 3 "INTERNAL PRESSURE AT SAP IS HIGH TO TAKE ON ORACLE IN RESPONSE
 4 TO PUBLIC PROVOCATION FROM ORACLE."
 5 SO, ONCE AGAIN, THIS IS RECOGNITION AT THE EXECUTIVE
 6 BOARD AT SAP THAT THE MARKET IS CHANGING AND ORACLE IS BECOMING
 7 A MUCH BIGGER COMPETITOR.
 8 Q. WHEN SAP SAYS "ORACLE IS POSITIONING ITSELF TO
 9 AGGRESSIVELY CHALLENGE SAP," WAS THAT SOMETHING NEW FOR SAP?
 10 A. NO. IN THE SENSE OF TWO REASONS. ONE, ENTERPRISE, SAP
 11 WAS ALWAYS THE DOMINANT. THEY WERE AROUND 60 PERCENT OF THE
 12 MARKET. EVERYBODY ELSE WAS ABOUT TEN PERCENT. SO, IN THAT
 13 MARKET, IT WAS A BIG CHANGE FOR SAP.
 14 IF YOU GO FROM EVERYBODY BEING AROUND 10 PERCENT NOW
 15 SOMEONE IS CLOSE TO 25, IT'S A BIG COMPETITOR, BUT IT'S ALSO A
 16 NEW COMPETITOR BECAUSE IT'S ORACLE AND PEOPLESFT. ORACLE HAS
 17 A BIG PLATFORM WITH ITS OTHER PRODUCTS. AND SO THIS WAS REALLY
 18 SAP RECOGNIZING THAT AND SAYING WE NEED TO RESPOND.
 19 Q. BY TAKING ON ORACLE?
 20 A. THAT'S CORRECT.
 21 Q. ALL RIGHT.
 22 LET'S GO TO -- LET ME ASK ONE LAST QUESTION BEFORE
 23 WE GET TO THE SPECIFIC NEGOTIATION.
 24 WE KNOW THAT ORACLE AND SAP THEY ARE ONE AND TWO,
 25 THEY'RE FIERCE COMPETITORS, HOW WOULD THAT HAVE IMPACTED THE

1 NEGOTIATION BETWEEN ORACLE AND SAP FOR THE PEOPLESFT SOFTWARE
 2 AND SUPPORT MATERIALS, HOW THAT WOULD COME OUT?
 3 A. I WOULD GO TO THE NEXT PHASE OF MY ANALYSIS. I'VE ALREADY
 4 SORT OF DESCRIBED THE SCOPE AND NEED AND TIMING AND
 5 COMPETITION. NOW I FOCUS ON THINGS THAT START TAKING US DOWN
 6 THE PATH OF THE VALUE.
 7 I HAVE A CHART THAT LAYS OUT FOR SAP WHAT I BELIEVE
 8 ARE THOSE KEY FACTORS AND CONSIDERATIONS AT A HIGH LEVEL, SOME
 9 OF MY FEEDBACK ON THAT.
 10 (SLIDE DISPLAYED ON SCREEN.)
 11 Q. YOU HAVE GOT THE TABLE NEGOTIATING, YOU'VE GOT ORACLE ON
 12 ONE SIDE, YOU'VE GOT SAP ON THE OTHER, AND THE DATE JANUARY 19,
 13 2005.
 14 WHAT ARE THE NEGOTIATION FACTORS YOU ARE CONSIDERING
 15 IN YOUR ANALYSIS OF THEM?
 16 A. THERE ARE THREE OVERALL CATEGORIES. I WILL GO THROUGH
 17 THESE.
 18 FIRST OFF, THERE'S A CATEGORY ONE. IT'S CALLED
 19 "SAP'S GOALS FOR THE NEW OFFERING." WE WILL TALK ABOUT, AT
 20 LENGTH ABOUT THE GOALS AND IN THIS CASE, WHAT I CALL THE DEMAND
 21 FOR THE SOFTWARE, WHAT IT DOES FOR YOU.
 22 SECONDLY, A VERY IMPORTANT POINT IN A NEGOTIATION IS
 23 NOW SAP'S EXPECTED IMPACT ON ORACLE, HOW THEY THINK THEY ARE
 24 GOING TO IMPACT ORACLE. AND YOU WILL SEE THERE THAT I
 25 MENTIONED AGAIN THE \$11 BILLION TRANSACTION WITH PEOPLESFT AND

1 LICENSE NEGOTIATION AND WHAT THE PRICE OF THE LICENSE WOULD
 2 HAVE BEEN?
 3 A. IT'S A VERY BIG ISSUE BECAUSE OF BEING DIRECT COMPETITORS.
 4 WHENEVER THERE IS A LICENSE BETWEEN COMPETITORS, THE
 5 PARTY THAT TAKES THE LICENSE IS NOW GOING TO COMPETE HEAD TO
 6 HEAD. AND IF THEY ARE SUCCESSFUL, THEY ARE TAKING A CUSTOMER
 7 AWAY FROM THE GROUP THAT LICENSED IT OUT, THE LICENSOR.
 8 SO WHEN IT IS HEAD TO HEAD, IT'S NEVER WIN-WIN.
 9 SOMEONE IS GOING TO LOSE SOMETHING BECAUSE YOU MAY GET PAID A
 10 ROYALTY AMOUNT, BUT YOU ARE GOING TO LOSE A CUSTOMER. AND
 11 CUSTOMERS IN THE SOFTWARE BUSINESS WHERE THERE'S LICENSE AND
 12 ONGOING MAINTENANCE, IT'S HUGE TO BE INSTALLED IN THAT COMPANY
 13 LONG-TERM RELATIONSHIPS MS. CATZ MENTIONED THIS MORNING, THEY
 14 CAN BE THERE FOR DECADES.
 15 SO, HEAD-TO-HEAD COMPETITION MEANS YOU NEED TO
 16 CHARGE A LOT MORE, AND AS I MENTIONED A WHILE BACK, UP FRONT TO
 17 MAKE CERTAIN THAT YOU ARE NOT INVITING THE FOX INTO THE HEN
 18 HOUSE.
 19 Q. THANK YOU, MR. MEYER.
 20 WE HAVE TALKED ABOUT WHAT THE LICENSE WOULD COVER,
 21 WE HAVE TALKED ABOUT THE TIMING OF THE LICENSE, SAP'S NEED FOR
 22 THE LICENSE, THE SIGNIFICANCE OF THE LEGAL RISK THAT SAP
 23 ACKNOWLEDGED, AND THE FACT THEY ARE COMPETITORS.
 24 WITH ALL OF THAT AS BACKGROUND, HOW DO WE GO ABOUT
 25 MEASURING WHAT THE RESULT, THE ACTUAL RESULT OF A LICENSED

1 TAKING CUSTOMERS AWAY FROM ORACLE.
 2 AND ALSO I MENTIONED THIS CONCEPT A MOMENT AGO ABOUT
 3 THE FACT THAT IF SAP INCREASES REVENUE, THEN ORACLE'S REVENUES
 4 ARE IMPACTED.
 5 THEN LASTLY I DO A LOT OF FINANCIAL CALCULATIONS.
 6 THIS IS CALLED SAP'S EXPECTED FINANCIAL GAINS.
 7 SO THE FIRST ITEM THERE, I THINK YOU HAVE HEARD THIS
 8 ALREADY IN THE TRIAL, THAT SAP EXPECTED TO HAVE REVENUES OF
 9 \$897 MILLION IN THE FIRST THREE YEARS OF THIS PROGRAM THAT WAS
 10 GOING TO USE ORACLE'S SOFTWARE.
 11 THERE'S MANY SOURCES OF PROJECTIONS THAT INCLUDE THE
 12 EXECUTIVE BOARD MEMBERS. AND THE WORD YOU SEE A LOT IS
 13 CONVERTED OR CONVERSION. AND THAT'S MOVING A CUSTOMER FROM
 14 PEOPLESFT OVER TO FIRST TOMORROWNOW, AND THEN HOPEFULLY FROM
 15 SAP'S PERSPECTIVE, TO THE SAP APPLICATION. AND THAT
 16 INFORMATION SAYS BETWEEN 2,000 AND 6,000 CUSTOMERS.
 17 AND THEN I HAVE RUN SOME CALCULATIONS. I WILL WALK
 18 YOU THROUGH, IF NOT TODAY, TOMORROW, WHICH TO SAY BASICALLY
 19 FROM MY ANALYSIS OF SAP'S EXPECTED GAINS, THEY ARE GOING TO
 20 MAKE BETWEEN \$881 MILLION UP TO \$2.7 BILLION IF THEY TAKE THIS
 21 LICENSE. THAT'S WHERE THEY GET VALUE FROM -- THEY GET VALUE IN
 22 THE WAY OF SOFTWARE, IT ALLOWS THEM TO GO OUT AND COMPETE FOR
 23 CUSTOMERS, AND THEY WILL PAY THESE AMOUNTS TO BE ABLE TO HAVE
 24 THAT OPPORTUNITY.
 25 Q. THAT'S THE TOTAL VALUE, NOT JUST THE FIRST THREE YEARS?

1 THEN IT SAYS, "AND FOR POTENTIALLY UPGRADING TO MY
 2 SAP BS." THIS IS THE FIRST TIME I SEE THAT THEY SAY WE WANT TO
 3 GO OUT AND BE ABLE TO OFFER THIS MAINTENANCE.
 4 AND THIS IS AROUND THE SAME TIME WHEN THEY ARE
 5 THINKING ABOUT HOW TO RESPOND TO ORACLE CLOSING ON ITS DEAL
 6 WITH PEOPLESFT. THAT DEAL IS GOING TO CLOSE IN JANUARY OF
 7 2005, AND THE EXECUTIVE BOARD IS COMMISSIONING THIS NEW
 8 BUSINESS OFFERING.
 9 AND THEN AT THE BOTTOM, IT IS REALLY IMPORTANT. IT
 10 SAYS, BOTTOM RIGHT-HAND SIDE. WE ARE TALKING ABOUT, ONCE
 11 AGAIN, THE OFFERING OF MAINTENANCE ON PEOPLESFT BECAUSE THAT'S
 12 CRITICAL TO SAFE PASSAGE AND GETTING THE REVENUE. IT SAYS,
 13 "SAFE PASSAGE FEATURES THREE FUNDAMENTAL ELEMENTS." THEN THE
 14 FIRST ELEMENT THERE, NUMBER ONE, "MAINTENANCE OF PEOPLESFT AND
 15 J.D. EDWARDS APPLICATIONS."
 16 IT ALL STARTS WITH NUMBER ONE, WHICH IS
 17 TOMORROWNOW'S USING THE SOFTWARE THAT'S IN THIS CASE THAT HAS
 18 BEEN INFRINGED.
 19 Q. SO YOU START WITH MAINTENANCE, AND THEN THE GOAL IS TO
 20 UPGRADE A CUSTOMER TO MY SAP. WHAT IS MY SAP?
 21 A. THAT'S THE ENTERPRISE APPLICATIONS. SO THAT'S SAP'S
 22 VERSION. THERE IS A FINANCIAL, HUMAN RESOURCE, AND ACCOUNTING.
 23 THESE ARE APPLICATIONS THAT RUN THE BUSINESS' SOFTWARE. AND
 24 THAT'S SAP'S COMPETING PRODUCT WITH PEOPLESFT AND J.D. EDWARDS
 25 AND ORACLE'S OWN INTERNAL APPLICATION SOFTWARE.

1 (PROCEEDINGS HELD OUTSIDE THE PRESENCE OF THE JURY.)
 2 THE COURT: ALL RIGHT, MR. MEYER. THANK YOU. YOU
 3 CAN STEP DOWN AS WELL.
 4 THE WITNESS: THANK YOU.
 5 THE COURT: ANYTHING, COUNSEL, BEFORE WE ADJOURN?
 6 MR. LANIER: I DON'T THINK SO ON OUR END.
 7 THE COURT: ALL RIGHT. WE WILL SEE YOU IN THE
 8 MORNING.
 9 THE CLERK: JUDGE?
 10 THE COURT: YES.
 11 MR. HOWARD: WE DO HAVE SOME EVIDENCE TO MOVE IN.
 12 WE CAN DO THAT NOW OR WE CAN DO IT IN THE MORNING. WHATEVER
 13 YOU PREFER.
 14 THE COURT: EVIDENCE THAT'S ALREADY BEEN STIPULATED
 15 TO?
 16 MR. HOWARD: YES. IT'S FROM THE OPENING.
 17 THE COURT: NICHOLE CAN TAKE IT DOWN.
 18 MR. HOWARD: VERY WELL. THANK YOU, YOUR HONOR.
 19 MR. LANIER: THANK YOU, YOUR HONOR.
 20 (PROCEEDINGS CONCLUDED AT 1:32 P.M.)
 21
 22
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 25

1 Q. SO LET ME SEE IF I UNDERSTAND THIS. THEY ARE NOT JUST
 2 GOING AFTER THE MAINTENANCE REVENUES, THEY WANT THESE CUSTOMERS
 3 TO SWITCH OVER TO MY SAP SOFTWARE APPLICATIONS, RIGHT?
 4 A. RIGHT. THE GOAL WAS TO BUY LICENSE, ULTIMATELY AN
 5 APPLICATION SOFTWARE LICENSE FOR MY SAP. AND THE WAY TO DO IT,
 6 THE VEHICLE TO DO IT WAS TO FIRST PROVIDE MAINTENANCE ON
 7 PEOPLESFT AND THEN CONVERT THAT CUSTOMER TO THE PRODUCT OF
 8 SAP, WHICH IS MY SAP, AND TAKE A LICENSE ON THAT. AND THEN
 9 THEY WOULD EARN LICENSE THERE AND MORE MAINTENANCE.
 10 Q. MORE MAINTENANCE ON THE MY SAP?
 11 A. THAT'S CORRECT.
 12 Q. FOR HOW LONG?
 13 A. IT COULD GO ON FOR DECADES.
 14 Q. ALL RIGHT.
 15 THE COURT: WE ARE --
 16 MR. PICKETT: WHY DON'T WE STOP HERE. SOUNDS LIKE A
 17 GOOD PLACE TO STOP.
 18 THE COURT: LADIES AND GENTLEMEN OF THE JURY, THANK
 19 YOU FOR YOUR TIME AND ATTENTION TODAY. YOU ARE EXCUSED UNTIL
 20 TOMORROW MORNING AT 8:30. PLEASE KEEP IN MIND THE INSTRUCTIONS
 21 THAT I HAVE GIVEN YOU FROM TIME TO TIME, NOT TO COMMUNICATE
 22 ABOUT THE CASE EVEN AMONGST YOURSELVES, NOT TO DO ANY
 23 INDEPENDENT RESEARCH ABOUT THE CASE, AND TO AVOID ANY MEDIA
 24 COVERAGE ABOUT THE CASE.
 25 THANK YOU.

1
 2
 3 CERTIFICATE OF REPORTER
 4 WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL
 5 REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF
 6 CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN
 7 C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE
 8 REPORTED BY US ON, MONDAY, NOVEMBER 8, 2010, CERTIFIED
 9 SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR
 10 DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL,
 11 COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT
 12 THE TIME OF FILING.
 13 THE VALIDITY OF THE REPORTER'S CERTIFICATION OF
 14 SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL
 15 FROM THE COURT FILE.
 16
 17 _____
 18 RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR, CCRR
 19
 20 _____
 21 DIANE E. SKILLMAN, CSR, RPR, FCRR
 22
 23 TUESDAY, NOVEMBER 9, 2010
 24
 25

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:

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

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

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

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

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

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

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DIANE E. SKILLMAN, CSR NO. 4909

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1 MR. BOIES: HE JUST RAISED IT IN HIS TESTIMONY. I
 2 DIDN'T ASK HIM ABOUT IT.
 3 THE COURT: CAN YOU TELL ME WHAT INFORMATION HE HAS
 4 ALREADY PROVIDED YOU?
 5 (PAUSE IN THE PROCEEDINGS.)
 6 MR. BOIES: YOUR HONOR, WOULD THIS BE A CONVENIENT
 7 TIME TO TAKE THE SECOND BREAK?
 8 THE COURT: NO. WE HAVE ANOTHER HALF HOUR.
 9 MR. BOIES: WE WILL FIND IT.
 10 BY MR. BOIES:
 11 Q. JUST FOR CLARIFICATION, THIS WAS THE C.V. ATTACHED TO YOUR
 12 EXPERT REPORT?
 13 A. I DON'T KNOW.
 14 (PAUSE IN THE PROCEEDINGS.)
 15 THE COURT: MR. BOIES, I WOULD SUGGEST YOU CONTINUE
 16 AND SOMEBODY WILL FIND IT AND YOU CAN COME BACK TO THAT.
 17 MR. BOIES: HAVE WE HANDED OUT THESE BOOKS YET?
 18 YOUR HONOR, MAY WE HAND OUT THE VOLUMES OF OUR
 19 BOOKS?
 20 THE COURT: SURE.
 21 MR. BOIES: THAT INCLUDES HIS EXPERT REPORT.
 22 THE COURT: I DON'T REALLY WANT ALL OF THAT.
 23 MR. BOIES: I APOLOGIZE FOR THE VOLUME, YOUR HONOR.
 24 THE COURT: ALL RIGHT. WHY DON'T YOU CONTINUE AND
 25 SOMEONE WILL LOOK FOR US.

1 A. YES.
 2 Q. AND THE OTHER WAS THE COMBINATION OR SUM OF LOST PROFITS
 3 AND INFRINGER PROFITS, CORRECT?
 4 A. YES.
 5 Q. OKAY.
 6 NOW TALKING ABOUT THE SUM OF THE LOST PROFITS AND
 7 THE INFRINGER PROFITS, ONE OF THE APPROACHES TO DAMAGES,
 8 CORRECT.
 9 A. CORRECT.
 10 Q. WHAT IS THAT NUMBER AS YOU CURRENTLY CALCULATE IT?
 11 A. \$28,036,720.
 12 Q. OKAY.
 13 NOW THAT NUMBER, AGAIN, STAYING WITH LOST PROFITS
 14 AND INFRINGER PROFITS, WHAT WAS THAT NUMBER THAT YOU ESTIMATED
 15 WHEN YOU PUT IN YOUR FIRST REPORT?
 16 A. MAY I LOOK AT A COPY OF MY REPORT?
 17 Q. CERTAINLY. CERTAINLY IF THAT WILL HELP YOU.
 18 THE WITNESS: MAY I STAND UP TO GET IT, YOUR HONOR?
 19 THE COURT: SURE.
 20 (PAUSE IN THE PROCEEDINGS.)
 21 BY MR. BOIES:
 22 Q. THE DATE OF YOUR FIRST REPORT WAS MARCH 26TH OF THIS YEAR,
 23 CORRECT?
 24 A. CORRECT.
 25 YOU KNOW, I DON'T HAVE MY MARCH REPORT. I AM AFRAID

1 MR. BOIES: WE WILL FIND THAT.
 2 BY MR. BOIES:
 3 Q. WHILE WE HAVE YOUR EXPERT REPORT HERE, MR. CLARKE, YOU
 4 HAVE SUBMITTED A SERIES OF EXPERT REPORTS AND SUPPLEMENTS,
 5 CORRECT?
 6 A. YES.
 7 Q. IN DOING SO, YOU HAVE CONSISTENTLY REVISED THE DAMAGES
 8 THAT YOU HAVE ASSERTED; IS THAT CORRECT?
 9 A. YES.
 10 Q. AND WITH RESPECT TO THE INFRINGER PROFITS AND LOST PROFITS
 11 NUMBER, THAT'S ONE OF YOUR CALCULATIONS OF DAMAGES, CORRECT?
 12 A. YES.
 13 Q. THE CURRENT NUMBER THAT YOU ARE ASSERTING IS WHAT, SIR?
 14 A. WE JUST HAD THAT UP ON THE SCREEN.
 15 Q. DO YOU REMEMBER IT?
 16 A. FOR INFRINGERS' PROFITS ONLY?
 17 Q. NO. YOU COMBINED INFRINGER PROFITS AND LOST PROFITS
 18 TOGETHER, RIGHT?
 19 A. WELL, AT CERTAIN POINTS I COMBINE THEM. SOMETIMES THEY
 20 WERE SEPARATE.
 21 Q. DO YOU REMEMBER TELLING COUNSEL FOR SAP THAT THERE WERE
 22 TWO ALTERNATIVE DAMAGE APPROACHES?
 23 A. YES, I DO.
 24 Q. AND ONE OF THOSE WAS THE FAIR MARKET VALUE LICENSE,
 25 CORRECT?

1 I ONLY HAVE MY MAY REPORT.
 2 Q. LET ME ASK YOU, DO YOU HAVE UP THERE THE TWO VOLUMES THAT
 3 WE HAVE FOR YOUR EXAMINATION?
 4 DO YOU HAVE THOSE UP THERE?
 5 A. I DON'T BELIEVE --
 6 THE COURT: DID YOU PROVIDE THEM?
 7 MR. BOIES: I THINK WE PUT THEM UP THERE.
 8 THE WITNESS: IS THAT THIS (INDICATING)?
 9 MR. BOIES: NO. I THINK THAT MAY BE YOUR COUNSEL'S
 10 VOLUME.
 11 WE HAVE ANOTHER COPY. IF WE CAN APPROACH, YOUR
 12 HONOR?
 13 THE COURT: SURE.
 14 MR. BOIES: COULD I APPROACH JUST TO SEE IF I CAN
 15 FIND IT UP THERE, YOUR HONOR?
 16 THE COURT: YES.
 17 (PAUSE IN THE PROCEEDINGS.)
 18 THE WITNESS: DID YOU WANT ME TO LOOK AT A
 19 PARTICULAR ONE OF THESE BINDERS?
 20 BY MR. BOIES:
 21 Q. YES. LOOK AT TAB 12. THAT'S YOUR MARCH 26TH REPORT; IS
 22 THAT CORRECT?
 23 A. YES.
 24 Q. OKAY. AND LOOK AT PAGE 294 AND SEE IF THAT HELPS YOU.
 25 MR. BOIES: YOUR HONOR, MAY I APPROACH THE BOARD?

1 THE COURT: YES.
 2 BY MR. BOIES:
 3 Q. AND THE FIRST REPORT WAS MARCH 26TH, RIGHT?
 4 A. CORRECT.
 5 Q. THIS IS ALL THIS YEAR. AND WHAT DID YOU ESTIMATE THE LOST
 6 PROFITS AND INFRINGER PROFITS TO BE?
 7 A. I NEED GUIDANCE FROM THE COURT OR FROM YOU ABOUT WHEN YOU
 8 SAY "THE LOST PROFITS", ARE WE TALKING ABOUT JUST FOR OIC, JUST
 9 THE ONE PLAINTIFF LEFT IN THE CASE? BECAUSE I HAVE A BUNCH OF
 10 PLAINTIFFS IN HERE.
 11 Q. YES.
 12 A. JUST OIC, 17.3 MILLION AND PROBABLY ABOUT 95 PERCENT OF
 13 7.7 MILLION.
 14 Q. DO YOU HAVE AN ACTUAL NUMBER?
 15 A. NO.
 16 Q. IN THE REPORT?
 17 A. WELL, I HAVE GOT A NUMBER FOR A BUNCH OF PLAINTIFFS. YOU
 18 ASKED ME JUST FOR OIC THOUGH.
 19 Q. WHAT WAS YOUR TOTAL NUMBER?
 20 A. 38 MILLION.
 21 Q. 38 MILLION.
 22 OKAY. THEN YOU PUT IN A SUPPLEMENT REPORT ON
 23 MAY 7TH, CORRECT?
 24 A. CORRECT.
 25 Q. AND WHAT WAS YOUR ESTIMATE THEN?

1 A. 33.9 MILLION.
 2 Q. THAT'S FOR THE SAME GROUP OF PLAINTIFFS; IS THAT RIGHT?
 3 A. NO.
 4 Q. THIS IS JUST THE OIC PLAINTIFFS?
 5 A. NO.
 6 Q. WHAT'S YOUR PLAINTIFFS FOR THESE?
 7 A. THAT IS INCLUDING OUSA.
 8 Q. WHAT?
 9 A. OUSA.
 10 Q. INCLUDES OUSA?
 11 A. CORRECT.
 12 Q. WHICH PLAINTIFFS ARE DROPPED OUT?
 13 A. THE PLAINTIFFS THAT WERE RELATED TO THE OEMEA.
 14 Q. AND THEN ON NOVEMBER 14TH YOU PUT IN ANOTHER ONE, RIGHT?
 15 THAT IS JUST TWO DAYS AGO.
 16 A. YEAH. OKAY. I WILL TAKE YOUR WORD FOR IT.
 17 Q. WELL, YOU DO REMEMBER JUST GIVING US A NEW DAMAGE
 18 STATEMENT TWO DAYS AGO, RIGHT?
 19 A. I DID.
 20 Q. OKAY. AND THAT ONE WAS YOUR \$28 MILLION, RIGHT?
 21 A. I DON'T REMEMBER THE NUMBER.
 22 IS IT IN A TAB HERE?
 23 YES, 28 MILLION.
 24 Q. NOW, ALL OF THOSE DAMAGE CALCULATIONS EXCLUDE, IN TERMS OF
 25 INFRINGING PROFITS AND LOST PROFITS, A NUMBER OF CUSTOMERS THAT

1 A. AGAIN, FOR ALL OF THE PLAINTIFFS?
 2 Q. YES.
 3 A. 36.4 MILLION.
 4 Q. NOW JUST TO BE CLEAR, THAT'S FOR THE SAME GROUP OF
 5 PLAINTIFFS AS THE 38 MILLION, RIGHT?
 6 A. CORRECT.
 7 Q. THEN YOU PUT IN ANOTHER EXPERT REPORT ON JUNE 4, CORRECT?
 8 A. I DON'T REMEMBER THE DATES.
 9 Q. HOW ABOUT JUNE 21, DO YOU REMEMBER THAT ONE?
 10 A. NO. I DON'T REMEMBER THE DATES. I AM SORRY.
 11 Q. ALL RIGHT. LOOK AT TAB 5.
 12 DO YOU HAVE THAT?
 13 A. I DO.
 14 Q. WHAT IS THE NUMBER THERE?
 15 A. FOR THE SAME GROUP FOR LOST PROFITS AND INFRINGERS'
 16 PROFITS?
 17 Q. RIGHT.
 18 A. 35.3 MILLION.
 19 Q. NOW YOU PUT A REPORT IN ON OCTOBER 19TH, CORRECT?
 20 A. I AM SORRY, I JUST DON'T REMEMBER DATES.
 21 Q. LOOK AT TAB 6.
 22 A. OKAY.
 23 Q. DO YOU HAVE IT?
 24 A. I DO.
 25 Q. WHAT'S THE NUMBER?

1 TOMORROWNOW HAD, CORRECT?
 2 A. CORRECT.
 3 Q. NOW, IN TERMS OF INFRINGER PROFITS, HOW MANY CUSTOMERS ARE
 4 INCLUDED IN YOUR NOVEMBER 14 NUMBER?
 5 A. FOUR ON THE SAP SIDE.
 6 Q. FOUR ON THE SAP SIDE.
 7 A. I WOULD HAVE TO DO SOME WORK TO FIND HOW MANY WERE IN THE
 8 TOMORROWNOW SIDE.
 9 Q. OKAY. WHAT WOULD YOU HAVE TO DO?
 10 A. I WOULD HAVE TO GET MY BINDER OUT.
 11 I SEEM TO HAVE LOST THE BINDER.
 12 THE COURT: WHICH ONE ARE YOU LOOKING FOR?
 13 THE WITNESS: THE ONE WITH MY SLIDES IN IT, YOUR
 14 HONOR.
 15 DID SOMEONE TAKE IT AWAY?
 16 THE COURT: MR. MITTELSTAEDT, DO YOU HAVE -- IS ONE
 17 OF THE THREE VOLUMES THAT YOU GAVE ME THIS MORNING, DOES ONE --
 18 MR. MITTELSTAEDT: YES.
 19 THE COURT: WHICH ONE?
 20 WHY DON'T YOU --
 21 THE WITNESS: YOUR HONOR, I FOUND IT.
 22 THE COURT: OKAY. I THINK THERE ARE PROBABLY MORE
 23 BINDERS HERE --
 24 MR. BOIES: I THINK SO, YOUR HONOR.
 25 THE WITNESS: I AM SORRY. I HAVE LOST TRACK OF THE

1 QUESTION. WAS THAT THE INFRINGERS' PROFITS FOR TOMORROWNOW?
 2 BY MR. BOIES:
 3 Q. YES. YOU HAVE -- YOU TOLD ME THAT THERE WERE TWO
 4 CUSTOMERS THAT YOU INCLUDED FOR INFRINGER PROFITS FOR SAP,
 5 CORRECT?
 6 MR. MITTELSTAEDT: I THINK HE SAID FOUR.
 7 THE COURT: HE DID.
 8 MR. BOIES: FOUR.
 9 THE WITNESS: YOU WANT TO KNOW HOW MANY IT IS FOR
 10 TOMORROW --
 11 BY MR. BOIES:
 12 Q. FOR TOMORROWNOW.
 13 A. I HAVE TO GO TO MY OTHER BINDERS FOR THAT.
 14 I AM LOSING THE BATTLE OF THE BINDERS.
 15 (WITNESS REVIEWING BINDER.)
 16 IT LOOKS LIKE 199 IF I COUNTED THEM ACCURATELY.
 17 Q. 199. OKAY.
 18 LET ME TAKE THOSE TWO GROUPS OF CUSTOMERS ONE AT A
 19 TIME.
 20 WHEN YOU PUT IN YOUR MARCH 26TH REPORT, HOW MANY
 21 CUSTOMERS DID YOU INCLUDE AS INFRINGING PROFITS CUSTOMERS FOR
 22 SAP? THAT IS, HOW MANY SAP CUSTOMERS DID YOU SAY ORACLE WAS
 23 ENTITLED TO INFRINGER PROFITS ON IT?
 24 A. YOU KNOW --
 25 Q. YOU SAY THERE WERE FOUR DOWN ON NOVEMBER 14TH, RIGHT?

1 A. I WILL HAVE TO CHECK.
 2 YES.
 3 Q. IN OTHER WORDS, WHAT IS ON NOVEMBER 14TH ARE THE THREE
 4 THAT WERE ON MAY 7TH PLUS ONE MORE?
 5 A. I AM SORRY, I THOUGHT YOU WERE REFERRING BACK TO MARCH.
 6 SO THE THREE IS ONE LESS THAN THE FOUR AND THE THREE WERE IN
 7 THE FOUR.
 8 SO IS YOUR QUESTION NOW, ARE THE THREE PART OF THOSE
 9 FOUR?
 10 Q. YES.
 11 THE QUESTION WAS, ARE THE THREE THAT YOU SAID WERE
 12 INFRINGING PROFIT CUSTOMERS FROM SAP ON MAY 7TH, ALL INCLUDED
 13 IN THE FOUR THAT YOU SAY WERE IN YOUR NOVEMBER 14TH REPORT?
 14 A. NO.
 15 Q. OKAY. NOW, ON JUNE 21ST, HOW MANY DID YOU HAVE?
 16 A. DO YOU HAVE A REFERENCE FOR ME BECAUSE I DON'T REMEMBER
 17 HOW MANY CUSTOMERS.
 18 Q. I DON'T HAVE A REFERENCE ON THAT ONE.
 19 A. THEN I CAN'T ANSWER THAT I AM AFRAID.
 20 Q. ALTHOUGH I BELIEVE IT WAS TWO.
 21 YOU DO KNOW THAT YOU ADDED TWO NEW ONES ON
 22 NOVEMBER 14TH, CORRECT?
 23 A. CORRECT.
 24 Q. AND SO OCTOBER 19TH THERE WOULD HAVE BEEN TWO, RIGHT?
 25 A. YES.

1 A. YEP.
 2 Q. SO THIS TIME THERE ARE FOUR.
 3 HOW MANY DID YOU SAY BACK ON MARCH -- THERE WERE ON
 4 MARCH 26TH?
 5 A. I DON'T HAVE THAT INFORMATION HANDY. I AM HAPPY TO GO
 6 FIND IT. YOU PROBABLY KNOW IT.
 7 Q. LET ME ASK YOU TO LOOK AT TAB 12.
 8 A. THAT IS WHERE I AM.
 9 Q. PAGE 247. OKAY?
 10 A. OKAY.
 11 Q. CAN YOU TELL ME FROM THAT?
 12 A. FOUR.
 13 Q. NOW, ARE THEY THE SAME FOUR?
 14 A. NO, I DON'T THINK THEY ARE.
 15 Q. THEY ARE NOT THE SAME FOUR?
 16 A. CORRECT.
 17 Q. OKAY. LET ME GO TO THE MAY 7TH REPORT.
 18 AND I AM NOW GOING TO ASK YOU TO LOOK AT TAB 1 OF
 19 PAGE 247.
 20 AND IF MY NOTES ARE RIGHT, THAT WILL ENABLE YOU TO
 21 TELL ME HOW MANY SAP INFRINGING CUSTOMERS YOU ESTIMATED ON
 22 MAY 7TH.
 23 A. THREE.
 24 Q. AND WERE THE THREE THAT YOU ESTIMATED ON MAY 7TH ALSO ALL
 25 INCLUDED IN THE FOUR THAT YOU ESTIMATED ON NOVEMBER 14TH?

1 Q. AND, WE'LL, IN THE INTEREST OF TIME, WE WILL SKIP
 2 JUNE 21ST.
 3 NOW WITH RESPECT TO THE CUSTOMERS THAT YOU EXCLUDED,
 4 THE LAST CUSTOMER I THINK THAT YOU TALKED ABOUT WITH COUNSEL
 5 FOR SAP WAS ABITIBI; IS THAT RIGHT?
 6 A. ABITIBI.
 7 Q. AND ABITIBI WAS ONE THAT YOU EXCLUDED BECAUSE THERE WAS AN
 8 ORACLE E-MAIL THAT TALKED ABOUT THEM LOOKING AT OTHER
 9 ALTERNATIVES.
 10 DO YOU RECALL THAT?
 11 A. YES.
 12 Q. AND WHEN WAS THAT ORACLE E-MAIL?
 13 A. I WOULD HAVE TO GET IT. I DON'T REMEMBER.
 14 MR. BOIES: MAYBE COUNSEL CAN PUT IT BACK UP ON THE
 15 SCREEN?
 16 MR. MITTELSTAEDT: DO YOU REMEMBER WHICH SLIDE IT
 17 WAS?
 18 MR. BOIES: 46?
 19 (SLIDE DISPLAYED ON SCREEN.)
 20 BY MR. BOIES:
 21 Q. NOW THIS WAS AN ORACLE E-MAIL, APRIL 11TH, 2005.
 22 DO YOU SEE THAT?
 23 A. I DO.
 24 Q. NOW, EVENTUALLY ABITIBI WENT TO TOMORROWNOW, CORRECT?
 25 A. CORRECT.

1 Q. APPROXIMATELY.
 2 A. I HAVE NO IDEA.
 3 Q. MORE THAN 5,000, SIR?
 4 A. THE -- THE BEST IT'S DESCRIBED AS A SELECT FEW.
 5 Q. THE BEST ARE. BUT WHAT I'M ASKING YOU IS HOW MANY
 6 PEOPLESOFT PARTNERS WERE THERE? APPROXIMATELY?
 7 A. YOU KNOW, THAT'S NOT INFORMATION THAT I'VE BEEN GIVEN BY
 8 ORACLE IN THE CONTEXT OF THIS CASE, SO I HAVE NO IDEA
 9 WHATSOEVER.
 10 Q. IS THAT INFORMATION THAT YOU'VE EVER ASKED FOR ORACLE IN
 11 THIS CASE?
 12 A. NO.
 13 Q. OKAY.
 14 A. WOULDNT BE RELEVANT TO ME.
 15 Q. NOW, IS THERE ANYTHING ABOUT BEING A PEOPLESOFT PARTNER THAT
 16 YOU THINK MEANS THAT THE COMPANY IS OFFERING MAINTENANCE SERVICE
 17 FOR PEOPLESOFT CUSTOMERS IN COMPETITION WITH ORACLE?
 18 A. I DON'T -- I DON'T DRAW THAT ANALOGY, THAT CONCLUSION, NO.
 19 Q. OKAY. LET'S GO TO 2007, PEOPLESOFT SOLUTION OF THE YEAR.
 20 WAS THAT SOLUTION OF THE YEAR THAT THEY GOT THE AWARD FOR -- DID
 21 THAT HAVE ANYTHING TO DO WITH PROVIDING MAINTENANCE FOR
 22 PEOPLESOFT CUSTOMERS IN COMPETITION WITH ORACLE?
 23 A. I DON'T KNOW.
 24 Q. OKAY. LET'S GO TO 2008, PEOPLESOFT SOLUTION OF THE YEAR.
 25 DID THAT SOLUTION HAVE ANYTHING TO DO WITH PROVIDING MAINTENANCE

1 TOMORROWNOW'S ACTUAL REVENUES AND A 50 PERCENT ROYALTY RATE
 2 APPLIED TO WHAT YOU REFER TO AS SAP PROFIT FROM ITS LICENSE
 3 SALES WHICH RELATED TO TOMORROWNOW, CORRECT?
 4 A. I WOULDNT DESCRIBE THEM AS "RELATED TO TOMORROWNOW." I
 5 THINK THAT'S -- THAT'S A STATEMENT THAT'S MUCH TOO -- TOO
 6 REFINED TO APPLY TO THE FACTS OF THIS CASE.
 7 Q. TOO REFINED?
 8 A. YES. YOU'RE TARGETING THAT TO TOMORROWNOW, AND I THINK I
 9 TESTIFIED MORE THAN ONCE THAT THE ONLY REASON THESE CUSTOMERS
 10 ARE STILL IN THE SAP SIDE OF THE EQUATION IS THAT THEY DIDN'T
 11 DOCUMENT WHY THEY LEFT, SO I DON'T HAVE THE INFORMATION TO TAKE
 12 THEM OUT. BUT WHEN I TOOK OUT 82 OF 86, IT SEEMED TO ME THAT IT
 13 WAS ONLY BECAUSE I DIDN'T HAVE THE DOCUMENTATION FOR THE OTHER 4
 14 THAT THEY WEREN'T EXCLUDED AS WELL.
 15 SO I THINK IT'S GOING TOO FAR TO SAY THAT THE 4 AROSE
 16 AS A RESULT OF TOMORROWNOW. I'VE ASSUMED THAT FOR THE SIMPLE
 17 REASON THAT I ASSUMED THE INFRINGEMENT OCCURRED AND UNLESS I
 18 FIND A COMPELLING REASON TO EXCLUDE A CUSTOMER, THEY'RE STILL IN
 19 THERE.
 20 Q. SO LET ME BE SURE I UNDERSTAND WHAT YOU'RE SAYING. FIRST OF
 21 ALL, YOU REFER TO 86 CUSTOMERS.
 22 A. YES.
 23 Q. NOW, THOSE 86 CUSTOMERS WERE 86 CUSTOMERS THAT WERE
 24 IDENTIFIED BY THE DEFENDANT SAP, CORRECT?
 25 A. CORRECT.

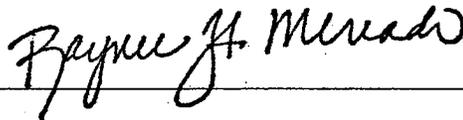
1 TO PEOPLESOFT CUSTOMERS?
 2 A. I DON'T KNOW.
 3 Q. HOW ABOUT THE -- NEXT-TO-LAST THING THAT'S LISTED HERE, THE
 4 2008 SOA AND INTEGRATION SOLUTION.
 5 DO YOU SEE THAT?
 6 A. I DO.
 7 Q. WHAT DOES "SOA" MEAN?
 8 A. I DON'T KNOW.
 9 Q. DID YOU EVER TRY TO FIND OUT?
 10 A. NO.
 11 Q. DOES THAT HAVE ANYTHING TO DO WITH PROVIDING MAINTENANCE TO
 12 PEOPLESOFT CUSTOMERS?
 13 A. IF I KNEW WHAT IT WAS, I MIGHT BE ABLE TO ANSWER BETTER, BUT
 14 I'M SORRY, I DON'T.
 15 Q. OKAY. AND LAST, THE 2008 ORACLE EXCELLENCE AWARD, DO YOU
 16 SEE THAT?
 17 A. I DO.
 18 Q. DOES THAT HAVE ANYTHING TO DO WITH PROVIDING MAINTENANCE
 19 SERVICE TO ORACLE OR PEOPLESOFT CUSTOMERS?
 20 A. I'VE NO IDEA.
 21 Q. OKAY.
 22 NOW, LET ME TURN TO YOUR GENERAL APPROACH TO WHAT YOU
 23 REFER TO AS THE -- YOUR CALCULATION OF A FAIR MARKET VALUE
 24 ROYALTY. YOU HAVE A PROPOSED FAIR MARKET VALUE ROYALTY THAT
 25 CONSISTS OF A 50 PERCENT ROYALTY RATE APPLIED TO ALL OF

1 Q. AND THOSE 86 CUSTOMERS WERE CUSTOMERS THAT THE DEFENDANT
 2 SAID WERE CUSTOMERS THAT EITHER BOUGHT SAP PRODUCTS
 3 SIMULTANEOUSLY WITH ACQUIRING TOMORROWNOW MAINTENANCE SERVICES
 4 OR BOUGHT SAP PRODUCTS AND SERVICES AFTER BECOMING A TOMORROWNOW
 5 CUSTOMER, CORRECT?
 6 A. YES, THERE WERE SOME SALES OF SOMETHING, WHATEVER THAT WAS,
 7 AT SAP AFTER THE TOMORROWNOW START DATE, YES.
 8 Q. NOW, THE DEFENDANTS ALSO IDENTIFIED ANOTHER SEVEN CUSTOMERS
 9 THAT THEY SAID THEY WEREN'T SURE ABOUT WHETHER THEY MET THOSE
 10 PARAMETERS, CORRECT?
 11 A. I -- I DON'T REMEMBER ANOTHER SEVEN. I JUST HAVE A LIST OF
 12 86 CUSTOMERS.
 13 Q. WHO GAVE YOU THAT LIST?
 14 A. SAP AND THEIR COUNSEL.
 15 Q. LET ME ASK YOU TO LOOK AT PLAINTIFFS' TRIAL EXHIBIT 735
 16 (SIC), WHICH IS BEHIND TAB 65 IN YOUR BOOKS THAT YOU HAVE.
 17 AND I WOULD OFFER PLAINTIFFS' EXHIBIT 735 (SIC), I
 18 THINK, WITHOUT OBJECTION.
 19 MR. MITTELSTAEDT: REDACTED VERSION?
 20 MR. BOISE: YES. 7035 -- 7035.
 21 MR. MITTELSTAEDT: NO OBJECTION.
 22 THE COURT: ALL RIGHT. IT MAY BE ADMITTED.
 23 (PLAINTIFFS' EXHIBIT 7035
 24 RECEIVED IN EVIDENCE)
 25 (EXHIBIT PUBLISHED TO JURY.)

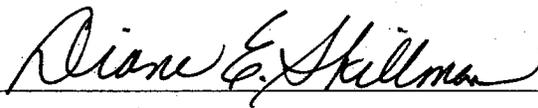
CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, TUESDAY, NOVEMBER 16, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

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



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



DIANE E. SKILLMAN, CSR, RPR, FCRR

WEDNESDAY, NOVEMBER 17, 2010

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL.	)	JURY TRIAL
)	
PLAINTIFFS,	)	NO. C 07-01658 PJH
)	
VS.	)	VOLUME 12
)	
SAP AG, ET AL.,	)	PAGES 2021 - 2230
)	
DEFENDANTS.)	OAKLAND, CALIFORNIA
)	MONDAY, NOVEMBER 22, 2010

TRANSCRIPT OF PROCEEDINGS

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(APPEARANCES CONTINUED NEXT PAGE)

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1 ON TIME. ARE THERE ANY PROBLEMS WITH THE DEMONSTRATIVE
 2 EXHIBITS?
 3 MR. LANIER: VERY BRIEFLY, YOUR HONOR, ON OUR END,
 4 JUST THREE MAJOR ISSUES. ONE IS WE OBJECT -- AND I'M DOING THIS
 5 FOR THE RECORD. WE OBJECT TO THE CONTINUED SLIDES AND ARGUMENT
 6 WITH RESPECT TO WILLINGNESS TO INFRINGE AS EVIDENCE OF
 7 VALUATION. WE'VE MADE THAT OBJECTION BEFORE, YOUR HONOR HAS
 8 RULED. WE'D LIKE TO PRESERVE THAT OBJECTION.
 9 SECOND THING, A VARIETY OF SLIDES USE THE WORDS
 10 "THEFT" AND "STOLE," THINGS LIKE THAT. YOUR HONOR HAD GIVEN
 11 GUIDANCE ABOUT THAT WITH RESPECT TO THE OPENING. THIS IS NOT A
 12 CRIMINAL CASE. IT'S NOT A THEFT CASE. WE OBJECT TO THOSE
 13 SLIDES AS WELL. WE DON'T THINK THOSE TERMS ARE APPROPRIATE IN
 14 THIS CASE.
 15 AND THEN THE THIRD MAJOR ISSUE HAS TO DO WITH THE
 16 SO-CALLED LIST OF 86, THE CHARACTERIZATION THAT THE LIST WAS
 17 CHOSEN BY COUNSEL. IT WAS ACTUALLY CHOSEN AS A RESULT OF A
 18 JUDICIALLY SUPERVISED PROCESS SUPERVISED BY MAGISTRATE JUDGE
 19 LAPORTE. THERE'S NO EVIDENCE THAT THE LIST OF 86 CUSTOMERS WAS
 20 ACTUALLY CHOSEN BY COUNSEL. THAT'S WHO MR. CLARKE GOT IT FROM,
 21 BUT THAT'S A DIFFERENT THING.
 22 SO THE CHARACTERIZATION THAT THIS LIST OF 86
 23 CUSTOMERS THAT BOTH EXPERTS STARTED FROM TO DETERMINE
 24 INFRINGER'S PROFITS, WE THINK, IS INAPPROPRIATE TO SAY IT WAS
 25 CHOSEN BY SAP'S COUNSEL.

1 REPRESENTED THE UNIVERSE OF DAMAGES. THE PROBLEM IS THAT WHEN
 2 YOU USE EITHER LOST PROFITS OR INFRINGER'S PROFITS OR RUNNING
 3 ROYALTY, YOU'RE DEALING WITH A UNIVERSE OF CUSTOMERS THAT IS, WE
 4 ALL KNOW, INCOMPLETE. AND THAT'S THE ONLY POINT WE'RE MAKING.
 5 THE COURT: WHAT IS THE LANGUAGE THAT IS OFFENSIVE?
 6 IS IT THAT THE LIST OF 86 WAS CHOSEN BY SAP'S COUNSEL.
 7 MR. LANIER: THAT'S CORRECT, YOUR HONOR.
 8 THE COURT: ALL RIGHT. WHAT EVIDENCE IS THERE IN THE
 9 RECORD THAT IT WAS CHOSEN BY COUNSEL AS OPPOSED TO BY SAP?
 10 MR. BOIES: IT COMES FROM THE LETTER ITSELF, WHICH
 11 WAS WRITTEN BY JONES DAY. NOW, IF --
 12 THE COURT: BUT JONES DAY DIDN'T DECIDE ON THE NUMBER
 13 OF CUSTOMERS. IF THEY DID, THERE CERTAINLY HAS BEEN NO EVIDENCE
 14 THAT IT WAS THE LAW FIRM THAT MADE THE DECISION.
 15 MR. BOIES: YOUR HONOR, COULD I HAVE JUST A MOMENT TO
 16 SEE -- IT ACTUALLY DOESN'T MATTER THAT MUCH TO ME WHETHER IT'S
 17 COUNSEL OR SAP THAT MADE THE DECISION. I JUST WANT TO SEE
 18 WHETHER I CAN CHANGE MY CHART.
 19 THE COURT: WELL, I WOULDN'T APPROVE YOU ATTRIBUTING
 20 ANY OF THE CONDUCT AT ISSUE IN THIS CASE TO THE LAW FIRM
 21 REPRESENTING SAP. THERE'S BEEN NO EVIDENCE OF THAT.
 22 SO -- SO IF, INDEED, IT WAS -- SAP GENERATED THE
 23 LIST, YOU CAN REFER TO SAP, BUT NOT TO SAP'S COUNSEL. I MEAN,
 24 WHY IS THAT A PROBLEM?
 25 MR. BOIES: WELL, YOUR HONOR, THE REASON IT'S A

1 THOSE ARE OUR THREE MAJOR OBJECTIONS.
 2 THE COURT: OKAY.
 3 MR. BOIES: THE COURT HAS OUR VIEW AND HAS ALREADY
 4 RULED ON THE FIRST OBJECTION.
 5 WITH RESPECT TO THE SECOND OBJECTION, THERE ARE ABOUT
 6 HALF A DOZEN CHARTS THAT USE A WORD LIKE "THEFT" OR "GUILT."
 7 WHATEVER MAY BE TRUE AT THE OPENING STATEMENT, THAT IS NOT AN
 8 ARGUMENT. IT IS CERTAINLY, WE BELIEVE, PERMISSIBLE TO ARGUE ON
 9 THE RECORD THAT HAS BEEN MADE THAT THIS STUFF WAS STOLEN,
 10 THAT -- THAT PEOPLE TOOK IT ILLEGALLY.
 11 ONE OF THE OBJECTIONS THEY HAVE IS EVEN TO REFERRING
 12 TO SAP AS THE GUILTY PARTY, WHICH IS SOMETHING THAT IS USED IN
 13 CIVIL CONTEXT ALL THE TIME.
 14 THE -- THE POINT OF THIS IS WHEN THEY TAKE ON A RISK,
 15 IT'S IMPORTANT TO KNOW THE NATURE OF THE RISK THAT THEY ARE
 16 TAKING ON. AND THEY ARE TAKING ON THE RISK OF BEING FOUND TO
 17 HAVE STOLEN COPYRIGHTS. AND THAT IS SOMETHING THAT WE THINK IS
 18 DIRECTLY RELEVANT TO THE DAMAGES ISSUES THAT ARE HERE.
 19 NOW, WITH RESPECT TO THE 86, THE LETTER THAT SETS
 20 FORTH HOW THE 86 WERE SELECTED IS IN EVIDENCE. THAT CAME IN AS
 21 EVIDENCE WITHOUT OBJECTION. IT IS SOMETHING THAT WAS DONE BASED
 22 ON THE INFORMATION PROVIDED BY SAP COUNSEL. THE LETTER STATES
 23 THE ISSUES, AND WE ARE REALLY JUST REFERRING TO THE ISSUES THAT
 24 ARE STATED IN THAT LETTER BY JONES DAY THAT IS IN EVIDENCE.
 25 THERE WAS NEVER A STIPULATION THAT THOSE 86 CUSTOMERS

1 PROBLEM IS BECAUSE THE LETTER WAS WRITTEN BY SAP'S COUNSEL. WE
 2 THOUGHT WE HAD A RIGHT TO RELY ON THAT. WE'VE PREPARED OUR
 3 CHARTS THAT WAY. SO I MEAN, THAT'S WHY IT'S A PROBLEM.
 4 THE COURT: CAN YOU SHOW ME WHAT THE LETTER LOOKS
 5 LIKE?
 6 MR. LANIER: YOUR HONOR, INTERROGATORY RESPONSES ARE
 7 SIGNED BY LAWYERS. THAT DOESN'T MAKE THEM LAWYERS' RESPONSES.
 8 THEY'RE THE COMPANY'S RESPONSES. IT'S THE SAME THING.
 9 THE COURT: ALL RIGHT.
 10 MR. LANIER: COMMUNICATING INFORMATION AND MAKING THE
 11 CHOICE.
 12 THE COURT: DOES ANYBODY --
 13 CAN YOU SHOW ME THE LETTER?
 14 MR. LANIER: AND MR. MITTELSTAEDT POINTS OUT TO ME
 15 THAT, IN FACT, THE EVIDENCE THAT'S IN THE RECORD -- THE EXHIBIT
 16 THAT'S IN THE RECORD WAS BY AGREEMENT OF COUNSEL. THE FACT THAT
 17 IT CAME FROM COUNSEL, THE LAWYERS' NAMES WERE, IN FACT, REDACTED
 18 OUT. SO THAT'S EXACTLY NOT THE POINT. THE EXHIBIT THAT'S IN
 19 THE RECORD, WHICH IS EXHIBIT -- OH, BOY.
 20 GOT TO GET MY GLASSES.
 21 7035.
 22 THE COURT: OKAY. 7035.
 23 MR. LANIER: 7035.
 24 THE COURT: AND THE LAWYERS NAMES ARE REDACTED?
 25 MR. LANIER: YEP. AND THE FIRM NAME AND ALL THAT.

1 THAT WAS BY AGREEMENT OF COUNSEL.
 2 I HAVE A DEMONSTRATIVE THAT HAS IT ON IT. IN FACT,
 3 HERE'S A COPY OF THE EXHIBIT. IT JUST DOESN'T HAVE THE EXHIBIT
 4 STAMP ON IT.
 5 (PAUSE IN THE PROCEEDINGS.)
 6 THE COURT: OKAY. IS THERE SOMETHING ELSE,
 7 MR. BOIES?
 8 MR. BOIES: NO, YOUR HONOR. WE DID NOT MENTION JONES
 9 DAY. WE MENTIONED SAP COUNSEL. I--
 10 THE COURT: YOU CAN ATTRIBUTE IT TO SAP, NOT TO THE
 11 LAWYERS.
 12 MR. BOIES: MAY WE HAVE ABOUT TEN MINUTES TO TRY TO
 13 CHANGE THE SLIDES?
 14 THE COURT: OKAY.
 15 NOW, WITH REGARD, THEN, TO THE -- THERE WERE THREE
 16 OBJECTIONS THAT YOU RAISE. WITH REGARD TO THE FIRST ONE, I'VE
 17 ALREADY RULED ON THAT. THE EVIDENCE HAS ALREADY COME IN. SO,
 18 OBVIOUSLY, I'M NOT GOING TO CHANGE MY VIEW ON THAT NOW.
 19 WITH REGARD TO THE CHARACTERIZATION OF COPYRIGHT
 20 INFRINGEMENT AS THEFT OR STEALING, I INDICATED TO YOU ALL FOR
 21 OPENINGS THAT YOU COULDN'T USE IT THROUGHOUT THE COURSE OF THE
 22 TRIAL. YOU'VE BEEN VERY GOOD. YOU HAVEN'T -- NONE OF THE
 23 WITNESSES HAVE USED THAT LANGUAGE. IN MY VIEW, THAT LANGUAGE IS
 24 INFLAMMATORY, UNNECESSARY.
 25 THIS IS A COPYRIGHT CASE. "COPYRIGHT INFRINGEMENT"

1 THE COURT: AND IS THAT THE COWLITZ COUNTY --
 2 MR. HOWARD: ONE OF THEM IS THE COWLITZ COUNTY. THE
 3 OTHER IS EXHIBIT A9329. I CAN PUT IT UP ON THE BOARD.
 4 MR. MITTELSTAEDT: CAN I SEE WHICH ONE --
 5 MR. LANIER: AND, YOUR HONOR, WHILE WE'RE DOING THAT,
 6 WE DON'T INTEND TO OFFER THEM TO THE TRUTH. WE UNDERSTAND THE
 7 COURT'S RULING ADMITTING THEM FOR THE LIMITED PURPOSE, AND
 8 THAT'S THE ONLY PURPOSE FOR WHICH THEY'D BE DISCUSSED.
 9 FOR EXAMPLE, IT'S APPROPRIATE TO SAY HERE'S SOMETHING
 10 THE EXPERT RELIED ON AS YOU'RE THINKING ABOUT HOW TO VALUE
 11 MR. MEYER'S OPINION, FOR EXAMPLE. THAT'S THE PURPOSE FOR WHICH
 12 WE'D OFFER THEM.
 13 MR. MITTELSTAEDT: I'M NOT GOING TO USE THE COWLITZ
 14 COUNTY ONE.
 15 THE COURT: AT ALL.
 16 MR. MITTELSTAEDT: IN CLOSING.
 17 MR. HOWARD: CAN WE PUT UP SLIDE 42.
 18 (DEMONSTRATIVE PUBLISHED TO COURT.)
 19 MR. HOWARD: THIS IS -- THIS IS THE OTHER ONE, YOUR
 20 HONOR. AND THAT JUST DOES NOT APPEAR TO US TO BE OFFERED TO
 21 DISCUSS RELIANCE. THAT APPEARS TO US TO BE OFFERED FOR THE
 22 TRUTH OF ITS CONTENTS.
 23 THE COURT: WHAT IS THIS?
 24 MR. HOWARD: THIS IS AN EMAIL FROM MR. MACKAY AND
 25 PERHAPS COUNSEL CAN EXPLAIN HOW THEY INTEND TO USE IT.

1 IS A TERM OF ART THAT IS WHAT HAS BEEN STIPULATED TO. AND NO,
 2 YOU MAY NOT USE THE LANGUAGE -- WORDS SUCH AS "THEFT" OR
 3 "STEALING."
 4 THROUGHOUT THE COURSE OF THE TRIAL, WITNESSES HAVE
 5 USED LANGUAGE SUCH AS "TAKING OUR SOFTWARE," AND, OBVIOUSLY, YOU
 6 CAN CONTINUE TO USE THAT. BUT KEEP IN MIND THE BASIS FOR MY
 7 RULING WAS TWO-FOLD, NOT JUST THAT I DID NOT WANT THE JURY TO BE
 8 MISLED INTO THINKING THAT THERE WERE ANY KIND OF CRIMINAL --
 9 CRIMINAL UNDERTONES HERE. BUT ADDITIONALLY, IT WAS ON THE BASIS
 10 OF MY DETERMINATION THAT THE LANGUAGE IS JUST INFLAMMATORY.
 11 IT'S NOT NECESSARY.
 12 SO THAT OBJECTION IS SUSTAINED.
 13 AND I'VE ALREADY INDICATED WITH REGARD TO THE LAST
 14 ONE, SAP CAN BE REFERRED TO BUT NOT ITS COUNSEL.
 15 ALL RIGHT. WERE THERE ANY OTHER OBJECTIONS TO
 16 DEMONSTRATIVES?
 17 MR. LANIER: IT'S FINE FROM US, YOUR HONOR.
 18 THE COURT: FROM YOU ALL?
 19 MR. HOWARD: YES, YOUR HONOR. THERE'S -- THERE'S
 20 ONLY A COUPLE ON OUR SIDE. THERE'S TWO EXHIBITS. THEY'RE SLIDE
 21 42 AND THEY'RE SLIDE 74 WHICH SHOW EVIDENCE -- WHICH HAS ONLY
 22 BEEN ADMITTED FOR A LIMITED PURPOSE RELATED TO THE EXPERTS'
 23 RELIANCE AND NOT FOR THE TRUTH.
 24 APPEARS TO US THAT IT'S BEING IN THE SLIDE DECK FOR
 25 THE TRUTH OF THE CONTENTS OF THE DOCUMENT. WE OBJECT TO THAT.

1 MR. MITTELSTAEDT: I'M GOING TO USE THIS TO CRITICIZE
 2 MR. MEYERS (SIC) FOR NOT CONSIDERING THIS DOCUMENT AND NOT
 3 GIVING IT ENOUGH WEIGHT IN HIS OPINION. SO IT'S NOT FOR THE
 4 TRUTH OF THE MATTER IT'S TO SHOW THAT HE DID NOT CONDUCT A
 5 PROPER EXAMINATION.
 6 THE COURT: OKAY. ALL RIGHT.
 7 MR. HOWARD: IF IT'S CLEAR.
 8 THE COURT: THAT'S FINE.
 9 MR. HOWARD: CLEAR IN THE ARGUMENT, YOUR HONOR, THAT
 10 IS FINE.
 11 AND COULD YOU PUT UP 43, PLEASE.
 12 (DEMONSTRATIVE PUBLISHED TO JURY.)
 13 MR. HOWARD: NOW, THE LAST CATEGORY OF OBJECTION,
 14 YOUR HONOR, IS TWO SLIDES WHERE THE IMPRESSION THAT'S BEING
 15 GIVEN IS THAT THIS INFORMATION APPEARS IN THE SLIDE, WHICH IT
 16 DOES NOT. THESE NUMBERS ARE NOWHERE IN THIS DOCUMENT. AND
 17 SO -- WE DON'T EVEN KNOW WHERE THE NUMBERS CAME FROM.
 18 MR. MITTELSTAEDT: IT'S --
 19 THE COURT: WAIT. WHICH -- THE CIRCLED NUMBERS?
 20 MR. HOWARD: THE ROW, THE ENTIRE ROW WHERE IT SAYS
 21 "CUSTOMERS."
 22 THE COURT: YEAH.
 23 MR. HOWARD: CAN YOUR HONOR SEE IT WITH COUNSEL
 24 STANDING THERE?
 25 THE COURT: NO, I CAN SEE IT.

1 BUSINESS RELATIONSHIPS. THAT WAS PART OF THE PURPOSE OF DOING
2 IT. AND FOURTH, IT DOES NOT FULLY COMPENSATE ORACLE BASED ON --
3 JUST LOOKING AT THE MAINTENANCE REVENUE.

4 NOW, I ALSO WANT TO TALK JUST FOR A MOMENT ABOUT
5 SOMETHING CALLED INFRINGER'S PROFITS, WHICH YOU MAY OR MAY NOT
6 GET TO DEPENDING ON HOW YOU ANSWER SOME OF THE OTHER QUESTIONS
7 ON THE JURY -- BUT I DO WANT TO TALK TO YOU ABOUT INFRINGER'S
8 PROFITS.

9 FIRST, INFRINGER PROFITS ARE THE PROFITS THAT THEY
10 MAKE. AND IF YOU GO TO 287 --

11 (DEMONSTRATIVE PUBLISHED TO JURY.)

12 MR. BOIES: -- MR. MEYER CAME UP WITH AN ESTIMATE OF
13 \$288 MILLION FOR INFRINGER PROFITS. AND HE SAID THAT'S
14 INCOMPLETE. HE SAID IT'S MORE THAN THAT, BUT I CAN'T TELL YOU
15 HOW MUCH MORE THAN THAT 'CAUSE I DON'T HAVE THE DATA. AND ONE
16 OF THE PROBLEMS WITH THE INFRINGER'S PROFITS IS THAT THE DATA IS
17 NOT ALL AVAILABLE.

18 BUT WHAT WE KNOW IS WE KNOW IT'S SUBSTANTIALLY ABOVE
19 \$288 MILLION. NOW, HOW DO WE KNOW THAT?

20 AND LET ME GO TO PAGE 110.

21 (DEMONSTRATIVE PUBLISHED TO JURY.)

22 MR. BOIES: YOU REMEMBER I DREW ON -- ON THE BOARD
23 OVER HERE A -- WHEN I WAS EXAMINING MR. CLARKE, I TALKED ABOUT
24 HOW SAP HAD IDENTIFIED 86 CUSTOMERS WHERE SAP HAD REVENUE AFTER
25 THE CUSTOMERS BECAME A TOMORROWNOW CUSTOMER. AND THAT WAS

1 ABOUT THESE NUMBERS THAT --

2 AND LET'S GO TO 204.

3 (DEMONSTRATIVE PUBLISHED TO JURY.)

4 MR. BOIES: THIS IS PLAINTIFFS' EXHIBIT 37. OVER THE
5 LONG TERM, SAP RECOGNIZED THAT EVERY DOLLAR OF TOMORROWNOW
6 STAND-ALONE REVENUE IN 2005 REPRESENTED \$18 MILLION -- OR \$18 --
7 EVERY \$1 REPRESENTS 18 -- EVERY MILLION DOLLARS REPRESENTS
8 \$18 MILLION OF ORIGINALLY EXPECTED ORACLE REVENUE.

9 SO IT HAS THIS MULTIPLIER EFFECT, AND THE MULTIPLIER
10 EFFECT WORKED BOTH WAYS. IT WORKED TO HURT ORACLE AND HELP SAP.

11 (DEMONSTRATIVE PUBLISHED TO JURY.)

12 MR. BOIES: GO TO 288, WHICH IS EXHIBIT 373.

13 \$1 OF TOMORROWNOW STAND-ALONE REVENUE EQUALS \$10 OF
14 SAP'S LICENSE REVENUE PIPELINE. SO WHEN YOU LOOK AT THE
15 REVENUES OF TOMORROWNOW, YOU'VE GOT TO TAKE INTO ACCOUNT THE
16 FACT THAT IT HAS THIS MULTIPLYING EFFECT, THAT EVERY DOLLAR THAT
17 TOMORROWNOW GETS HURTS ORACLE MUCH MORE THAN A DOLLAR AND HELPS
18 SAP MUCH MORE THAN A DOLLAR.

19 SO IF YOU SIMPLY LOOK AT SAP'S AND TOMORROWNOW'S
20 REVENUE FROM THOSE CUSTOMERS, MAINTENANCE REVENUES FROM THOSE
21 CUSTOMERS, THAT GREATLY UNDERSTATES THE VALUE OF WHAT'S GOING
22 ON, FOR BOTH SAP AND FOR ORACLE.

23 NOW, IF YOU WANTED TO DO SOME REALITY TESTING, YOU
24 WANT TO DO THAT REALITY TESTING BASED ON WHAT PEOPLE KNEW AT THE
25 TIME.

1 \$885 MILLION. AND THEY HAD ONGOING -- WHAT SAP CALLED ONGOING
2 REVENUES. THAT MEANS THAT THEY WERE REVENUES THAT STARTED
3 BEFORE, BUT CONTINUED AFTER -- AND HE CONCLUDED THEY OUGHT TO BE
4 SUBTRACTED. THAT CAME UP WITH \$689 MILLION.

5 NOW, THERE ARE TWO ISSUES. FIRST, HE SAYS, WELL, NOT
6 ALL 86 CUSTOMERS REALLY WENT TO SAP BECAUSE OF TOMORROWNOW EVEN
7 THOUGH THEY WENT TO SAP AFTER TOMORROWNOW. AND THE QUESTION IS
8 HOW DO YOU FIGURE THAT OUT. AND THAT'S ONE OF THE PROBLEMS WITH
9 USING THIS APPROACH, IS IT'S HARD TO FIGURE THAT OUT.

10 THE SECOND THING IS HE SAYS, WELL, THAT'S NOT ALL
11 PROFIT. AND IT'S TRUE IT'S NOT ALL PROFIT. BUT HOW MUCH OF IT

12 IS PROFIT IN TERMS OF THE INFRINGER'S PROFIT? IT'S THEIR BURDEN
13 TO PROVE AND THEY SIMPLY HAVE NOT CARRIED THAT BURDEN.

14 THEY HAVEN'T BEGUN TO COME FORWARD WITH EVIDENCE,
15 ACTUAL EVIDENCE OF WHAT THE COST OF SERVING THESE ADDITIONAL
16 CUSTOMERS WERE.

17 SO YOU STARTED WITH \$689 MILLION, CONCEDED REVENUES
18 ON JUST THESE 86 CUSTOMERS -- THAT'S JUST 86 CUSTOMERS. THESE
19 ARE 86 ACTUAL CUSTOMERS. THAT SAYS \$689 MILLION OF ACTUAL
20 REVENUE FROM ACTUAL CUSTOMERS. BECAUSE IN INFRINGER'S PROFITS,
21 YOU ARE LOOKING AT WHAT HAPPENS AFTER THE FACT. HOW MUCH OF
22 THAT IS INFRINGER PROFITS?

23 SINCE THEY HAVE THE BURDEN, IT'S THAT AMOUNTS MINUS
24 WHATEVER THEY SHOW YOU THE RIGHT EVIDENCE IS FOR THEIR COST.

25 I WANTED YOU TO KEEP IN MIND WHEN YOU'RE THINKING

1 AND LET'S GO TO 225. THIS IS PLAINTIFFS' EXHIBIT 23.

2 (DEMONSTRATIVE PUBLISHED TO JURY.)

3 MR. BOIES: THIS IS A CONFERENCE CALL, JANUARY 19TH,
4 THE DAY OF THE HYPOTHETICAL NEGOTIATION. THIS IS WHAT
5 MR. AGASSI, THE SAP BOARD MEMBER, SAYS: HE'S ASKED ABOUT THE
6 VALUES. SAYS IF YOU WANT TO LOOK AT IT FROM A FINANCIALS
7 PERSPECTIVE, THE RATIONALE IS MORE AROUND THE VALUE THAT THESE
8 CUSTOMERS REPRESENT AS POTENTIAL FUTURE CUSTOMERS OF SAP.

9 AND THE CUSTOMERS OF -- PEOPLESFT CUSTOMERS. AND HE
10 GOES ON. AND THIS IS MR. AGASSI'S WORDS AT THE TIME. AND IT'S
11 THE VALUE WAS ESTIMATED BY ORACLE RIGHTLY OR WRONGLY AS
12 \$10 BILLION.

13 WE BELIEVE THAT THIS CUSTOMER BASE IS NOT NECESSARILY
14 CAPTIVE (SIC) BY ORACLE. I THINK THIS CUSTOMER BASE HAS TO MAKE
15 A CHOICE RIGHT NOW. AND THE REASON THEY HAD TO MAKE A CHOICE
16 RIGHT NOW WAS BECAUSE OF TOMORROWNOW. BECAUSE WITHOUT
17 TOMORROWNOW, YOU'VE SEEN THEY HAD NO MAINTENANCE OFFERING.

18 MR. CLARKE TESTIFIED THAT SAP ON ITS OWN COULD NEVER
19 HAVE COME UP WITH A SOFTWARE NECESSARY TO SERVICE ORACLE
20 CUSTOMERS. THEY COULD NOT HAVE DONE IT ON THEIR OWN. ALSO
21 TESTIFIED THAT TOMORROWNOW COULDN'T HAVE DONE IT LEGALLY. BUT
22 THEY NEEDED TOMORROWNOW, THEY NEEDED THESE INFRINGING COPIES IN
23 ORDER TO COMPETE. THEY COULD ONLY GIVE THESE CUSTOMERS WORTH
24 \$10 BILLION A CHOICE THROUGH THE INFRINGEMENT, AND THAT SHOWS
25 YOU THE VALUE OF THE INFRINGEMENT.

1 LET ME GO TO 244.
 2 (SLIDE DISPLAYED ON SCREEN.)
 3 THIS IS THE SAME DOCUMENT, PLAINTIFFS' EXHIBIT 37,
 4 FROM ANDREW NELSON. AND MR. CLARKE SAYS HAS NO FINANCIAL
 5 EFFECT WHATSOEVER. AND YET THE DOCUMENT WAS WRITTEN BY
 6 TOMORROWNOW'S FOUNDER AND CEO WHO WAS ALSO AN SAP AMERICA VICE
 7 PRESIDENT AT THE TIME. IT WAS SENT TO MR. APOTHEKER AND
 8 OTHERS. AND MAYBE MOST IMPORTANT OF ALL, NO ONE EVER DISAGREED
 9 WITH NELSON'S ANALYSIS. IN FACT, OTHER ANALYSES CONFIRMED
 10 NELSON'S ANALYSIS, AND WE CITE PLAINTIFFS' EXHIBIT 373.
 11 THIS IS VERY IMPORTANT, LADIES AND GENTLEMEN,
 12 BECAUSE I ASK YOU TO LOOK AT THE EVIDENCE. I ASK YOU TO LOOK
 13 AT WHAT IS ACTUALLY SAID, WHAT THE WITNESSES ACTUALLY SAID, NOT
 14 WHAT COUNSEL SAYS THEY SAY. LOOK AT WHAT THE DOCUMENTS
 15 ACTUALLY SAY, NOT WHAT COUNSEL SUGGESTS THEY MIGHT SAY. LOOK
 16 AT THE ACTUAL DOCUMENTS THAT ARE INVOLVED.
 17 LET ME GIVE YOU ANOTHER ONE.

18 COUNSEL TALKED TO YOU ABOUT INFRINGER PROFITS AND
 19 CUSTOMERS. AND HE SAID, WELL, MR. MEYER AGREES THAT SOME OF
 20 THESE 86 CUSTOMERS SHOULDN'T BE THERE. HE SAYS MR. MEYER
 21 AGREES ON ABOUT 20, 23 OF THOSE CUSTOMERS.
 22 WHAT HE DIDN'T TELL YOU IS WHAT MR. MEYER SAYS IS
 23 THAT CALCULATION, THIS CALCULATION IS NOT THE BEST WAY TO LOOK
 24 AT DAMAGES BECAUSE IT IS NOT COMPLETE. HE COULD NOT COMPLETE
 25 IT WITH THE DATA THAT WAS AVAILABLE. NOBODY COULD COMPLETE IT

1 WITH THE DATA THAT WAS AVAILABLE.
 2 THAT'S WHY HE SAID THAT THE RIGHT WAY TO LOOK AT IT
 3 IS THE FAIR MARKET VALUE LICENSE THAT THE COURT IS GOING TO
 4 INSTRUCT YOU ABOUT. IT WAS NOT TO FOLLOW THIS APPROACH.
 5 IF YOU DID FOLLOW THIS APPROACH, YOU STILL GET A
 6 NUMBER THAT'S HUNDREDS OF MILLIONS OF DOLLARS HIGHER THAN THE
 7 NUMBER THAT THEY SUGGEST.
 8 BECAUSE ONE OF THE THINGS THAT THE COURT WILL
 9 INSTRUCT YOU IS THAT ON INFRINGER PROFITS, THEY HAVE THE BURDEN
 10 OF PROOF, NOT ASSERTION, NOT SAYING, WELL, THE COST OF
 11 50 PERCENT. THAT'S NOT PROOF, THAT IS NOT EVIDENCE. THEY HAVE
 12 THE BURDEN OF PROVING WHAT THEIR COSTS ARE. IF THEY DON'T,
 13 THEN UNDER THE LAW YOU AWARD THE TOTAL AMOUNT OF THE REVENUE.
 14 AND THE JUDGE IS GOING TO GIVE YOU INSTRUCTIONS ON THAT ISSUE.
 15 SO I ASK YOU TO LOOK AT THE ACTUAL EVIDENCE THAT YOU
 16 HAVE AND COMPARE THE EVIDENCE THAT YOU HAVE WITH THE ARGUMENTS
 17 THAT THEY ARE MAKING, AND THEN LOOK AT IT ALL IN THE CONTEXT OF
 18 WHAT THE JUDGE IS GOING TO INSTRUCT YOU THE LAW IS AND THE
 19 RULES THAT YOU HAVE TO FOLLOW.
 20 NOW, WITH RESPECT TO THESE CUSTOMERS, THERE WAS AN
 21 INTERESTING SUGGESTION THAT BECAUSE I HAD NOT CROSS-EXAMINED
 22 MR. MEYER (SIC) ABOUT ALL 358 CUSTOMERS, SOMEHOW WE HAD
 23 CONCEDED MR. MEYER -- MR. CLARKE WAS RIGHT ABOUT THOSE. OF
 24 COURSE COUNSEL DIDN'T CROSS-EXAMINE MR. MEYER ABOUT THOSE 358
 25 EITHER.

1 IN FACT, WHAT WE DID WAS WE TOOK YOU THROUGH ENOUGH
 2 EXAMPLES SO THAT YOU UNDERSTOOD HOW THE DIFFERENT WITNESSES
 3 WERE APPROACHING THE ISSUE. FOR EXAMPLE, TAKE MR. CLARKE. AND
 4 TAKE THE EXAMPLE OF NATIONAL FOODS. 113.

5 (SLIDE DISPLAYED ON SCREEN.)
 6 AND THIS IS IMPORTANT BECAUSE IT GIVES YOU AN IDEA,
 7 GOOD IDEA OF HOW FLAWED MR. CLARKE'S ANALYSIS IS. HE EXCLUDES
 8 NATIONAL FOODS BECAUSE HE SAYS THERE IS NO EVIDENCE THAT WHAT
 9 SAP GOT WAS RELATED TO TOMORROWNOW. NO EVIDENCE.

10 WELL, IF THERE WAS NO EVIDENCE YOU COULD LOOK AT IT
 11 ONE OF TWO WAYS. DO I LEAVE THEM IN BECAUSE THERE IS NO
 12 EVIDENCE ON IT OR DO I TAKE THEM OUT BECAUSE THERE'S NO
 13 EVIDENCE? BUT YOU DON'T HAVE TO REACH THAT ISSUE BECAUSE THERE
 14 IS EVIDENCE.

15 LOOK AT PLAINTIFFS' EXHIBIT 7027. TOMORROWNOW WAS
 16 ABLE TO GIVE SUBSTANTIAL TEETH TO THE SAP LICENSE BID. ALSO,
 17 ORACLE MOUNTED AN INTENSE CAMPAIGN TO MAINTAIN THIS CLIENT,
 18 HOWEVER THE JOINT SAP AND TOMORROWNOW OFFERING WAS SIMPLY TOO
 19 STRONG.

20 THOSE ARE SAP'S STATEMENTS. THAT'S WHAT SAP IS
 21 SAYING AT THE TIME IS THE REASON THEY GOT THIS CUSTOMER.

22 BUT MR. CLARKE WOULD IGNORE IT EVEN IN THE FACE OF
 23 THAT EVIDENCE.

24 LET'S GO TO 114.
 25 BUT THERE'S EVEN MORE THAN THAT EXHIBIT.

1 THE TECHNOLOGY DOES NOT SEEM TO BE WORKING, BUT
 2 MAYBE THE ELMO WILL. DO IT THE OLD FASHION WAY.

3 (SLIDE DISPLAYED ON ELMO.)
 4 THIS IS MR. HURST, THEIR CORPORATE REPRESENTATIVE ON
 5 SAFE PASSAGE. HE TESTIFIED THAT TOMORROWNOW'S SUPPORT OFFERING
 6 WAS INSTRUMENTAL IN ACHIEVEMENT OF THIS CUSTOMER WIN.

7 NOW THAT'S THE EVIDENCE. THAT'S THE EVIDENCE IN THE
 8 FACE OF WHICH MR. CLARKE STILL EXCLUDES NATIONAL FOODS.

9 NOW, HE ALSO EXCLUDED PEPSI, AND YOU HEARD COUNSEL
 10 PUT UP SOME TESTIMONY FROM PEPSI. YOU WILL RECALL THAT PEPSI
 11 TESTIFIED THAT THEY WOULD NOT HAVE LEFT ORACLE IF THEY HAD
 12 KNOWN THAT TOMORROWNOW WAS INFRINGING. AND YET MR. CLARKE
 13 EXCLUDES THEM. THEY EXCLUDE THEM FROM THE DAMAGE CALCULATION.

14 IT'S THOSE KINDS OF EXCLUSIONS THAT SHOW TWO THINGS.
 15 FIRST, IT SHOWS HOW UNRELIABLE THIS APPROACH TO DAMAGES IS.
 16 THAT IS HOW UNRELIABLE THE APPROACH OF LOOKING AT THESE KIND OF
 17 DECISIONS ON LOST PROFITS AND LOST CUSTOMERS.

18 THAT'S NOT ALWAYS SO. SOMETIMES YOU HAVE WAYS OF
 19 CALCULATING LOST PROFITS OR INFRINGERS' PROFITS THAT DO NOT
 20 DEPEND ON SUBJECTIVE DETERMINATION. WHY DID A CUSTOMER LEAVE?
 21 WHY DID A CUSTOMER GO TO SAP? WHY DID A CUSTOMER TAKE THIS
 22 PRODUCT FROM SAP?

23 WHEN YOU HAVE THOSE KIND OF SUBJECTIVE JUDGMENTS
 24 THAT ARE NECESSARY TO MAKE FOR A LOST PROFITS OR AN INFRINGER
 25 PROFIT ANALYSIS, OR RUNNING ROYALTY ANALYSIS, WHICH IS THE SAME

