

# **EXHIBIT 46**



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

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

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

BINGHAM MUCCUTCHEN LLP  
THREE EMBARCADERO CENTER  
SAN FRANCISCO, CALIFORNIA 94111-4607  
BY: ZACHARY J. ALINDER,  
HOLLY A. HOUSE,  
GEOFFREY M. HOWARD,  
DONN P. PICKETT, ATTORNEYS AT LAW

BOIES, SCHILLER & FLEXNER LLP  
1999 HARRISON STREET, SUITE 900  
OAKLAND, CALIFORNIA 94612  
BY: DAVID BOIES,  
STEVEN C. HOLTZMAN, ATTORNEYS AT LAW

(APPEARANCES CONTINUED NEXT PAGE)

REPORTED BY: RAYNEE H. MERCADO, CSR NO. 8258  
DIANE E. SKILLMAN, CSR NO. 4909

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

1

2

3

4

5

6

TEXT REMOVED - NOT RELEVANT

7

8

9

10

11

12

13 Q. NOW, WHEN YOU BECAME C.E.O., DID YOU DISCIPLINE ANYBODY FOR  
14 THAT?

15 A. I DID NOT.

16 Q. OKAY. THE PEOPLE WHO HAD BEEN INVOLVED WERE STILL AT SAP,  
17 CORRECT?

18 A. THE PEOPLE THAT INVOLVED -- INVOLVED, YES.

19 Q. AND WERE ANY OF THE SAP OFFICERS OR DIRECTORS EVER  
20 DISCIPLINED IN ANY WAY FOR WHAT HAPPENED?

21 A. NOT THAT I AM AWARE OF, SIR.

22 Q. DID YOU THINK THEY SHOULD HAVE BEEN?

23 A. AT THIS STAGE OF THE SITUATION, WE WERE FOCUSED ON  
24 CORRECTING THE SITUATION AND COMING UP WITH A RESOLUTION WITH  
25 ORACLE.

1 Q. BUT IN ADDITION TO COMING UP WITH A RESOLUTION AT ORACLE,  
2 DIDN'T YOU WANT, AS A MATTER OF RUNNING THE COMPANY THAT YOU  
3 WERE NOW THE CO-C.E.O. FOR, TO BE SURE THIS NEVER HAPPENED  
4 AGAIN?

5 A. YES.

6 Q. AND TO DO THAT, DIDN'T YOU THINK YOU HAD TO SEND A MESSAGE  
7 TO EMPLOYEES THAT THIS WAS UNACCEPTABLE CONDUCT?

8 A. I BELIEVE THAT WE ENTERED INTO THE TOMORROWNOW ACQUISITION  
9 TOO QUICKLY WITHOUT THE RIGHT DUE DILIGENCE. AND I BELIEVE WHEN  
10 YOU MAKE MOVES ON PERSONNEL, IT SHOULD BE QUITE THOUGHTFUL AND  
11 WELL -- WELL PLANNED OUT.

12 AND MY INVOLVEMENT AT THAT POINT WAS REALLY IN  
13 DEALING WITH ONE SITUATION AT A TIME. AND IT'S BEEN FOCUSED ON  
14 THE RESOLUTION WITH ORACLE. THAT'S NOT TO SAY THAT THERE  
15 WOULDN'T BE FURTHER INVOLVEMENT OF SAP IN LOOKING INTO THE  
16 EMPLOYEES THAT MAY OR MAY NOT HAVE HAD A HAND IN SOMETHING TO DO  
17 WITH TOMORROWNOW 'CAUSE THAT, I'M SURE, WILL BE FORTHCOMING AS  
18 WELL.

19 Q. LET ME SEE IF I UNDERSTAND WHAT YOU'RE SAYING. ARE YOU  
20 SAYING THAT YOU PLAN TO DISCIPLINE SOME OF THE SAP EMPLOYEES  
21 THAT WERE RESPONSIBLE FOR TOMORROWNOW BUT YOU JUST HAVEN'T  
22 GOTTEN TO IT YET?

23 A. I'M SAYING I'M UNAWARE AT THIS TIME THAT THIS IS AN ISSUE,  
24 BUT I WILL TELL YOU THAT IF SUCH AN ISSUE EXISTS, IT WILL BE  
25 DEALT WITH ONCE WE GET THROUGH THIS PHASE OF THE PROCESS.

1 Q. WELL, LET ME JUST SEE IF I UNDERSTAND WHAT YOU'RE SAYING.

2 YOU UNDERSTAND THAT SAP WAS WRONG?

3 A. YES.

4 Q. ALL RIGHT.

5 NOW, AND SAP OBVIOUSLY IS PEOPLE, AND SO SOMEBODY HAD  
6 TO DO THE THINGS THAT WERE WRONG, CORRECT?

7 A. YES.

8 Q. AND YOU NOW KNOW WHO THOSE PEOPLE WERE THAT DID THE THINGS  
9 THAT WERE WRONG, CORRECT?

10 A. THAT'S CORRECT.

11 Q. AND WHAT I'M ASKING YOU IS, YOU HAVE NOT DONE ANYTHING TO  
12 DISCIPLINE ANY OF THOSE PEOPLE YET, BUT YOU PLAN TO DO SOMETHING  
13 TO DISCIPLINE THOSE PEOPLE?

14 A. WHAT I AM AWARE OF AT THIS TIME IS THAT THE TOMORROWNOW  
15 SUBSIDIARY ACTED INAPPROPRIATELY, AND I AM ALSO AWARE THAT SAP  
16 TOOK DISCIPLINARY ACTIONS THERE. I AM NOT AWARE OF PEOPLE  
17 WITHIN SAP AT THIS TIME THAT HAVE DONE SOMETHING THAT IS  
18 PARTICULARLY WRONG.

19 WE HAVE FOCUSED ON THE RESOLUTION OF THE MATTER WITH  
20 ORACLE, SHOULD IT COME TO OUR ATTENTION THAT PEOPLE IN SAP DID  
21 THE WRONG THING, WE'LL STAND UP TO IT, JUST LIKE WE STOOD UP TO  
22 THE RESOLUTION WITH ORACLE.

23 Q. SIR, ARE YOU SAYING THAT YOU THINK THE ONLY PEOPLE WHO DID  
24 ANYTHING WRONG WERE AT TOMORROWNOW?

25 A. NO, I'M SAYING THAT --

1 Q. OKAY. OKAY. THAT'S --

2 A. OKAY.

3 Q. SOME OF THE PEOPLE WHO DID THINGS WRONG WERE AT SAP,  
4 CORRECT?

5 A. MANAGEMENT SHOULD HAVE DONE A MUCH BETTER JOB OF MANAGING  
6 TOMORROWNOW, CORRECT.

7 Q. AND, INDEED, YOU WERE ON THE EXECUTIVE BOARD -- IN FACT, YOU  
8 WERE THE CO-C.E.O. WHEN SAP ADMITTED THE CONTRIBUTORY  
9 INFRINGEMENT, CORRECT, SIR?

10 A. CORRECT.

11 Q. AND SO YOU KNOW FROM PERSONAL EXPERIENCE THAT SAP ITSELF --  
12 NOT TOMORROWNOW, BUT SAP ITSELF DID SOMETHING WRONG, CORRECT?

13 A. YES.

14 Q. OKAY. NOW, FOCUSING ON SAP ITSELF, NOT TOMORROWNOW, SAP  
15 ITSELF, IN GERMANY.

16 A. UM-HMM.

17 Q. WHAT HAVE YOU DONE, IF ANYTHING, TO DISCIPLINE THE PEOPLE  
18 THAT WERE THERE THAT DID SOMETHING WRONG?

19 A. WE HAVE -- I PERSONALLY HAVE NOT TAKEN ANY DISCIPLINARY  
20 ACTION WITH THOSE PEOPLE AT THIS TIME.

21 Q. OKAY. DO YOU PLAN TO?

22 A. I PLAN ON MAKING SURE THAT THIS WHOLE SCENARIO IS EVALUATED  
23 THOUGHTFULLY AND IN GREAT DETAIL.

24 Q. THIS CASE WAS BROUGHT IN 2007, CORRECT?

25 A. CORRECT.

1 Q. IT'S NOW ALMOST THE END OF 2010, RIGHT?

2 HOW LONG DOES IT TAKE TO EVALUATE WHETHER IT'S  
3 APPROPRIATE TO DISCIPLINE PEOPLE FOR COMMITTING THIS COPYRIGHT  
4 INFRINGEMENT?

5 MR. LANIER: OBJECTION, YOUR HONOR. IT'S BEEN GOING  
6 ON A WHILE. IT'S NOT RELEVANT. HE'S ARGUING WITH HIM AT THIS  
7 POINT, AND I'M AFRAID HE'S GETTING INTO THE GROUND COVERED BY  
8 THE ATTORNEY-CLIENT PRIVILEGE AS WELL.

9 THE COURT: ALL RIGHT. WE'LL MAKE SURE THAT THAT  
10 DOESN'T HAPPEN. I'M GOING TO OVERRULE THAT OBJECTION, BUT BE  
11 CAREFUL WITH REGARD TO THAT ISSUE.

12 THE WITNESS: COULD YOU PLEASE RESTATE THE QUESTION.  
13 BY MR. BOIES:

14 Q. CERTAINLY. AND I WANT TO MAKE CLEAR THAT I'M NOT ASKING FOR  
15 ATTORNEY-CLIENT DISCUSSIONS. I'M ASKING FOR WHAT WAS DONE AS A  
16 BUSINESS MATTER AT THE BOARD.

17 A. UH-HUH.

18 Q. AND WHAT I'M ASKING IS YOU'VE SAID THAT PEOPLE AT SAP DID  
19 THINGS WRONG AND YOU MAY DISCIPLINE THEM SOMETIME IN THE FUTURE,  
20 CORRECT?

21 A. YES.

22 Q. AND WHAT I'M ASKING IS TO PUT IT BLUNTLY AND I DON'T MEAN  
23 THIS IN ANY KIND OF A RUDE WAY, BUT WHAT'S TAKING SO LONG?

24 A. FIRST, YOU HAVE TO UNDERSTAND, AS I KNOW YOU DO, THAT  
25 THERE'S AN EXECUTIVE BOARD AND A SUPERVISORY BOARD OF SAP. TO



1 THE EXTENT THAT SOMETHING WAS DONE IN AN INAPPROPRIATE WAY, THE  
2 SUPERVISORY BOARD WILL HAVE TO BE A PART OF THE DECISION-MAKING  
3 PROCESS.

4 OUR ATTENTION HAS BEEN FOCUSED ON THE RESOLUTION OF  
5 THE CASE WITH ORACLE. IT IS ENTIRELY POSSIBLE -- AND I DON'T  
6 THINK IT'S APPROPRIATE FOR ME TO HAVE TO DISCUSS TODAY MY  
7 PERSONNEL MATTERS IN THE COMPANY -- THAT FURTHER ACTION, SHOULD  
8 IT BE NECESSARY, WOULD BE TAKEN. IT JUST HASN'T BEEN TAKEN YET.  
9 THAT'S IT.

10 Q. ARE YOU SUGGESTING THAT THERE'S SOMETHING ABOUT THE ONGOING  
11 RESOLUTION OF THE CASE THAT PREVENTS YOU FROM TAKING  
12 DISCIPLINARY ACTION?

13 A. NO, I'M NOT SUGGESTING THAT.

14 Q. OKAY.

15 A. I'M SUGGESTING THAT IT'S A MATTER OF PRIORITIES, AND  
16 ABSOLUTELY THE PRIORITY IN THIS INTERIM TIME -- I BECAME  
17 CO-C.E.O. IN FEBRUARY -- HAS BEEN ON STEPPING UP AND DOING THE  
18 RIGHT THING AND RESOLVING THE MATTER WITH ORACLE. TO THE EXTENT  
19 THAT FURTHER PERSONNEL ACTIONS ARE APPROPRIATE, THEY WILL BE  
20 TAKEN.

21 Q. WOULD YOU GRANT ME THIS AND MAYBE WE CAN STOP THIS LINE OF  
22 QUESTION?

23 A. ALL RIGHT.

24 Q. WOULD YOU GRANT ME THAT YOU COULD HAVE DONE BOTH. YOU COULD  
25 HAVE PURSUED A RESOLUTION WITH ORACLE AND DISCIPLINED THE PEOPLE

1 AT THE SAME TIME?

2 A. I WILL GRANT YOU THAT, YES.

3 Q. OKAY.

4 NOW, I RAISE THIS NEXT LINE BECAUSE OF -- YOU WEREN'T  
5 HERE AT DURING THE OPENING STATEMENTS, WERE YOU, SIR?

6 A. YES, I WAS.

7 Q. YOU WERE?

8 A. YES.

9 Q. OKAY. WELL, YOU HEARD YOUR COUNSEL SAY THAT SAP WANTED TO  
10 TAKE RESPONSIBILITY FOR WHAT HAD HAPPENED?

11 A. YES.

12 Q. NOW, AS PART OF THAT, HAS SAP EVER APOLOGIZED TO ORACLE FOR  
13 TAKING ITS SOFTWARE?

14 A. I AM NOT AWARE OF AN APOLOGY.

15 Q. WOULD YOU LIKE TO DO THAT NOW, SIR?

16 A. I WOULD. YES, I AM. I AM SORRY TO ORACLE.

17 Q. OKAY. AND I APPRECIATE THAT. BECAUSE I THINK IT'S  
18 IMPORTANT --

19 A. UM-HMM.

20 Q. -- THAT THAT SORT OF THING HAPPEN.

21 A. I AGREE WITH YOU.

22

23

TEXT REMOVED - NOT RELEVANT

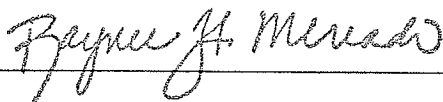
24

25


CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, MONDAY, NOVEMBER 15, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

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

  
\_\_\_\_\_

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

  
\_\_\_\_\_

DIANE E. SKILLMAN, CSR, RPR, FCRR

TUESDAY, NOVEMBER 16, 2010