

# **EXHIBIT 12**

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 7
	)	
SAP AG, ET AL.,	)	PAGES 1188 - 1420
	)	
DEFENDANTS.	)	OAKLAND, CALIFORNIA
_____	)	FRIDAY, NOVEMBER 12, 2010

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:           BINGHAM MUCCUTCHEN LLP  
                                  THREE EMBARCADERO CENTER  
                                  SAN FRANCISCO, CALIFORNIA 94111-4607

BY: ZACHARY J. ALINDER,  
      HOLLY A. HOUSE,  
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      STEVEN C. HOLTZMAN, ATTORNEYS AT LAW

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                                  DIANE E. SKILLMAN, CSR NO. 4909

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

TEXT REMOVED - NOT RELEVANT TO MOTION

19 Q. AND YOU PREPARED ONE SCHEDULE THAT WAS CALLED "SUMMARY OF  
20 EXCLUDED CUSTOMERS."

21 A. THAT'S CORRECT.

22 Q. AND YOU LISTED THE REASONS FOR EXCLUSION.

23 A. THAT'S CORRECT.

24 Q. AND ONE OF THE REASONS YOU LISTED WAS CAUSATION, CORRECT?

25 A. I BELIEVE THAT'S ON THERE; THAT'S CORRECT.

2 Q. BUT AS IT TURNED OUT, THE ONLY CUSTOMERS YOU EXCLUDED  
3 BECAUSE OF SERVICE GAP ARE CUSTOMERS WHO JUST HAPPENED TO HAVE A  
4 SERVICE GAP OF FOUR YEARS OR LONGER; IS THAT CORRECT?

5 A. NO, THERE'S STILL ONE IN THAT'S OVER FOUR YEARS. I NEVER  
6 ADOPTED A SERVICE-GAP METHODOLOGY.

7 Q. OKAY. WELL, WHY DIDN'T YOU EXCLUDE THAT OTHER ONE ON A  
8 SERVICE-GAP BASIS?

9 A. BECAUSE THEY WERE TAKING TOMORROWNOW SERVICE THAT BUT FOR  
10 TOMORROWNOW, THEY DIDN'T HAVE A SERVICE PROVIDER THAT CAN  
11 PROVIDE VENDOR-LEVEL SERVICE.

12 Q. WHAT WAS IT ABOUT THE TWO YOU EXCLUDED?

13 A. I --

14 Q. -- HAD BEEN GONE FOR MORE THAN FOUR YEARS.

15 A. I MENTIONED SIEBEL A FEW MINUTES AGO. THE EVERGREEN  
16 CUSTOMER LEFT SIEBEL IN 2002, AND THEN FIVE YEARS LATER, THEY  
17 GO -- THEY TAKE A CONTRACT WITH -- WITH TOMORROWNOW. AND AS I  
18 MENTIONED A MOMENT AGO, SAP BEGAN OFFERING TOMORROWNOW SERVICES  
19 I BELIEVE IN THE FALL OF 2006. SO FROM THAT PERSPECTIVE, I TOOK  
20 THEM OUT, JUST BASED ON THOSE FACTS.



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BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

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

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TEXT REMOVED - NOT RELEVANT TO MOTION

18                   MR. PICKETT:   THIS -- WHAT I'M GOING TO DO IS A VERY  
19   NARROW SLICE OF THIS.   THERE ARE FIVE CUSTOMER DECLARATIONS THAT  
20   MR. CLARKE PURPORTS TO RELY UPON WHICH WERE PRODUCED AFTER THE  
21   DISCOVERY DATE AND, INDEED, AFTER HIS EXPERT REPORT CAME IN.  
22   THEY ARE LISTED HERE ON THE DEMONSTRATIVE.   THESE FIVE CUSTOMER  
23   DECLARATIONS WERE -- WERE PRODUCED LATE.

24                   AND THEN MR. CLARKE SUPPLEMENTED HIS EXPERT REPORT TO  
25   REDUCE HIS DAMAGES BASED ON THESE LATE-PRODUCED FILINGS.   NOT

1 ONLY -- DEFENDANTS, OF COURSE, KNEW WHO THESE CUSTOMERS WERE.  
2 THEY DISCLOSED THEM IN DISCOVERY IN JULY 2007. AND THESE  
3 DECLARATIONS OBVIOUSLY IN 2010 ARE VERY LATE INDEED.

4 THE RULES ARE THAT EXPERT CANNOT RELY ON THIS, AND  
5 YOUR HONOR, OF COURSE, WILL RECALL THAT OUR DAMAGES EXPERT WAS  
6 NOT PERMIT TO RELY ON DOCUMENTS THAT WERE PRODUCED WELL  
7 BEFORE -- A YEAR BEFORE THE DISCOVERY DEADLINE. SO IN THIS  
8 CASE, IT SEEMS TO ME THERE'S JUST NO QUESTION THAT THESE  
9 LATE-PRODUCED DOCUMENTS CANNOT FORM THE BASIS FOR HIS OPINION.

10 THE COURT: ALL RIGHT. RESPONSE?

11 MR. McDONELL: YES, YOUR HONOR. MR. CLARKE HAS  
12 RELIED ON DECLARATIONS FROM CUSTOMERS. ALL BUT ONE OF THOSE  
13 WERE PRODUCED AND PROVIDED TO PLAINTIFFS PRIOR TO THE DEPOSITION  
14 OF THEIR EXPERT, MR. MEYER. THE VAST MAJORITY WITH THE POSSIBLE  
15 EXCEPTION OF THAT ONE -- I CAN'T BE SURE ABOUT THAT -- BUT MOST  
16 OF THEM WERE ACTUALLY USED IN EXAMINATION OF THEIR EXPERT.

17 THE COURT: ARE YOU TALKING ABOUT THESE FIVE?

18 MR. McDONELL: YES. THEY WERE PART OF HIS  
19 DEPOSITION. AND MR. CLARKE HAS RELIED ON THEM, WHICH IS  
20 APPROPRIATE. I COULD -- MR. MEYER HIMSELF TESTIFIED IN THIS  
21 TRIAL THAT IT IS HIS PRACTICE AND HE BELIEVES IT'S APPROPRIATE  
22 TO RELY ON SWORN STATEMENTS IN DOING THIS KIND OF WORK, SO I  
23 DON'T THINK THERE'S ANY QUESTION ABOUT WHETHER IT'S THE TYPE OF  
24 INFORMATION A DAMAGES EXPERT IN A CASE LIKE THIS WOULD RELY  
25 UPON.

1 SO THE ONLY QUESTION, I THINK, IS WHETHER MR. CLARKE,  
2 TOO, CAN RELY ON THEM IN THIS CASE AND HE CAN.

3 THE -- THE --

4 THE COURT: THE WHOLE OBJECTION IS THAT THEY WERE  
5 DISCLOSED AFTER THE DISCOVERY CUTOFF.

6 MR. McDONELL: THEY WERE -- THEY WERE WRITTEN AFTER  
7 THE DISCOVERY CUTOFF. BUT, AGAIN, WITH THE EXCEPTION OF, I  
8 BELIEVE, ONE, THEY WERE COMPLETED BEFORE THE DEPOSITION OF  
9 MR. MEYER AND PROVIDED TO MR. MEYER, AND HE HAD A CHANCE --

10 THE COURT: BUT IT'S MR. CLARKE WHO RELIED UPON THEM,  
11 CORRECT?

12 MR. McDONELL: THIS IS TRUE. AND IT WAS WELL BEFORE  
13 MR. CLARKE'S DEPOSITION THAT THEY WERE -- MR. MEYER WAS DEPOSED  
14 FIRST. HE HAD THE DECLARATIONS. A MONTH OR TWO LATER,  
15 MR. CLARKE WAS.

16 THE COURT: WAS MR. CLARKE DEPOSED ON THESE  
17 DECLARATIONS?

18 MR. McDONELL: I'M TRYING TO REMEMBER IF THEY ASKED  
19 HIM QUESTIONS ABOUT THEM. BUT THEY HAD THEM, AND THEY WERE FREE  
20 TO ASK QUESTIONS ABOUT THEM.

21 THE COURT: SO THE DECLARATIONS WERE PRODUCED TO  
22 PLAINTIFFS' COUNSEL BEFORE MR. CLARKE'S DEPOSITION.

23 MR. McDONELL: THAT'S TRUE, YOUR HONOR.

24 THE COURT: WAS HIS DEPOSITION AFTER HIS SUPPLEMENTAL  
25 REPORT?

1 MR. McDONELL: HIS DEPOSITION WAS AFTER HIS MAY 7  
2 SUPPLEMENTAL REPORT, YES.

3 THE COURT: OKAY.

4 ALL RIGHT. IS THERE A PARTICULAR REASON WHY -- I  
5 MEAN, YOU RECEIVED THESE.

6 MR. PICKETT: WELL, LET ME -- IF I COULD GO BACK TO  
7 THE DEMONSTRATIVE --

8 (SIMULTANEOUS COLLOQUY.)

9 THE COURT: HOLD ON. COULD I ASK MY QUESTION --

10 (SIMULTANEOUS COLLOQUY.)

11 THE COURT: IF, INDEED, YOU RECEIVED THESE AFTER THE  
12 DISCOVERY CUTOFF DATE AND HAD THEM IN ORDER TO USE THEM FOR ANY  
13 EXAMINATION ON DEPOSITION OF MR. CLARKE, WHY WAS NO MOTION FILED  
14 WITH RESPECT TO THESE?

15 MR. PICKETT: THERE WAS A MOTION, YOUR HONOR. IT WAS  
16 OUR MOTION IN LIMINE AND --

17 THE COURT: WITH RESPECT TO THESE?

18 MR. PICKETT: YES, IT WAS INCLUDED IN THE MOTION TO  
19 EXCLUDE PORTIONS OF MR. CLARKE'S TESTIMONY, WHICH YOU DENIED  
20 OUTRIGHT, WITHOUT DEALING WITH THE SEPARATE ISSUES.

21 THE COURT: IT WAS IN THE DAUBERT MOTION?

22 MR. PICKETT: YES.

23 THE COURT: OH, OKAY. AS OPPOSED -- DID YOU SPEAK  
24 SPECIFICALLY TO EACH --

25 MR. PICKETT: EACH ONE OF THE FIVE. IT WAS THE LAST

1 TWO PAGES OF THAT MOTION. AND AS TO -- THESE DOCUMENTS WERE NOT  
2 PART OF THE EXPERT REPORT. THEY CAME IN -- THE FIRST FOUR CAME  
3 IN -- MR. MEYER'S DEPOSITION WAS MAY 10TH. SO ONE OF THEM CAME  
4 IN A MONTH BEFORE. THREE OF THEM CAME IN THE WEEK OF HIS  
5 DEPOSITION. THE AUGUST 4 CAME IN AFTER BOTH OF THEM.

6 BUT FOR EXAMPLE, THE -- THE SPICE -- PROJECT SPICE  
7 REPORT THAT YOUR HONOR HAS NOT PERMITTED OUR EXPERT TO RELY ON  
8 WAS PRODUCED IN 2009. THERE WAS PLENTY OF DEPOSITION  
9 OPPORTUNITY FOR THAT EVEN WITH THE FACT WITNESSES, SO I DON'T  
10 UNDERSTAND HOW THE STREET ISN'T A TWO-WAY STREET HERE.

11 MR. McDONELL: THAT'S APPLES AND ORANGES ENTIRELY,  
12 YOUR HONOR. THAT THING HE'S TALKING ABOUT WAS SUBJECT OF  
13 LITIGATION BEFORE JUDGE LAPORTE.

14 YOUR HONOR, FOR WHAT IT'S WORTH, WE WERE NOT PLANNING  
15 TO OFFER THESE DECLARATIONS INTO EVIDENCE WITH MR. CLARKE. BUT  
16 MR. CLARKE WOULD, CONSISTENT WITH RULE 703, DESCRIBE GENERALLY  
17 ALONG WITH HIS DESCRIPTION OF THE BODY OF INFORMATION THAT HE  
18 HAD AVAILABLE TO HIM IN FORMING HIS OPINIONS, TESTIFY TO THE  
19 FACT THERE WERE SWORN STATEMENTS OF CUSTOMERS THAT HE RELIED  
20 UPON. AND THEN THEY'D BE FREE TO CROSS-EXAMINE HIM ABOUT THAT  
21 IF THEY'D LIKE TO.

22 THE COURT: OKAY.

23 MR. McDONELL: BUT THERE'S NO REASON THIS EVIDENCE  
24 SHOULD NOT BE AT LEAST PART OF WHAT HIS RELIANCE MATERIALS  
25 INCLUDE.

1 THE COURT: OKAY.

2 MR. PICKETT: TWO QUICK POINTS. WE COULD NOT TAKE  
3 THESE CUSTOMERS DEPOSITIONS WITH THESE NEWLY FOUND INFORMATION  
4 BECAUSE DISCOVERY HAD CLOSED. UNLIKE THEIR ABILITY TO TAKE THE  
5 ORACLE EXECUTIVES ON PROJECT SPICE, WE COULDN'T TAKE THE  
6 CUSTOMERS' DEPOSITIONS TO SEE WHETHER THESE DECLARATIONS WERE  
7 TRUSTWORTHY, WHAT THE BACKGROUND WAS, WHETHER THERE WAS ANYTHING  
8 TO THEM.

9 AND, SECONDLY, WE'RE IN A SITUATION WHERE HE SAYS,  
10 WELL, WE'RE NOT GOING TO SPECIFICALLY CALL THEM OUT. OUR EXPERT  
11 DIDN'T HAVE TO CALL OUT THE PROJECT SPICE, COULD HAVE TESTIFIED  
12 THAT THE DAMAGES WERE \$2.156 BILLION WITHOUT CALLING THEM OUT,  
13 AND YOUR HONOR DIDN'T PERMIT IT.

14 MR. McDONELL: AGAIN, THAT'S DIFFERENT, YOUR HONOR.

15 ONE SMALL POINT, IF YOU WANT A COMPLETE HISTORY, THEY  
16 TOO GOT CUSTOMER DECLARATIONS, MOST OF WHICH WERE PROVIDED TO US  
17 WITHIN DAYS OR A COUPLE OF WEEKS BEFORE THE CLOSE OF FACT  
18 DISCOVERY. SO THERE'S REALLY NOT THAT MUCH DIFFERENCE IN TERMS  
19 OF OPPORTUNITIES TO TAKE DEPOSITIONS OF THESE PEOPLE.

20 MR. PICKETT: "BEFORE" THE FACT DISCOVERY CUTOFF.  
21 THIS WAS MONTH, MONTHS AFTER.

22 THE COURT: OKAY. ALL RIGHT.

23 HE CAN REFER TO THEM. THEY WILL NOT COME IN AS  
24 EVIDENCE.

25 MR. McDONELL: THANK YOU.

1

THE COURT: THAT'S MY RULING.

TEXT REMOVED - NOT RELEVANT TO MOTION

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23 Q. OKAY. LET'S TURN TO THIS CASE NOW. WOULD YOU DESCRIBE IN  
24 GENERAL WHAT WORK YOU DID ON THIS CASE.

25 A. YES. THE FIRST THING I DID WAS TO START GATHERING

1 DOCUMENTS. THE WORK IS BASED ALMOST ENTIRELY ON DOCUMENTS. AND  
2 IN THIS CASE, THERE WAS A MOUNTAIN OF -- OF DOCUMENTS THAT WE  
3 GATHERED, 12 AND A HALF MILLION PAGES OF DOCUMENTS, IS WHAT WE  
4 GOT, WHICH IS A PILE ABOUT A MILE AND A HALF HIGH IF YOU JUST  
5 STACK IT UP. AND WE STARTED TO ANALYZE THAT INFORMATION.

6 LATER ON, WE GATHERED MORE INFORMATION FROM THE  
7 COMPANIES ABOUT THEIR OPERATIONS, THEIR FINANCIAL CONDITION, THE  
8 AMOUNT OF PROFIT THAT THEY MAKE. AND ALSO DURING THAT LATER  
9 TIME, DEPOSITIONS WERE BEING TAKEN WHERE SOMEBODY WOULD TELL  
10 EITHER WHAT THEY KNEW AND WHAT THEY'D SAID AND DONE, OR THEY  
11 WERE TESTIFYING ON BEHALF OF THE COMPANY AND SAYING THIS IS WHAT  
12 THE COMPANY DID. SO I READ THOSE. AND THERE WERE MANY OF  
13 THOSE, TOO.

14 AND THEN THERE WERE CUSTOMERS' DECLARATIONS, SOME OF  
15 WHICH TALKED ABOUT HOW THEY MADE THE DECISION TO GO TO  
16 TOMORROWNOW OR MAKE SOME OTHER DECISION.

17 IN ADDITION, I SHOULD POINT OUT THAT VIRTUALLY ALL OF  
18 THE INFORMATION I WAS LOOKING AT WAS REALLY FOCUSED ON THE 358  
19 TOMORROWNOW CUSTOMERS AND THE 86 SAP CUSTOMERS.

20 Q. NOW, MR. CLARKE, WHY WERE YOU FOCUSING ON THE CUSTOMERS?

21 A. THIS CASE IS ALL ABOUT CUSTOMERS.

22 Q. WHEN YOU REFERRED TO THE 12 AND A HALF MILLION PAGES, DID  
23 YOU HAVE ANYONE HELP YOU REVIEW THAT INFORMATION?

24 A. I DID.

25 Q. AND HOW MANY STAFF MEMBERS DID YOU HAVE WORKING ON THIS FROM

1 TIME TO TIME?

2 A. AT ANY ONE TIME, THERE MIGHT HAVE BEEN 50 PEOPLE WORKING ON  
3 THIS ENGAGEMENT. OVERALL, JUST BEFORE MY DEPOSITION, WHICH WAS  
4 IN JUNE, I COUNTED THEM UP. AND THERE WERE 121 DIFFERENT PEOPLE  
5 WHO WORKED ON THE ENGAGEMENT. YOU CAN IMAGINE WITH THAT VOLUME  
6 OF INFORMATION TO LOOK AT, IT'S JUST VERY TIME-CONSUMING, SO WE  
7 HAD A LARGE TEAM OF PEOPLE.

TEXT REMOVED - NOT RELEVANT TO MOTION

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 10
	)	
SAP AG, ET AL.,	)	PAGES 1696 - 1879
	)	
DEFENDANTS.	)	OAKLAND, CALIFORNIA
_____	)	THURSDAY, NOVEMBER 18, 2010

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3 Q. YOU WERE ASKED ABOUT THE CHANGE IN YOUR NUMBERS, YOUR  
4 CALCULATION FOR INFRINGER'S PROFITS. THOSE ARE SAP'S SOFTWARE  
5 PROFITS ATTRIBUTABLE TO TOMORROWNOW'S INFRINGEMENT.

6 YOU REMEMBER THAT?

7 A. I DO.

8 Q. AND WHAT I'D LIKE TO DO WITH YOU IS HAVE YOU TELL US WHY YOU  
9 CHANGED THE NUMBERS. SO LET'S START WITH -- YOUR FIRST REPORT  
10 WAS DATED MARCH 26 OF THIS YEAR, CORRECT?

11 A. THAT'S CORRECT.

12 Q. AND IN THAT REPORT, YOU HAD FOUR COMPANIES -- FOUR CUSTOMERS  
13 IN THIS CATEGORY AND THE AMOUNT OF THE PROFIT WAS APPROXIMATELY  
14 \$38 MILLION. IS THAT RIGHT?

15 A. THAT'S CORRECT.

16 Q. AND YOU DID A SUPPLEMENT IN MAY, AND THE NUMBER DROPPED FROM  
17 FOUR TO THREE?

18 A. YES.

19 Q. WOULD YOU TELL US WHY THAT NUMBER DROPPED?

20 A. BECAUSE I HAD A CUSTOMER DECLARATION THAT INDICATED THAT  
21 TOMORROWNOW HAD NOT PLAYED A ROLE IN -- IN THEM MAKING THAT --  
22 THAT CHANGE.

23 Q. DO YOU RECALL THE NAME OF THAT CUSTOMER?

24 A. NOT OFFHAND.

25 Q. OKAY. LET ME SHOW YOU WHAT'S BEEN MARKED FOR IDENTIFICATION

1 A6891.

2 A. (REVIEWING DOCUMENT.)

3 (OFF-THE-RECORD DISCUSSION.)

4 MR. MITTELSTAEDT: I'VE GOT A COPY FOR THE COURT.

5 Q. AND WOULD YOU TELL US WHAT THIS DECLARATION IS, SIR.

6 A. YES. IT'S A DECLARATION FROM A DANIEL CLARK, NO RELATION,  
7 AND IT'S -- HE WAS THE SENIOR VICE-PRESIDENT OF BUSINESS  
8 EXCELLENCE AND CHIEF INFORMATION OFFICER AT A COMPANY CALLED  
9 NEWPAGE CORPORATION.

10 DO YOU WANT ME TO CONTINUE TO DESCRIBE IT?

11 Q. YES.

12 MR. BOISE: OBJECTION, YOUR HONOR. IT'S NOT IN  
13 EVIDENCE, AND IT CAN'T GO IN EVIDENCE.

14 MR. MITTELSTAEDT: I THINK --

15 THE COURT: HAVE YOU HAD ANY DISCUSSION ABOUT THIS  
16 ONE? I DON'T REMEMBER THIS CUSTOMER.

17 MR. MITTELSTAEDT: I THINK THEY'VE OPENED THE DOOR BY  
18 MAKING THE POINT THAT HE CHANGED THE NUMBER, THE NUMBER WENT  
19 FROM FOUR TO THREE WITHOUT ASKING HIM WHY. AND THIS GOES TO --  
20 DIRECTLY TO WHY. THIS IS THE DECLARATION, AND I THINK NOT ONLY  
21 SHOULD BE ABLE TO EXPLAIN WHY HE DROPPED THIS CUSTOMER, BUT I  
22 THINK THIS ALSO SHOULD COME INTO EVIDENCE. IT'S SOMETHING HE'S  
23 RELIED ON.

24 MR. BOISE: YOUR HONOR, IT'S NOT EVEN DATED. IT  
25 LOOKS LIKE THE STAMP SIGNATURE. HE DIDN'T EVEN REMEMBER IT

1 BEFORE.

2 THE COURT: OKAY. WELL, THE RELIANCE RULE ONLY GOES  
3 WHEN THE OPPONENT IS OFFERING THE EXHIBIT. I WILL ALLOW HIM TO  
4 REFER TO IT, BUT IT'S NOT PROPERLY ADMISSIBLE AS AN EXHIBIT.

5 BY MR. MITTELSTAEDT:

6 Q. OKAY. WOULD YOU TELL US WHAT IN THIS DECLARATION YOU RELIED  
7 ON TO REMOVE THIS COMPANY. AND YOU'LL NOTE IN PARAGRAPH 3, IT  
8 TALKS ABOUT NEWPAGE COMPLETING ITS ACQUISITION OF ANOTHER  
9 COMPANY.

10 MR. BOISE: OBJECTION, YOUR HONOR. HE CAN'T READ THE  
11 DOCUMENT WHEN IT'S NOT IN EVIDENCE.

12 THE COURT: HE CAN SIMPLY -- SUSTAINED.

13 HE CAN SIMPLY REFER TO THE FACT THAT HE RELIED UPON  
14 THE DOCUMENT.

15 MR. MITTELSTAEDT: MAY I ASK HIM IN WHAT RESPECT? I  
16 MEAN, WHAT DID THE -- WHY DID HE REMOVE THEM BASED ON THIS  
17 DOCUMENT?

18 THE COURT: YEAH. I'LL LET YOU ASK THAT QUESTION.

19 BY MR. MITTELSTAEDT:

20 Q. WHY DID YOU REMOVE THIS CUSTOMER, STORA ENSO, FROM YOUR  
21 DAMAGE CALCULATION BASED ON THIS DECLARATION?

22 A. I DID THAT BECAUSE STORA ENSO HAD BEEN ACQUIRED BY NEWPAGE.  
23 NEWPAGE WAS A LONG-TERM USER OF SAP. SO IF YOU REMEMBER, I  
24 DESCRIBED TO YOU THAT IF A COMPANY WAS ACQUIRED, VERY OFTEN THE  
25 PARENT COMPANY WOULD REQUIRE THE NEW SUBSIDIARY TO CHANGE TO

1 THEIR SOFTWARE. THAT'S EXACTLY WHAT HAPPENED IN THIS CASE.

2 AND, ACTUALLY, IT IS DATED MAY 4TH, 2010.

3 Q. SO IT'S DATED THREE DAYS BEFORE YOUR SUPPLEMENTAL REPORT?

4 A. CORRECT.

5 Q. AND IF YOU'D LOOK AT THE FOURTH PARAGRAPH AND TELL US  
6 WHETHER THAT PROVIDED ANY ADDITIONAL REASON WHY YOU EXCLUDED  
7 THEM?

8 A. YES, IT DOES.

9 Q. AND WHAT'S THE FURTHER REASON?

10 A. THAT MR. CLARK SAYS THAT THE -- THE SUPPORT FROM TOMORROWNOW  
11 WAS NOT INFLUENCED IN ANY WAY -- DID NOT INFLUENCE IN ANY WAY  
12 THE DECISION TO GO TO SAP.

13 Q. OKAY.

14 AND THEN YOU WERE ASKED WHETHER YOU TOOK ANOTHER  
15 CUSTOMER OUT IN YOUR OCTOBER SUPPLEMENT. DO YOU RECALL THAT?

16 A. I DO.

17 Q. AND YOU SAID YOU TOOK ANOTHER CUSTOMER OUT, AND SO THE --  
18 THE PROFITS OWED TO ORACLE DROPPED BY A COUPLE MILLION DOLLARS.

19 DO YOU REMEMBER THAT?

20 A. I DO.

21 Q. AND I'D LIKE TO SHOW YOU THAT SECOND SUPPLEMENT. I THINK --  
22 I THINK COUNSEL FOR ORACLE ASKED YOU TO REFER TO THIS TO REFRESH  
23 YOUR RECOLLECTION AS TO WHAT YOU HAD DONE. I'D LIKE YOU TO LOOK  
24 AT IT AND TELL ME THE REASON THAT YOU REMOVED A CUSTOMER.

25 MAY I APPROACH, YOUR HONOR?

1 THE COURT: YES.

2 BY MR. MITTELSTAEDT:

3 Q. (HANDING DOCUMENT.)

4 A. THANK YOU.

5 Q. NOW, THAT'S THE SECOND SUPPLEMENT YOU FILED IN OCTOBER?

6 A. I BELIEVE THIS WAS A -- THIS WAS A JUNE CHANGE, ACTUALLY.

7 Q. OKAY.

8 A. THE SECOND SUPPLEMENT WAS DATED JUNE 4TH.

9 Q. WELL -- OKAY. ACTUALLY, I THINK WHAT HAPPENED WAS COUNSEL  
10 SAID HE WOULD SKIP OVER THE JUNE ONE IN THE INTEREST OF TIME.

11 A. YES.

12 Q. SO --

13 A. THAT'S THIS ONE.

14 Q. AND DOES THAT EXPLAIN WHY YOU DECREASED FROM THREE TO TWO?

15 A. CORRECT.

16 Q. AND IS THERE A DECLARATION ATTACHED TO THAT SECOND  
17 SUPPLEMENT?

18 A. YES, THERE IS.

19 Q. AND WHO IS THAT BY?

20 A. IT'S FROM MR. BIRRENBACH.

21 Q. OKAY. AND WHAT COMPANY IS HE WITH?

22 A. I'M PROBABLY GOING TO BUTCHER THIS NAME, BUT I'LL DO MY BEST  
23 ROTK-PPCHEN SEKTKELLEREI. IT'S A GERMAN COMPANY.

24 Q. AND IN YOUR SECOND SUPPLEMENT IN JUNE, DID YOU DESCRIBE THE  
25 REASON WHY YOU REMOVED THAT COMPANY FROM THE DAMAGE CALCULATION?

1 A. YES.

2 Q. AND WHAT REASON DID YOU PROVIDE?

3 A. I GAVE AS THE REASON THIS DECLARATION. AND BASED UPON THE  
4 DECLARATION, WHICH IS -- IT'S ONLY JUST OVER HALF A PAGE LONG, I  
5 WAS ABLE TO IDENTIFY FIVE DIFFERENT EXCLUSION REASONS FOR  
6 EXCLUDING THIS CUSTOMER.

7 THEY SPECIFICALLY WANTED THE SAP FUNCTIONALITY. THEY  
8 SAID THEY DIDN'T LIKE FUSION IN THE FUTURE FOR JDE WORLD  
9 PRODUCTS, WHICH IS WHAT THEY WERE USING AT THE TIME; THAT THEY  
10 HAD EVALUATED OTHER PROVIDERS. THEY HAD DECIDED TO JOIN SAP  
11 PRIOR TO JOINING TOMORROWNOW. IF YOU REMEMBER, THAT WAS ONE OF  
12 MY EXCLUSION POOLS. AND ALSO FOR OTHER REASONS, WHICH MAY BE  
13 GOING TOO FAR.

14 Q. DID THEY -- DID YOU RECEIVE ANY INFORMATION AS TO WHETHER  
15 TOMORROWNOW PLAYED A ROLE IN THEIR DECISION TO GO TO SAP?

16 A. YES.

17 Q. AND WHAT INFORMATION DID YOU RELY ON?

18 A. MR. BIRRENBACH SAID THAT IF TOMORROWNOW HAD NOT BEEN  
19 AVAILABLE, THEY WOULD STILL HAVE REPLACED THE JDE WORLD PROGRAMS  
20 THEY WERE USING WITH SAP.

21 Q. OKAY.

22 SO THAT GETS US TO JUNE, OCTOBER, WHEN YOU'RE DOWN TO  
23 TWO. WERE THE REMAINING TWO AT THAT TIME PERIOD TWO OF THE  
24 ORIGINAL THAT HAD BEEN INCLUDED IN THE FOUR?

25 A. YES.

1 Q. AND THEN YOU'VE EXPLAINED ALREADY WHY IT WENT BACK UP TO  
2 FOUR, BUT COULD YOU TELL US AGAIN JUST BRIEFLY WHY YOU ADDED TWO  
3 BACK?

4 A. YES. I ADD THESE TWO CUSTOMERS BACK BECAUSE IN THE  
5 PREPARATION FOR THE CASE WHERE YOU SORT OF SHINE A BRIGHTER  
6 LIGHT ON EVERYTHING, THESE TWO CUSTOMERS APPEARED TO ME TO BE SO  
7 CLOSE THAT I DIDN'T CARE TO TRY TO EXPLAIN TO YOU WHY I HAD  
8 EXCLUDED THEM.

9 SO EVEN THOUGH I THINK THERE'S -- THERE'S REASON TO  
10 DO SO, THEY WERE SO CLOSE, I -- I CAME ON THE OTHER SIDE OF THE  
11 DECISION AND DECIDED TO INCLUDE THEM IN THE DAMAGE CALCULATION.

12 Q. OKAY. AND SO THE -- THE FOUR THAT YOU ARE INCLUDING NOW IN  
13 THE INFRINGER'S PROFITS ANALYSIS ARE TWO FROM THE ORIGINAL; YOU  
14 DROPPED OUT TWO BECAUSE OF THE DECLARATIONS THEY PROVIDED; AND  
15 THEN YOU ADDED TWO DIFFERENT ONES IN?

16 A. THAT'S CORRECT.

17 Q. AND THAT MAKES THE FOUR NOW?

18 A. CORRECT.

TEXT REMOVED - NOT RELEVANT TO MOTION

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 18, 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

FRIDAY, NOVEMBER 19, 2010