

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:

FOR PLAINTIFFS:	BINGHAM MUCCUTCHEN LLP
	THREE EMBARCADERO CENTER
	SAN FRANCISCO, CALIFORNIA 94111-4607
BY:	ZACHARY J. ALINDER,
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	DONN P. PICKETT, ATTORNEYS AT LAW
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BY:	STEVEN C. HOLTZMAN, ATTORNEY AT LAW

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REPORTED BY: RAYNEE H. MERCADO, CSR NO. 8258

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

1 VALUE OF THAT ADMITTED INFRINGING SOFTWARE IS IN THE BILLIONS OF  
 2 DOLLARS.  
 3 THANK YOU VERY MUCH FOR YOUR ATTENTION.  
 4 THE COURT: ALL RIGHT. THANK YOU, MR. HOWARD.  
 5 LADIES AND GENTLEMEN, WE'RE GOING TO TAKE OUR FIRST  
 6 RECESS OF THE MORNING BEFORE WE HEAR FROM THE DEFENSE. YOU'RE  
 7 EXCUSED FOR 15 MINUTES.  
 8 (RECESS TAKEN AT 10:29 A.M.)  
 9 (PROCEEDINGS RESUMED AT 10:48 A.M.)  
 10 THE CLERK: PLEASE BE SEATED AND COME TO ORDER.  
 11 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE  
 12 OF THE JURY:)  
 13 THE COURT: OKAY. MR. MITTELSTAEDT?  
 14 MR. MITTELSTAEDT: YES, YOUR HONOR.  
 15 OPENING STATEMENT  
 16 MR. MITTELSTAEDT: IF IT PLEASE THE COURT, LADIES AND  
 17 GENTLEMEN OF THE JURY. GOOD MORNING.  
 18 IN MOST CIVIL CASES, THE JURY HAS TWO THINGS TO  
 19 DECIDE, DID THE DEFENDANT DO SOMETHING WRONG AND IF SO, HOW MUCH  
 20 SHOULD THE DEFENDANT PAY THE PLAINTIFF. THIS CASE IS DIFFERENT.  
 21 IT'S DIFFERENT BECAUSE TOMORROWNOW AND SAP ADMIT THEY DID  
 22 SOMETHING WRONG, AND I WANT TO TELL YOU WHAT IT IS.  
 23 FIRST, LET ME SAY THAT, JUST TO SET THE BACKGROUND,  
 24 WHEN ORACLE SELLS SOFTWARE TO A CUSTOMER, THAT CUSTOMER HAS A  
 25 RIGHT TO DOWNLOAD CERTAIN MATERIALS FROM ORACLE'S WEBSITE. WHAT

1 TOMORROWNOW, SAP SHOULD HAVE MADE SURE THAT TOMORROWNOW WAS  
 2 COMPLYING WITH THE COPYRIGHTS AND SHOULD HAVE MADE SURE THAT IT  
 3 WAS DOING WHAT WAS RIGHT. SAP SHOULD HAVE SUPERVISED  
 4 TOMORROWNOW MUCH MORE CLOSELY.  
 5 SAP'S BOARD TOLD TOMORROWNOW NOT TO DOWNLOAD  
 6 MATERIALS ONTO THEIR OWN COMPUTERS BUT TO HAVE THEM DOWNLOADED  
 7 ONTO THE CUSTOMER'S COMPUTER. THAT WAS A DIRECTIVE THAT WAS  
 8 GIVEN BY THE BOARD. BUT IT WAS NOT FOLLOWED THROUGH ON, AND  
 9 TOMORROWNOW DID NOT COMPLY WITH IT.  
 10 THE OTHER THING SAP DID WRONG WAS IT SHOULD HAVE SHUT  
 11 DOWN TOMORROWNOW FASTER THAN IT DID. AND WE ADMIT ALL OF THAT.  
 12 AND MORE IMPORTANT, WE ACKNOWLEDGE RESPONSIBILITY FOR IT.  
 13 AND WE CONTINUE TO STAND READY TO PAY ORACLE THE  
 14 COMPENSATION THAT IT IS ENTITLED TO FOR THE HARM THAT WAS CAUSED  
 15 TO IT, COMPENSATION THEY'RE ENTITLED TO UNDER THE LAW. AND THAT  
 16 COMPENSATION IS FOR THE REVENUES THEY LOST, THE PROFITS THEY  
 17 LOST IF CUSTOMERS WENT TO TOMORROWNOW (SIC) BECAUSE OF  
 18 TOMORROWNOW.  
 19 THE OTHER COMPENSATION THEY'RE ENTITLED TO ARE THE  
 20 PROFITS THAT SAP GAINED BY SELLING SOFTWARE -- SAP'S OWN  
 21 SOFTWARE. THIS IS NOT SOFTWARE THAT WAS ORACLE'S BUT SELLING  
 22 SAP'S SOFTWARE TO CUSTOMERS THAT CAME TO SAP ONLY BECAUSE OF  
 23 TOMORROWNOW. AND I'LL EXPLAIN THOSE TWO CATEGORIES AS WE GO ON  
 24 THIS MORNING.  
 25 WHAT YOU WILL HEAR, THOUGH, IS ORACLE WANTS MUCH MORE

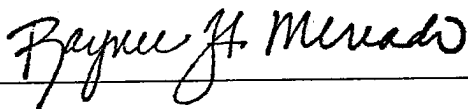
1 THE CUSTOMER CAN DO WITH THOSE MATERIALS DEPENDS ON THE TERMS OF  
 2 THE CONTRACT, THE LICENSE BETWEEN ORACLE AND THE CUSTOMER.  
 3 UNDER MOST OF THOSE LICENSES, THE CUSTOMER CAN  
 4 DOWNLOAD THE MATERIALS TO ITS OWN COMPUTER, AND IT CAN USE THOSE  
 5 MATERIALS TO WORK ON IT AND CAN HAVE A THIRD PARTY LIKE  
 6 TOMORROWNOW HELP IT WORK ON THOSE MATERIALS, HELP IT USE THOSE  
 7 MATERIALS.  
 8 IF THAT'S ALL THAT HAD HAPPENED HERE, IT WOULD HAVE  
 9 BEEN OKAY. BUT TOMORROWNOW DID MORE. ONE OF THE THINGS IT DID  
 10 WAS IT DOWNLOADED MATERIALS THAT THE CUSTOMER WAS ENTITLED TO,  
 11 BUT DOWNLOADED THEM NOT TO THE CUSTOMER'S COMPUTER BUT TO  
 12 TOMORROWNOW'S OWN COMPUTER. AND UNDER THE LICENSES, IT WASN'T  
 13 SUPPOSED TO DO THAT.  
 14 TOMORROWNOW ALSO USED THOSE MATERIALS -- USED THE  
 15 MATERIALS TO SERVICE OTHER CLIENTS, CLIENTS THAT HAD A RIGHT TO  
 16 DOWNLOAD THE MATERIALS, BUT TOMORROWNOW JUST DOWNLOADED THEM ALL  
 17 FOR ONE CUSTOMER AND THEN USED THEM FOR OTHERS. AND TOMORROWNOW  
 18 ALSO DOWNLOADED MORE MATERIALS THAN A CUSTOMER WAS ENTITLED TO  
 19 DOWNLOAD.  
 20 TOMORROWNOW ADMITS ALL OF THAT. THAT WAS WRONG. IT  
 21 WAS COPYRIGHT INFRINGEMENT.  
 22 FOR SAP'S PART, SAP'S CONDUCT ALSO FELL SHORT OF WHAT  
 23 IT SHOULD HAVE BEEN. FIRST OF ALL, SAP SHOULD NOT HAVE BOUGHT  
 24 TOMORROWNOW WITHOUT MAKING SURE THAT TOMORROWNOW WAS COMPLYING  
 25 WITH ORACLE'S COPYRIGHTS. AND HAVING MADE THE MISTAKE OF BUYING

1 THAN THAT. IN ADDITION TO A LONG PUBLIC TRIAL WHERE THEY TROT  
 2 OUT EVIDENCE OF THINGS WE'VE ALREADY ADMITTED TO, THEY WANT A  
 3 WINDFALL. THEY WANT A BONANZA THAT IS OUT OF ALL PROPORTION TO  
 4 THE HARM THAT THEY SUFFERED. AND IN A NUTSHELL, THAT'S WHAT  
 5 THIS CASE IS ABOUT.  
 6 THE ONE STUBBORN FACT THAT IS GOING TO BE IMPORTANT  
 7 THROUGHOUT THIS CASE IS THAT OF THE 9- OR 10,000 CUSTOMERS THAT  
 8 PEOPLESOFT HAVE -- HAD THAT YOU HEARD ABOUT, THE NUMBER OF THOSE  
 9 CUSTOMERS WHOEVER WENT TO TOMORROWNOW IS ONLY 358. AND I SAY  
 10 THAT'S A STUBBORN FACT BECAUSE NOBODY CAN DISPUTE IT, AND IT  
 11 MEANS THAT DESPITE THE PLANS AND THE HOPES AND THE EXPECTATIONS  
 12 OR THE HYPE THAT ANYBODY HAD OF ALL THOSE 9-, 10,000 CUSTOMERS  
 13 FROM PEOPLESOFT, ONLY 358 EVER WENT TO TOMORROWNOW. AND SO WHEN  
 14 WE START LOOKING AT THE HARM THAT WAS CAUSED TO ORACLE, WE START  
 15 WITH THAT 358.  
 16 THAT, IN A NUTSHELL, IS WHAT THIS CASE IS ABOUT. AND  
 17 THE EVIDENCE WILL SHOW THE COMPENSATION THAT ORACLE IS ENTITLED  
 18 TO IS IN THE MILLIONS, THE TENS OF MILLIONS. IT'S NOT IN THE  
 19 BILLIONS.  
 20 OKAY. BEFORE I GO FURTHER AND TELL YOU HOW THE  
 21 EVIDENCE IS GOING TO SHOW ALL OF THAT, LET ME MAKE SOME  
 22 INTRODUCTIONS.  
 23 FIRST LET ME START WITH BILL MCDERMOTT.  
 24 MR. MCDERMOTT IS ONE OF TWO CHIEF EXECUTIVE OFFICERS OF --  
 25 C.E.O.'S OF SAP AG. HE WAS GIVEN THAT POSITION IN FEBRUARY OF

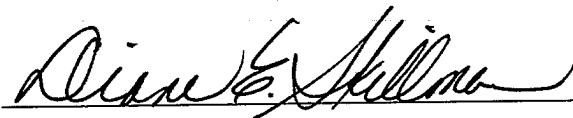
CERTIFICATE OF REPORTER

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.



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



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.	)	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  
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RAYNEE H. MERCADO, CSR NO. 8258  
DIANE E. SKILLMAN, CSR NO. 4909

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

1 RESPONSIBILITIES. CERTAINLY NOT THE SCOPE OF HIS  
2 RESPONSIBILITIES IN FEBRUARY 2007 WITH RESPECT TO THE TOPICS OF  
3 THIS EMAIL. IT JUST ISN'T THAT SIMPLE TO GET IN.

4 THE COURT: WELL, THERE'S A -- CERTAINLY THERE'S A  
5 LIMITED SHOWING THAT HAS TO BE MADE. IT CAN BE SIMPLE IF IT HAS  
6 BEEN ESTABLISHED --

7 (SIMULTANEOUS COLLOQUY.)

8 MR. PICKETT: IT'S FOUNDATION, RIGHT.

9 THE COURT: EXACTLY. AND IF, INDEED, THERE HAS BEEN  
10 IN THE RECORD -- I'M NOT AWARE THAT THERE'S BEEN SUCH A  
11 FOUNDATION. AND, IN FACT, YOU DO NEED TO HAVE SUCH A FOUNDATION  
12 BEFORE I CAN ADMIT IT AS AN ADMISSION.

13 I DON'T SEE IT AS A BUSINESS RECORD, THOUGH. I MEAN,  
14 IS THIS EMAIL -- IS IT -- DOES IT EXCERPT SOME SORT OF A REPORT  
15 THAT IS ITSELF A BUSINESS RECORD?

16 MR. MITTELSTAEDT: I THINK THAT GOES BACK TO WHAT HIS  
17 POSITION IS AND WHETHER THIS IS WITHIN THE SCOPE OF WHAT HE'S  
18 DOING. BUT IF HE'S WRITING SOMETHING THAT'S WITHIN THE SCOPE OF  
19 WHAT HE'S DOING AND HE'S -- HE'S EXPRESSING FACTS BASED ON WHAT  
20 HE KNOWS, SEEMS TO ME THAT IS A BUSINESS RECORD.

21 MR. LANIER: AND, YOUR HONOR, I'D REFER THE COURT --  
22 AND WE CAN PROVIDE A COPY OF IT FOR YOUR HONOR, TO PAGES --  
23 PAGE 780 -- 779 AND 780 OF THE TRANSCRIPT. IT'S THE TESTIMONY  
24 OF MR. ELLISON. AND I ASKED MR. ELLISON,  
25 "AND THE ATTENDEES TO THIS MEETING ARE LISTED,

1 BUT YOU SEE ONE OF THEM IS MR. ROTTLE, DON'T YOU?"

2 MR. ELLISON SAID, "I DO."

3 "Q. AND AT THE TIME, WHAT WAS HIS JOB, DO  
4 YOU REMEMBER, JANUARY 2005?"  
5 "HE WAS IN CHARGE OF ALL SUPPORT."

6 SO THAT'S IN JANUARY 2005. I DON'T KNOW THAT WE'VE  
7 ESTABLISHED THAT AS OF FEBRUARY 2007, BUT THAT WAS THE TESTIMONY  
8 FROM MR. ELLISON AS OF SOME OF THE DOCUMENTS WE GOT IN THROUGH  
9 MR. ELLISON.

10 THE COURT: THAT'S CLOSER. THAT'S CLOSER. WE JUST  
11 DON'T HAVE IT AS OF 2007, ALTHOUGH THERE'S A FAIR INFERENCE THAT  
12 CAN BE RAISED THAT HE'S GOT THE SAME POSITION.

13 MR. PICKETT: SO ANY EMPLOYEE'S EMAIL IS IN?

14 THE COURT: IT'S NOT ANY EMPLOYEE'S. IT'S AN AGENT.  
15 THERE HAS TO BE A RELATIONSHIP, OBVIOUSLY, AND IT CAN'T BE ANY  
16 JUST LOWER-LEVEL EMPLOYEE. BUT THIS, AS I UNDERSTAND IT, IS A  
17 DIRECT REPORT TO THE CHIEF EXECUTIVE OFFICER. WHY WOULDN'T HE  
18 BE AN AGENT?

19 (OFF-THE-RECORD DISCUSSION.)

20 THE COURT: WHY WOULDN'T --

21 MR. PICKETT: HE CERTAINLY IS AN OFFICER. I'M NOT  
22 DISPUTING THAT. ALTHOUGH, WHAT I AM DISPUTING IS THAT ALL OF  
23 THE STATEMENTS IN HERE ARE WITHIN THE SCOPE OF HIS EMPLOYMENT.  
24 THERE ARE A BUNCH OF STATEMENTS --

25 THE COURT: WELL, IT'S NOT WITHIN THE SCOPE OF HIS

1 EMPLOYMENT. SCOPE OF HIS AUTHORITY.

2 MR. PICKETT: I'M SORRY. SCOPE OF HIS AGENCY,  
3 AUTHORITY.

4 THE COURT: BUT ALL -- WELL, LET'S LOOK AT THE  
5 STATEMENTS THAT MR. MITTELSTAEDT SPECIFICALLY REFERRED TO.

6 WOULD THOSE BE? IS THERE SOME SUGGESTION THAT THEY  
7 WOULD NOT BE WITHIN THE SCOPE OF HIS AUTHORITY AS THE CHIEF OF  
8 SUPPORT?

9 (PAUSE IN THE PROCEEDINGS.)

10 THE COURT: OKAY. I'M GOING TO ALLOW THIS ONE IN.

11 MR. PICKETT: ALL RIGHT.

12 THE COURT: I'M GOING TO ALLOW THIS ONE IN.

13 MR. PICKETT: OVER OBJECTION, OBVIOUSLY.

14 I HAVE ONE OTHER ISSUE RELATED TO THIS.

15 THE COURT: OKAY.

16 MR. PICKETT: BECAUSE THE DOOR HAS BEEN OPENED, WE  
17 THINK INAPPROPRIATELY, TO THIS TYPE OF HEARSAY EVIDENCE ON  
18 TUESDAY, WE DO HAVE ONE DOCUMENT WE WOULD LIKE TO USE WITH  
19 MR. MEYER, WHICH IS AN ORACLE DOCUMENT WHICH REFUTES THE STATE  
20 OF MIND THAT THEY ATTEMPT TO SHOW WITH THESE DOCUMENTS.

21 IN OTHER WORDS, IT'S A DOCUMENT THAT SHOWS THAT THEY  
22 ARE VERY CONCERNED ABOUT TOMORROWNOW AND DESPITE THE FACT THEY  
23 DON'T KNOW ABOUT THE IP --

24 THE COURT: WHAT KIND OF DOCUMENT IS IT?

25 MR. PICKETT: I CAN SHOW IT TO YOU. IT'S

1 EXHIBIT 432. IT'S ANOTHER EMAIL.

2 THE COURT: IT'S ONE OF YOUR EXHIBITS, 432?

3 MR. PICKETT: YES.

4 THE COURT: OKAY. LET ME TAKE A LOOK AT IT.

5 (PAUSE IN THE PROCEEDINGS.)

6 THE COURT: I DON'T HAVE IT IN THE MEYER'S BINDER.  
7 IS THERE ANOTHER PLACE I FIND IT?

8 (PAUSE IN THE PROCEEDINGS.)

9 MR. PICKETT: HERE'S A COPY. IT'S --

10 (PAUSE IN THE PROCEEDINGS.)

11 MR. PICKETT: NOW, UNLIKE THE PRIOR DOCUMENT, THIS IS  
12 A DOCUMENT MR. MEYER RELIED ON. AND MR. ALLBRITTEN IS THE --  
13 AWKWARD SAYING -- HE IS THE HEAD OF SUPPORT FOR PEOPLESOFT IN  
14 PARTICULAR AT ORACLE.

15 THE COURT: OKAY. OKAY.

16 MR. MITTELSTAEDT: AND OUR POSITION IS IT'S DIFFERENT  
17 WHEN THE --

18 THE COURT: IT'S THE SAME PARTY.

19 MR. PICKETT: IT IS DIFFERENT.

20 THE COURT: IT IS DIFFERENT, BUT I'M GOING TO ALLOW  
21 IT -- SINCE I ALLOWED THREE IN ON A MUCH THINNER BASIS FOR THE  
22 DEFENSE THE OTHER DAY, I'M GOING TO ALLOW THE PLAINTIFF TO GET A  
23 SIMILAR NUMBER IN THAT OTHERWISE ARE --

24 MR. PICKETT: TWO LEFT OR THREE -- WELL, TWO LEFT.

25 THE COURT: THREE. TWO MORE.

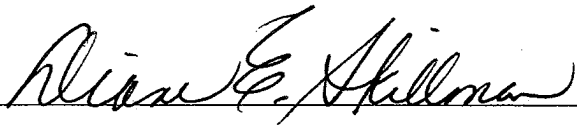
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CERTIFICATE OF REPORTER

WE, RAYNEE H. MERCADO AND DIANE E. SKILLMAN, OFFICIAL REPORTERS FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C07-01658PJH, ORACLE USA, INC., ET AL. V. SAP AG, ET AL., WERE REPORTED BY US ON, FRIDAY, NOVEMBER 12, 2010, CERTIFIED SHORTHAND REPORTERS, AND WERE THEREAFTER TRANSCRIBED UNDER OUR DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY US AT THE TIME OF FILING.

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

  
DIANE E. SKILLMAN, CSR, RPR, FCRR

SATURDAY, NOVEMBER 13, 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 8
	)	
SAP AG, ET AL.,	)	PAGES 1421 - 1511
	)	
DEFENDANTS.	)	OAKLAND, CALIFORNIA
_____	)	MONDAY, NOVEMBER 15, 2010

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

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(APPEARANCES CONTINUED NEXT PAGE)

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DIANE E. SKILLMAN, CSR NO. 4909

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

1 A. OF COURSE.  
 2 Q. YOU MENTIONED A WINDOW OF OPPORTUNITY THAT WAS THERE FOR  
 3 SAFE HARBOR. WAS THAT THE SAME WINDOW OF OPPORTUNITY FOR SAFE  
 4 PASSAGE?  
 5 A. YES, I THINK SO, BECAUSE, AGAIN, AT THAT TIME, YOU HAVE TO  
 6 THINK LIKE THE CUSTOMER THINKS DURING THE SITUATION WHERE THEIR  
 7 WORLD HAS BEEN TURNED UPSIDE-DOWN. AND WHEN THEIR WORLD'S  
 8 TURNED UPSIDE-DOWN, THEY'RE THEN IN THE INVESTIGATION MODE ON  
 9 WHAT THEIR OPTIONS ARE. AND TO THE EXTENT THAT WE COULD CREATE  
 10 CONFIDENCE IN SAP AND DOUBT ABOUT THE COMPETITION, THAT WAS GOOD  
 11 FOR SOFTWARE SALES.

12 Q. YOU MENTIONED THE WORLD BEING TURNED UPSIDE-DOWN. I'M  
 13 GUESSING I KNOW WHAT YOU MEAN, BUT WOULD YOU JUST CLARIFY FOR  
 14 THE JURY WHAT THAT IS?

15 A. SURE. IF A CUSTOMER INVESTED IN PEOPLESOFT AND JDE AND HAD  
 16 THOSE SYSTEMS, LIKED THOSE SYSTEMS, LIKED THE PEOPLE THEY WERE  
 17 DEALING WITH, WHEN THEY REALIZED THAT THEY WERE UNCERTAIN WHAT  
 18 ORACLE'S INTENTIONS MIGHT BE, THEY THEN WERE IN A SITUATION OF  
 19 EXPLORING THEIR OPTIONS, YOU KNOW, WHAT MIGHT ORACLE DO. WILL  
 20 THEY CONTINUE THE MAINTENANCE? WILL THEY FORCE ME OFF OF  
 21 MAINTENANCE AND FORCE ME TO UPGRADE TO A NEW SYSTEM?  
 22 AND THEN SAP, SINCE SAP WAS A WELL-RESPECTED BRAND IN  
 23 THE INDUSTRY, WAS RIGHT OUT THERE IN THE MEDIA SAYING, "WE HAVE  
 24 A GREAT SYSTEM, WE THINK WE HAVE A BETTER SYSTEM THAN THEY DO  
 25 WHILE YOU'RE CONSIDERING YOUR OPTIONS, PLEASE CONSIDER THIS."

1 Q. DIFFERENTLY TOPIC. AS C.E.O. OF SAP, ARE YOU GENERALLY  
 2 FAMILIAR WITH THE -- THE FACT THAT SAP HAS LICENSES, AND  
 3 DIFFERENT SORTS OF INTELLECTUAL PROPERTY AGREEMENTS WITH OTHER  
 4 COMPANIES?

5 A. YES.  
 6 Q. DO SOME OF THOSE COMPANIES INCLUDE THROUGH COMPETITORS OF  
 7 SAP?

8 A. YES.  
 9 Q. AS YOU UNDERSTAND IT, DOES SAP TYPICALLY ENTER INTO THOSE  
 10 AGREEMENTS BASED ON AN UPFRONT, LUMP-SUM PAYMENT?

11 A. NEVER.  
 12 Q. TYPICALLY HOW ARE PAYMENT ARRANGEMENTS MADE IN GENERAL? I'M  
 13 NOT ASKING YOU ABOUT ANY PARTICULAR ONE.

14 A. WELL, TYPICALLY, IT'S A RUNNING ROYALTY. SO AS WE HAVE  
 15 SUCCESS WITH CUSTOMERS IN THE MARKETPLACE, THERE IS A  
 16 REVENUE-SHARING MODEL BETWEEN ONE COMPANY AND ANOTHER COMPANY.

17 AND AS CUSTOMERS ARE CONVINCED THAT THE VALUE IS THERE, BOTH  
 18 SIDES WIN.  
 19 Q. DIFFERENT TOPIC.

20 YOU KNOW, YOU COULD INFER FROM WHAT YOU WERE SAYING  
 21 THAT IT MIGHT HAVE BEEN A MISTAKE TO BUY TOMORROWNOW. DO YOU  
 22 THINK IT WAS?

23 A. YES, I DO.  
 24 Q. WHY?  
 25 A. WELL, THE FACT THAT WE'RE ALL HERE IN THE FIRST PLACE MAKES

1 AND THE SAFE HARBOR PROGRAM WAS, IN ADDITION TO  
 2 PROVING THAT WE'RE BETTER, WE'LL ALSO GIVE YOU A VERY COMPELLING  
 3 FINANCIAL OFFER TO TRADE IN YOUR OLD LICENSES FOR NEW ONES.

4 Q. I'M GOING TO TAKE A RISK, AND I'M GOING TO CHALLENGE YOU ON  
 5 SOMETHING HERE. YOU KNOW, WE SWITCHED FROM WINDOWS COMPUTER TO  
 6 APPLE COMPUTERS NOT TOO LONG AGO AT OUR HOUSE.

7 A. SURE.  
 8 Q. AND WE SURVIVED THROUGH THAT. IS IT REALLY THAT BIG A DEAL  
 9 TO SWITCH THE ERP SYSTEM AT A COMPANY?

10 A. IT REALLY IS A BIG DEAL.  
 11 Q. WHY?

12 A. WELL, YOU -- IF YOU THINK OF IT AS A PLUMBING IN A HOUSE,  
 13 YOU'RE ESSENTIALLY REWIRING ALL THE PLUMBING IN THE HOUSE, AND  
 14 THAT'S A BIG DEAL. SHEETROCK HAS TO COME OFF. PEOPLE HAVE TO  
 15 PUT NEW PIPES INTO TWO-BY-FOURS, AND THEY HAVE TO DO THAT  
 16 THROUGHOUT THE WHOLE ENTERPRISE. IT'S A BIG COMMITMENT. AND  
 17 CUSTOMERS WILL ONLY MAKE THAT COMMITMENT IF THEY SEE THE  
 18 BUSINESS RATIONALE IS ROCK SOLID AND THE GAIN FAR OUTWEIGHS THE  
 19 DIFFICULTY OF CHANGE, SO IT'S A BIG CONVERSATION.

20 Q. IS MAINTENANCE AND SAVING MONEY ON MAINTENANCE A  
 21 SUFFICIENTLY COMPELLING BUSINESS RATIONALE IN YOUR EXPERIENCE  
 22 WITH CUSTOMERS?

23 A. ABSOLUTELY NOT.  
 24 Q. JUST A COUPLE MORE QUESTIONS, MR. MCDERMOTT.  
 25 A. SURE.

1 IT VERY CLEAR TO ME THAT IT WAS A MISTAKE. AND IT'S OBVIOUS  
 2 THAT THEY WERE DOING THINGS THAT NEEDED MUCH CLOSER SCRUTINY.  
 3 AND ANYTHING THAT HARMS THE BRAND AND THE REPUTATION OF OUR

4 COMPANY, I TAKE VERY SERIOUSLY, AND I'M SORRY FOR THAT. SO I  
 5 THINK IT WAS A MISTAKE. YES.

6 MR. LANIER: THANK YOU, SIR.  
 7 THE WITNESS: THANK YOU.  
 8 MR. LANIER: PASS THE WITNESS, YOUR HONOR.

9 THE COURT: ALL RIGHT.  
 10 CROSS-EXAMINATION?  
 11 CROSS-EXAMINATION

12 BY MR. BOIES:  
 13 Q. GOOD MORNING, MR. MCDERMOTT.  
 14 A. GOOD MORNING, MR. BOIES.

15 Q. WE HAVEN'T MET, BUT WE KNOW WHO EACH OTHER ARE?  
 16 A. YES, SIR. I NOTICED YOU WENT TO NORTHWESTERN AT ONE POINT  
 17 IN YOUR CAREER AS WELL.

18 Q. YES. I WAS BORN IN LOUISVILLE, ILLINOIS.  
 19 A. I WENT TO NORTHWESTERN BUSINESS SCHOOL.

20 Q. WELL, GOOD. IT'S A FINE SCHOOL. LITTLE COLD IN THE  
 21 WINTERTIME.  
 22 A. YES, INDEED.

23 Q. WHEN DID YOU FIRST BECOME AWARE THAT SAP HAD ENGAGED IN  
 24 CONTRIBUTORY COPYRIGHT INFRINGEMENT OF ORACLE'S SOFTWARE?  
 25 A. WHEN THE ORACLE LAWSUIT WAS ANNOUNCED.



1473

1 Q. SO IT'S YOUR TESTIMONY THAT YOUR RESPONSIBILITY ON THE  
2 EXECUTIVE BOARD WAS SIMPLY LIMITED TO SALES AND YOU DIDN'T HAVE  
3 ANY RESPONSIBILITY FOR ANYTHING ELSE; IS THAT TRUE?  
4 A. YES.  
5 Q. SO IT WOULD BE YOUR TESTIMONY THAT YOU DIDN'T HAVE ANY  
6 RESPONSIBILITY AT ALL FOR TOMORROWNOW UNTIL YOU BECAME C.E.O.?  
7 A. YES.  
8 Q. AND BY THAT TIME, TOMORROWNOW HAD BEEN SHUT DOWN?  
9 A. YES.  
10 Q. NOW, YOU RECOGNIZE THAT SAP WAS WRONG TO HAVE INFRINGED ON  
11 ORACLE'S COPYRIGHTS, CORRECT?  
12 A. YES, I DO.  
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.

1474

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.

1475

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 --

1476

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.

1477	1479
<p>1 Q. IT'S NOW ALMOST THE END OF 2010, RIGHT?</p> <p>2 HOW LONG DOES IT TAKE TO EVALUATE WHETHER IT'S</p> <p>3 APPROPRIATE TO DISCIPLINE PEOPLE FOR COMMITTING THIS COPYRIGHT</p> <p>4 INFRINGEMENT?</p> <p>5 MR. LANIER: OBJECTION, YOUR HONOR. IT'S BEEN GOING</p> <p>6 ON A WHILE. IT'S NOT RELEVANT. HE'S ARGUING WITH HIM AT THIS</p> <p>7 POINT, AND I'M AFRAID HE'S GETTING INTO THE GROUND COVERED BY</p> <p>8 THE ATTORNEY-CLIENT PRIVILEGE AS WELL.</p> <p>9 THE COURT: ALL RIGHT. WE'LL MAKE SURE THAT THAT</p> <p>10 DOESN'T HAPPEN. I'M GOING TO OVERRULE THAT OBJECTION, BUT BE</p> <p>11 CAREFUL WITH REGARD TO THAT ISSUE.</p> <p>12 THE WITNESS: COULD YOU PLEASE RESTATE THE QUESTION.</p> <p>13 BY MR. BOIES:</p> <p>14 Q. CERTAINLY. AND I WANT TO MAKE CLEAR THAT I'M NOT ASKING FOR</p> <p>15 ATTORNEY-CLIENT DISCUSSIONS. I'M ASKING FOR WHAT WAS DONE AS A</p> <p>16 BUSINESS MATTER AT THE BOARD.</p> <p>17 A. UH-HUH.</p> <p>18 Q. AND WHAT I'M ASKING IS YOU'VE SAID THAT PEOPLE AT SAP DID</p> <p>19 THINGS WRONG AND YOU MAY DISCIPLINE THEM SOMETIME IN THE FUTURE,</p> <p>20 CORRECT?</p> <p>21 A. YES.</p> <p>22 Q. AND WHAT I'M ASKING IS TO PUT IT BLUNTLY AND I DON'T MEAN</p> <p>23 THIS IN ANY KIND OF A RUDE WAY, BUT WHAT'S TAKING SO LONG?</p> <p>24 A. FIRST, YOU HAVE TO UNDERSTAND, AS I KNOW YOU DO, THAT</p> <p>25 THERE'S AN EXECUTIVE BOARD AND A SUPERVISORY BOARD OF SAP. TO</p>	<p>1 AT THE SAME TIME?</p> <p>2 A. I WILL GRANT YOU THAT, YES.</p> <p>3 Q. OKAY.</p> <p>4 NOW, I RAISE THIS NEXT LINE BECAUSE OF -- YOU WEREN'T</p> <p>5 HERE AT DURING THE OPENING STATEMENTS, WERE YOU, SIR?</p> <p>6 A. YES, I WAS.</p> <p>7 Q. YOU WERE?</p> <p>8 A. YES.</p> <p>9 Q. OKAY. WELL, YOU HEARD YOUR COUNSEL SAY THAT SAP WANTED TO</p> <p>10 TAKE RESPONSIBILITY FOR WHAT HAD HAPPENED?</p> <p>11 A. YES.</p> <p>12 Q. NOW, AS PART OF THAT, HAS SAP EVER APOLOGIZED TO ORACLE FOR</p> <p>13 TAKING ITS SOFTWARE?</p> <p>14 A. I AM NOT AWARE OF AN APOLOGY.</p> <p>15 Q. WOULD YOU LIKE TO DO THAT NOW, SIR?</p> <p>16 A. I WOULD. YES, I AM. I AM SORRY TO ORACLE.</p> <p>17 Q. OKAY. AND I APPRECIATE THAT. BECAUSE I THINK IT'S</p> <p>18 IMPORTANT --</p> <p>19 A. UM-HMM.</p> <p>20 Q. -- THAT THAT SORT OF THING HAPPEN.</p> <p>21 A. I AGREE WITH YOU.</p> <p>22 Q. OKAY. NOW, LET ME TURN TO --</p> <p>23 THE COURT: MR. BOIES, EXCUSE ME. I'VE LET THE TIME</p> <p>24 GET BY US. WE'RE OVERDUE FOR OUR FIRST BREAK OF THE MORNING, SO</p> <p>25 MAYBE THIS WOULD BE A GOOD TIME.</p>
<p>1478</p> <p>1 THE EXTENT THAT SOMETHING WAS DONE IN AN INAPPROPRIATE WAY, THE</p> <p>2 SUPERVISORY BOARD WILL HAVE TO BE A PART OF THE DECISION-MAKING</p> <p>3 PROCESS.</p> <p>4 OUR ATTENTION HAS BEEN FOCUSED ON THE RESOLUTION OF</p> <p>5 THE CASE WITH ORACLE. IT IS ENTIRELY POSSIBLE -- AND I DON'T</p> <p>6 THINK IT'S APPROPRIATE FOR ME TO HAVE TO DISCUSS TODAY MY</p> <p>7 PERSONNEL MATTERS IN THE COMPANY -- THAT FURTHER ACTION, SHOULD</p> <p>8 IT BE NECESSARY, WOULD BE TAKEN. IT JUST HASN'T BEEN TAKEN YET.</p> <p>9 THAT'S IT.</p> <p>10 Q. ARE YOU SUGGESTING THAT THERE'S SOMETHING ABOUT THE ONGOING</p> <p>11 RESOLUTION OF THE CASE THAT PREVENTS YOU FROM TAKING</p> <p>12 DISCIPLINARY ACTION?</p> <p>13 A. NO, I'M NOT SUGGESTING THAT.</p> <p>14 Q. OKAY.</p> <p>15 A. I'M SUGGESTING THAT IT'S A MATTER OF PRIORITIES, AND</p> <p>16 ABSOLUTELY THE PRIORITY IN THIS INTERIM TIME -- I BECAME</p> <p>17 CO-C.E.O. IN FEBRUARY -- HAS BEEN ON STEPPING UP AND DOING THE</p> <p>18 RIGHT THING AND RESOLVING THE MATTER WITH ORACLE. TO THE EXTENT</p> <p>19 THAT FURTHER PERSONNEL ACTIONS ARE APPROPRIATE, THEY WILL BE</p> <p>20 TAKEN.</p> <p>21 Q. WOULD YOU GRANT ME THIS AND MAYBE WE CAN STOP THIS LINE OF</p> <p>22 QUESTION?</p> <p>23 A. ALL RIGHT.</p> <p>24 Q. WOULD YOU GRANT ME THAT YOU COULD HAVE DONE BOTH. YOU COULD</p> <p>25 HAVE PURSUED A RESOLUTION WITH ORACLE AND DISCIPLINED THE PEOPLE</p>	<p>1480</p> <p>1 MR. BOIES: THANK YOU.</p> <p>2 THE COURT: ALL RIGHT.</p> <p>3 LADIES AND GENTLEMEN OF THE JURY, YOU'RE EXCUSED FOR</p> <p>4 15 MINUTES.</p> <p>5 (RECESS TAKEN AT 10:24 A.M.)</p> <p>6 (PROCEEDINGS RESUMED AT 10:43 A.M.)</p> <p>7 THE CLERK: PLEASE BE SEATED AND COME TO ORDER.</p> <p>8 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE</p> <p>9 OF THE JURY:)</p> <p>10 THE COURT: ALL RIGHT. CONTINUE.</p> <p>11 MR. BOIES: THANK YOU, YOUR HONOR.</p> <p>12 Q. I'M GOING TO BEGIN BY OFFERING WITHOUT OBJECTION CERTAIN</p> <p>13 DOCUMENTS THAT I'LL BE USING. THOSE ARE PLAINTIFFS' EXHIBITS</p> <p>14 117, 146, 148, 185, 197, 227, 231, 332, 333, 443, 462, 671,</p> <p>15 1236, 1662, 4836, 4850, AND 4024.</p> <p>16 THAT'S -- I'M SORRY, IT'S A4 -- 4024. THAT'S A</p> <p>17 DEFENDANTS' EXHIBIT. A424 (SIC) AND ALSO A148, WHICH IS A</p> <p>18 DEFENDANTS' EXHIBIT AS WELL?</p> <p>19 THE COURT: ALL RIGHT. YOU INDICATE NO OBJECTION TO</p> <p>20 ANY OF THESE.</p> <p>21 MR. LANIER: NO OBJECTION.</p> <p>22 THE COURT: ALL RIGHT.</p> <p>23 (PLAINTIFFS' EXHIBITS 117, 146, 148,</p> <p>24 185, 197, 227, 231, 332, 333, 443,</p> <p>25 462, 671, 1236, 1662, 4836, 4850</p>

Raynee H. Mercado, CSR, RMR, CRR, FCRR & Diane E. Skillman, CSR, RPR, FCRR

1 THE COURT: ALL RIGHT. I WILL TAKE A LOOK AND  
 2 DECIDE IF I WANT TO REVISIT IT OR NOT.  
 3 MY UNDERSTANDING WAS YOU WERE RAISING A DIFFERENT  
 4 GROUND THAN YOU RAISED BEFORE. I HAVEN'T HAD A CHANCE TO READ  
 5 IT, BUT IT APPEARS TO ME THAT YOU ARE NOW ARGUING THAT THE  
 6 APPROPRIATE HEARSAY EXCEPTION WOULD BE FOR ADOPTIVE ADMISSIONS?  
 7 MR. LANIER: THAT'S CORRECT, YOUR HONOR.  
 8 THE COURT: WHICH IS NOT SOMETHING YOU ARGUED  
 9 BEFORE; IS THAT THE POSITION YOU ARE TAKING?  
 10 MR. LANIER: YES, YOUR HONOR.  
 11 THE COURT: YOU CERTAINLY COULD HAVE ARGUED IT  
 12 BEFORE.  
 13 MR. LANIER: YOUR HONOR'S RULING THAT WE HADN'T  
 14 ARTICULATED A BASIS ON WHICH IT WAS ADMISSIBLE OR AN EXCEPTION  
 15 THAT WAS APPLICABLE, PEOPLE WENT BACK AND THOUGHT ABOUT IT AND  
 16 CAME UP WITH THAT ONE.  
 17 NOT TO BE UNFAIR TO THEM, WE HAVE GIVEN YOU OUR  
 18 POSITION IN WRITING.  
 19 THE COURT: RIGHT. JUST GIVE ME A BRIEF FIRST THING  
 20 IN THE MORNING AND I WILL TAKE A LOOK AT IT AND DECIDE.  
 21 MR. HOWARD: THAT IS WHAT WE WILL DO.  
 22 THE COURT: ALL RIGHT. WE ARE ADJOURNED.  
 23 MR. LANIER: THANK YOU.  
 24 MR. HOWARD: THANK YOU.  
 25 (PROCEEDINGS ADJOURNED AT 1:28 P.M.)

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

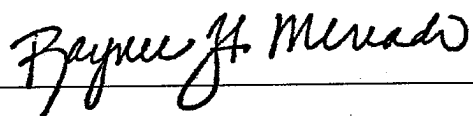
\_\_\_\_\_  
 DIANE E. SKILLMAN, CSR, RPR, FCRR

TUESDAY, NOVEMBER 16,

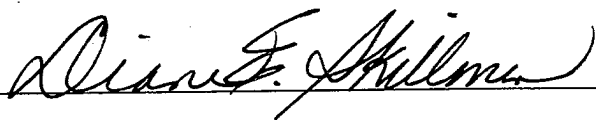
CERTIFICATE OF REPORTER

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

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:

FOR PLAINTIFFS:

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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

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1 SOME OF THEM PURPORT TO INSTRUCT THE JURY AS TO WHAT THE LAW IS  
2 IN TERMS OF GEORGIA PACIFIC FACTORS. SOME OF THEM PURPORT  
3 INACCURATELY, IN OUR VIEW, TO TRY TO SUMMARIZE WHAT OUR EXPERT  
4 SAID.  
5 OBVIOUSLY, THE JURY HAS HEARD OUR EXPERT. IT'S UP TO  
6 THE JURY TO DETERMINE WHAT OUR EXPERT SAID, NOT FOR HIM TO  
7 SUMMARIZE IT.  
8 THE COURT: ALL RIGHT. SO HOW WOULD YOU LIKE TO  
9 HANDLE THIS, MR. BOIES? DO YOU WANT TO MAKE AN OBJECTION ON A  
10 SLIDE-BY-SLIDE BASIS OF WHAT -- I MEAN, HERE WE ARE. IT'S 8:30  
11 IN THE MORNING. YOU'RE TALKING ABOUT SOMETHING THAT WAS  
12 PRODUCED LAST NIGHT. WHAT IS IT THAT YOU WANT ME TO DO ABOUT  
13 IT?  
14 MR. BOIES: YOUR HONOR, GIVEN THE FACT OF THE TIME, I  
15 THINK PROBABLY THE BEST THING TO DO IS TO GIVE THE COURT THE  
16 DIFFERENT VERSIONS OF THE SLIDES THAT THEY'VE PRODUCED SO THAT  
17 YOU HAVE THEM, AND THEN AS THEY GET TO THEM -- AND I DON'T KNOW  
18 WHEN THEY'RE GOING TO GET TO THEM -- THE ONES THAT THEY GET TO  
19 AFTER THE FIRST BREAK, OBVIOUSLY, WE CAN DEAL WITH AT THAT  
20 POINT.  
21 BUT WITH RESPECT TO THE ONES THAT THEY GET TO NOW,  
22 I'LL HAVE TO SIMPLY RISE, AND THE COURT WILL LOOK AT IT AND --  
23 AND MAKE A DECISION.  
24 THE COURT: I DON'T QUITE UNDERSTAND WHY ARE THERE  
25 ARE CHANGES BEING MADE TO THE SLIDES AT THIS LAST DATE.

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1 MR. McDONELL: THE PRIMARY CHANGE COUNSEL REFERRED TO  
2 WAS THE RESULT OF MR. CLARKE'S INTENSIVE PRETRIAL PREPARATION  
3 WHERE HE WENT BACK AND LOOKED AT ALL THE MATERIAL THAT HE'S  
4 WORKED WITH AND TOOK INTO CONSIDERATION INFORMATION MR. MEYER  
5 TESTIFIED ABOUT HERE IN THIS COURTROOM.  
6 AND THEN THE DOLLAR CHANGE THAT HE'S REFERRING TO IS  
7 MR. CLARKE DECIDED THAT WITH RESPECT TO TWO CUSTOMERS, HE WAS  
8 GOING TO INCLUDE THEM IN HIS CALCULATION OF INFRINGER'S PROFITS  
9 DAMAGES WHERE HE HAD PREVIOUSLY EXCLUDED THEM, AND THAT WAS  
10 SIMPLY BASED ON A CONTINUING AND INTENSIVE REVIEW OF THE  
11 INFORMATION THAT HE'S BASING HIS OPINION ON IN THE RAMP-UP TO  
12 TRIAL.  
13 IT'S HARD TO IMAGINE ANY PREJUDICE WHEN WHAT THIS --  
14 THE EFFECT OF THIS IS IT HAS INCREASED THE DAMAGES THAT  
15 MR. CLARKE IS TESTIFYING TO.  
16 THE COURT: HMM. WE'LL DO IT -- WE'LL HAVE TO HANDLE  
17 IT ON AN INDIVIDUAL BASIS. YOU CAN OBJECT TO EVERY SINGLE ONE OF  
18 THEM IF YOU WISH.  
19 MR. McDONELL: AND, YOUR HONOR, JUST TO PREVIEW,  
20 THESE SLIDES ARE DEMONSTRATIVE, OPINION. THEY ARE NOT INTENDED  
21 TO BE THE EVIDENCE.  
22 MR. MITTELSTAEDT: YOUR HONOR, COULD I JUST ADD THIS  
23 SO WE DON'T HAVE TO CONFUSE THIS IN FRONT OF THE JURY?  
24 WHEN MR. MEYER TESTIFIED, HE TESTIFIED THAT HE WAS  
25 CHANGING HIS MIND ON THREE CUSTOMERS. WE DIDN'T OBJECT TO THAT.

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1 THAT CHANGES HIS DOLLAR AMOUNT. I THINK IT'S APPROPRIATE AT THE  
2 LAST MINUTE, IF THEY WANT TO CHANGE THEIR MIND, THEY CAN CHANGE  
3 THEIR MIND.  
4 MR. CLARKE HAS CHANGED HIS MIND ON TWO CUSTOMERS, AND  
5 UNLIKE MR. MEYER, WE HAVE SUBMITTED A REVISED SCHEDULE TO THE  
6 PLAINTIFFS TO PUT THEM ON NOTICE SO THEY DON'T HEAR ABOUT IT FOR  
7 THE FIRST TIME ON THE STAND. SO IT INCREASES THE DAMAGES.  
8 I'M HAPPY TO GO WITH THE LOWER DAMAGE AMOUNT. BUT IF  
9 MR. BOIES IS GOING TO GET UP AND CROSS-EXAMINE HIM AND SAY, WHY  
10 DID YOU INCLUDE THESE, MR. CLARKE SHOULD BE ABLE TO SAY, WELL  
11 ACTUALLY, I'VE CHANGED MY MIND, AND NOW I'M -- INSTEAD OF  
12 EXCLUDING THEM, I'M INCLUDING THEM.  
13 THE COURT: HE CAN SAY WHATEVER IS THE TRUTH. HE CAN  
14 SAY WHATEVER HE WANTS. I WOULDN'T RULE THAT HE COULDN'T SAY  
15 WHATEVER --  
16 MR. BOIES: NO, NOBODY'S SAYING THAT HE CAN'T ANSWER  
17 QUESTIONS --  
18 (SIMULTANEOUS COLLOQUY.)  
19 THE COURT: HOLD ON. HOLD ON.  
20 THE ONLY WAY TO HANDLE THIS IS ON A SLIDE-BY-SLIDE  
21 BASIS. I NEED TO SEE THEM, AND YOU CAN MAKE YOUR ARGUMENTS.  
22 STPHAOT: THANK YOU, YOUR HONOR.  
23 THE COURT: OKAY. AND IF WE HAVE TO DO IT IN FRONT  
24 OF THE JURY, WE'LL DO IT IN FRONT OF THE JURY.  
25 MR. BOIES: AND THE ONLY THING I WOULD ADD, THEY KEEP

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1 SAYING "TWO CUSTOMERS." THAT'S -- THEY'VE DOUBLED THE NUMBER OF  
2 CUSTOMERS. IN OTHER WORDS, THEY'VE GONE FROM TWO TO FOUR.  
3 THE COURT: ALL RIGHT.  
4 WITH REGARD TO THE MOTION THAT WAS BRIEFED YESTERDAY  
5 BY THE DEFENDANTS, ESSENTIALLY THE REQUEST THAT THE COURT  
6 RECONSIDER THE AT-RISK REPORT CUSTOMER COMMENTS, I'M PREPARED TO  
7 RULE ON THAT.  
8 MR. MCDONELL YOU PRESENTED THAT, DID YOU NOT?  
9 MR. McDONELL: YES, YOUR HONOR.  
10 THE COURT: OKAY. ALL RIGHT. I'VE READ YOUR BRIEF;  
11 I READ YOUR BRIEF. I DID NOT READ THE VOLUMINOUS DOCUMENTS THAT  
12 YOU ALL SUBMITTED BECAUSE I DIDN'T HAVE AN OPPORTUNITY TO DO SO.  
13 AND AT THIS TIME, I'M GOING TO DENY YOUR REQUEST.  
14 I'M NOT GOING TO ALLOW IT IN. I RULED PRIOR TO TRIAL THAT YOU  
15 HAD NOT CITED AN EXCEPTION TO THE HEARSAY RULE THAT I FOUND  
16 PERSUASIVE. I LOOKED AT THE ADDITIONAL ONE CASE THAT YOU CITED  
17 AND IT DOESN'T CHANGE MY VIEW.  
18 I THINK ORACLE'S POSITION IS -- IS THE CORRECT ONE.  
19 THEY WEREN'T -- THESE CUSTOMER COMMENTS WEREN'T ADOPTED BY  
20 ORACLE. IN FACT, TO THE EXTENT THAT SOME OF THE COMMENTS WERE  
21 COMPLAINTS, IT WOULD BE ODD TO FIND THAT ORACLE ADOPTED THEM AS  
22 THEIR OWN.  
23 SO, THEREFORE, THE CUSTOMER COMMENTS STILL, IN MY  
24 VIEW, ARE HEARSAY, AND THEY'RE NOT SUFFICIENTLY RELIABLE TO  
25 WARRANT ADMISSION UNDER THE RESIDUAL HEARSAY EXCEPTION.

1 SO YOUR REQUEST IS DENIED.

2 MR. HOWARD: THANK YOU, YOUR HONOR.

3 THE COURT: OKAY. LET'S BRING THE JURY.

4 (THE FOLLOWING PROCEEDINGS WERE HEARD IN THE PRESENCE

5 OF THE JURY:)

6 THE COURT: ALL RIGHT. GOOD MORNING, LADIES AND

7 GENTLEMEN.

8 COUNSEL, EVERYONE, BE SEATED.

9 MR. MITTELSTAEDT, CALL YOUR NEXT WITNESS.

10 MR. MITTELSTAEDT: YES, YOUR HONOR.

11 GOOD MORNING.

12 THE COURT: GOOD MORNING.

13 MR. MITTELSTAEDT: THE DEFENDANTS CALL MR. STEPHEN

14 CLARKE.

15 (PAUSE IN THE PROCEEDINGS.)

16 THE CLERK: PLEASE STEP UP HERE. RAISE YOUR RIGHT

17 HAND.

18 STEPHEN K. CLARKE,

19 CALLED AS A WITNESS FOR THE DEFENDANTS, HAVING BEEN DULY SWORN,

20 TESTIFIED AS FOLLOWS:

21 THE CLERK: PLEASE STATE YOUR FULL NAME AND SPELL

22 YOUR LAST NAME FOR THE RECORD AND SPEAK CLEARLY INTO THE

23 MICROPHONE.

24 THE WITNESS: MY NAME IS STEPHEN CLARKE, C-L-A-R-K-E.

25

1 Q. AND HOW LONG DID YOU SERVE IN THE AIR FORCE AFTER COLLEGE?

2 A. AFTER COLLEGE, IT WAS ABOUT TWO MORE YEARS.

3 Q. AND AFTER THE AIR FORCE, WHAT DID YOU DO?

4 A. I BECAME -- I WENT FROM THE SUBLIME TO THE RIDICULOUS. I --

5 I BECAME A CHARTERED ACCOUNTANT IN LONDON.

6 Q. AND WOULD YOU DESCRIBE TO US THE PROCESS OF BECOMING A

7 CHARTERED ACCOUNTANT, AND ACTUALLY TELL US WHAT THAT IS, TOO.

8 A. YES. THE -- A CHARTERED ACCOUNTANT IS A LOT LIKE A C.P.A.

9 IT'S A SOMEWHAT MORE INTERNATIONAL QUALIFICATION. AND IT'S VERY

10 DIFFICULT TO BECOME ONE. AND IT'S A THREE-YEAR TRAINING WHERE

11 YOU'RE -- WE CALLED IT ARTICLED, SO YOU'RE -- YOU HAVE A LEADER

12 WHO IS RESPONSIBLE FOR TAKING YOU THROUGH YOUR CAREER AND

13 TEACHING YOU HOW TO BE AN ACCOUNTANT.

14 Q. AND DURING THAT PERIOD, WHAT KIND OF WORK WERE YOU DOING?

15 A. MY MAIN ROLE WAS TO -- AT FIRST TO DO ACCOUNTING FOR SMALLER

16 COMPANIES. I WOULD TRAVEL AROUND LONDON AND SHOW UP FOR A DAY

17 OR TWO HOURS AND DO THEIR ACCOUNTING. AND AT THE SAME TIME, I

18 WAS LEARNING TO DO AUDIT WORK. SO LATER, ONCE I FIGURED OUT THE

19 ACCOUNTING, I STARTED TO DO AUDITING, TRAVELING AROUND FROM ONE

20 COMPANY TO ANOTHER TO SEE WHETHER THE BOOKS WERE BEING PROPERLY

21 KEPT.

22 Q. OKAY. AND WHAT WAS YOUR NEXT JOB?

23 A. AFTER -- AFTER I BECAME A CHARTED ACCOUNTANT AND FULLY

24 QUALIFIED, I JOINED A SMALL AIRLINE IN -- JUST NORTH OF LONDON

25 AT STANSTED AIRPORT AND, AND I WAS THEIR CONTROLLER -- IT'S WHAT

1 DIRECT EXAMINATION

2 BY MR. MITTELSTAEDT:

3 Q. MR. CLARKE, GOOD MORNING. WHAT IS YOUR ROLE IN THIS CASE?

4 A. IT WAS TO CALCULATE THE DAMAGES THAT ORACLE HAD SUFFERED AS

5 A RESULT OF COPYRIGHT INFRINGEMENT AND ALSO TO LOOK AT

6 MR. MEYER'S ANALYSIS OF THAT SAME ISSUE AND COMMENT ON IT AS I

7 SAW FIT.

8 Q. BEFORE WE GET INTO THAT, LET'S GET SOME BACKGROUND ON YOU.

9 COULD YOU TELL THE JURY WHEN AND WHERE YOU WERE BORN?

10 A. I WAS BORN IN A SMALL TOWN CALLED WIGAN NEAR MANCHESTER IN

11 ENGLAND. THE -- DID YOU JUST SAY WHEN, TOO?

12 Q. YES.

13 A. 1950.

14 Q. AND WOULD YOU TELL US ABOUT YOUR EDUCATION BRIEFLY, PLEASE.

15 A. I STARTED HIGH SCHOOL IN THAT -- IN THAT LITTLE TOWN IN

16 1961. WE START WHEN WE'RE 11 YEARS OLD IN ENGLAND IN HIGH

17 SCHOOL. I GRADUATED FROM THERE IN '69 AND WENT TO MANCHESTER

18 UNIVERSITY, AND AT THE SAME TIME I WAS AT MANCHESTER, I ALSO

19 JOINED THE ROYAL AIR FORCE. SO STRAIGHT OUT OF HIGH SCHOOL, I

20 JOINED THE ROYAL AIR FORCE, SO I WENT THE COLLEGE WHILE I WAS IN

21 THE ROYAL AIR FORCE AS A PILOT.

22 Q. AND AFTER COLLEGE, WHAT DID YOU DO?

23 A. I THEN WENT TO THE EQUIVALENT OF THE U.S. AIR FORCE ACADEMY.

24 IT'S CALLED THE ROYAL AIR FORCE COLLEGE CRANWELL LEARNED TO BE

25 AN OFFICER IN THE ROYAL AIR FORCE.

1 WE WOULD CALL THE CONTROLLER IN THE UNITED STATES.

2 Q. YOUR NEXT JOB?

3 A. MY NEXT JOB WAS WITH 20TH CENTURY FOX. I ALWAYS WANTED TO

4 WORK IN A FOREIGN COUNTRY, SO I STARTED APPLYING TO FOREIGN

5 COMPANIES AND GOT A JOB WITH 20TH CENTURY FOX. AND THEY MOVED

6 ME TO THE UNITED STATES IN 1980.

7 Q. WHAT KIND OF WORK WERE YOU DOING FOR 20TH CENTURY FOX?

8 A. I DID PREDOMINANTLY AUDIT WORK AGAIN, BUT VERY MUCH OF AN

9 INTERNATIONAL NATURE. I TRAVELED TO MANY COUNTRIES TO SEE

10 WHETHER SOMEONE WAS STEALING FROM THE COMPANY, AND THEY USUALLY

11 WERE.

12 AND IN THE PROCESS OF DOING THAT WORK, I OFTEN HAD TO

13 APPROVE ROYALTY PAYMENTS, SO I WAS WORKING WITH THE CONTRACTS

14 AND THE LICENSE AGREEMENTS TO COMPUTE HOW MUCH THE DIRECTORS AND

15 THE STARS SHOULD BE PAID FOR THEIR -- THEIR WORK ON THE -- ON

16 THE SHOWS.

17 Q. AND WHEN DID YOU GET INTO THE CONSULTING BUSINESS?

18 A. THAT WAS 1984 OR SO. MAYBE '85.

19 Q. OKAY. AND CAN YOU TELL US WHAT KIND OF CONSULTING YOU DID

20 AT THE START?

21 A. YES, WHEN I FIRST STARTED CONSULTING, I WAS PREDOMINANTLY

22 HELPING COMPANIES IMPROVE THEIR OPERATIONS, JUST TRYING TO MAKE

23 THEM RUN BETTER, MORE EFFICIENTLY, MAKE MORE PROFIT, AND

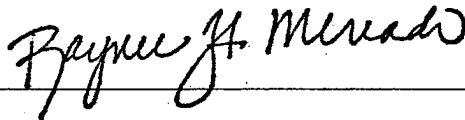
24 ADVISING THEM, IN MANY CASES, ON THEIR SYSTEMS, THEIR ACCOUNTING

25 SYSTEMS AND COMPUTER SYSTEMS.

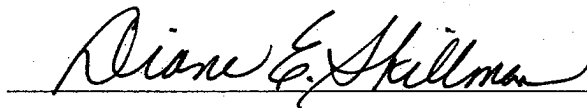
CERTIFICATE OF REPORTER

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