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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE PHYLLIS J. HAMILTON, JUDGE

ORACLE CORPORATION, ET AL.)	
)	
PLAINTIFFS,)	NO. C 07-01658 PJH
)	
VS.)	WEDNESDAY, MAY 24, 2012
)	
SAP AG, ET AL.,)	OAKLAND, CALIFORNIA
)	
DEFENDANTS.)	
)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFFS:

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FOR DEFENDANTS:

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BY: ROBERT A. MITTELSTAEDT, ESQUIRE
JASON MCDONELL, ESQUIRE

REPORTED BY: DIANE E. SKILLMAN, CSR #4909, RPR, FCCR
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1 THE 50 PERCENT EXPENSE DEDUCTION, AND TESTIFIED TO IT
2 THEREAFTER, INCLUDING AT TRIAL BEFORE YOUR HONOR IN WHICH HE
3 PRESENTED AN INFRINGER'S PROFITS CLAIM THAT DEDUCTED 50 PERCENT
4 PROFITS.

5 IT WAS NOT UNTIL THE PROPOSED JURY INSTRUCTIONS FOR
6 THIS NEW TRIAL THAT THE PLAINTIFFS HAVE SURFACED THE IDEA THAT
7 A WILLFUL INFRINGER SHOULD NOT BE ALLOWED TO DEDUCT ANY
8 EXPENSES.

9 SOMETHING THAT NO CASE HAS EVER HELD, BY THE WAY,
10 EVER. THE MOST THE CASES HAVE EVER INDICATED, AND WE THINK
11 THESE ARE OFF BASE AND CAN BE EXPLAINED, IS THAT SOME PORTION
12 OF OVERHEAD EXPENSES NOT BE DEDUCTED.

13 SECOND POINT, YOUR HONOR, WE THINK THE LAW IS
14 OVERWHELMINGLY IN FAVOR OF A FINDING AS A MATTER OF LAW THAT A
15 WILLFUL INFRINGER CAN DEDUCT EXPENSES FROM INFRINGER'S PROFITS.

16 I SAY THAT FOR A VARIETY OF REASONS. FIRST OF ALL,
17 THE LAST APPELLATE COURT, THE LAST FEDERAL CIRCUIT COURT TO
18 ADDRESS THE ISSUE WAS THE HAMIL CASE IN 2000 IN THE SECOND
19 CIRCUIT. CRYSTAL CLEAR HOLDING IN AN ACTUAL CASE OF AN ACTUAL
20 WILLFUL INFRINGER, THE COURT LOOKED AT THE ISSUE AND FOUND THAT
21 DEFENSE CAN DEDUCT EXPENSES.

22 IN THIS CIRCUIT, THE ONLY CASES THAT ARE DISCUSSED
23 BY COUNSEL IN THEIR PLEADING ARE THE KAMAR CASE AND THE FRANK
24 MUSIC CASE. KAMAR DOESN'T SAY THAT AT ALL. KAMAR BASICALLY
25 TALKS ABOUT AN OLDER NEW YORK CASE, THE SHELDON CASE, AND NEVER

1 **THE COURT:** OKAY. AND YOU BELIEVE THAT ORACLE
2 SHOULDN'T BE ABLE TO DO ANYTHING WITH THAT INFORMATION?

3 AS I UNDERSTAND IT, ORACLE SIMPLY WANTS TO BE ABLE
4 TO ARGUE THAT THEIR FIGURES ARE CONSERVATIVE, THAT BASED UPON
5 THIS 86, WHEN POTENTIALLY THERE ARE SEVEN OTHERS OR SIX OTHERS
6 IF YOU CAN AGREE ON A NUMBER.

7 **MR. MCDONELL:** THAT IS OUR POSITION, YOUR HONOR.
8 AND ALL OF THE FINANCIAL -- MY CONCERN IS THEY ARE GOING TO GET
9 THEIR NOSE UNDER THE TENT AND THEN MAKE THIS MORE THAN WHAT IT
10 IS, AND ARGUE THAT THE WHOLE THING IS UNRELIABLE. IF IT
11 WERE --

12 **THE COURT:** WE DON'T KNOW EXACTLY WHAT THEY ARE
13 GOING TO DO AND WE WILL LET MR. HOWARD EXPLAIN.

14 BUT FROM THE PAPERS, IT APPEARS TO ME THAT ORACLE IS
15 NOT OFFERING ANY PARTICULAR FIGURE THAT WOULD REPRESENT THIS
16 EXTRA UNIVERSE GROUP, BUT THAT YOU DO WANT TO BE ABLE TO USE IT
17 IN SOME WAY; IS THAT RIGHT?

18 **MR. HOWARD:** AT A MINIMUM, YOUR HONOR. WE'RE -- WE
19 MAY DEVELOP SOMETHING, BUT WE DON'T -- I AM NOT HERE TELLING
20 YOU THERE'S A NUMBER NOW.

21 I THINK THE POINT IS, WE SHOULDN'T BE PRECLUDED
22 BECAUSE THE TRANSPARENCY THAT COUNSEL SAYS OCCURRED WITH
23 RESPECT TO THE SEVEN CUSTOMERS HAPPENED IN A THREE-PAGE LETTER
24 THE DAY AFTER WE COULD SERVE WRITTEN DISCOVERY.

25 SO THE REASON WHY THERE'S NO DISCOVERY AND THE

1 VARIETY OF EFFORTS TO REVIVE A VARIETY OF DAMAGES THEORIES THAT
2 WE HAD THOUGHT HAD BEEN FAIRLY CLEARLY STRUCK FROM THIS TRIAL.
3 NOT JUST THE HYPOTHETICAL LICENSE, BUT THE SAVED ACQUISITION
4 COSTS AND OTHER THINGS THAT WERE USED TO SUPPORT THAT LICENSE
5 THEORY.

6 THERE IS POSSIBLY A SPECIFIC DOCUMENT THAT MIGHT
7 HAVE RELEVANCE TO MORE THAN ONE PURPOSE. WE CANNOT IN THE
8 THOUSANDS OF EXHIBITS ON THEIR LIST OR THE 345 ON OURS, CAN'T
9 IDENTIFY EVERY PURPOSE FOR WHICH A PARTY MAY OFFER A DOCUMENT.

10 BUT AS THE COURT DID AT THE LAST TRIAL, IT IS -- OR
11 AS THE COURT DID ON FRIDAY, IT'S ENTIRELY APPROPRIATE TO SAY
12 DON'T OFFER A DOCUMENT -- DON'T OFFER A PIECE OF EVIDENCE THAT
13 RELATES SOLELY TO THE HYPOTHETICAL LICENSE THEORY, DON'T MAKE
14 ARGUMENTS ABOUT THE HYPOTHETICAL LICENSE THEORY, DON'T ASK YOUR
15 WITNESSES WHAT WOULD YOU HAVE EXPECTED TO GET IN A NEGOTIATION.

16 IF ONE LOOKS AT THE AMENDED WITNESS LIST FILED
17 YESTERDAY, THE -- ONE OF THE REASONS THAT MR. CATZ,
18 MR. PHILLIPS AND MS. CATZ, MR. ELLISON AND MS. PHILLIPS ARE
19 LISTED ARE HYPOTHETICAL LICENSE FACTORS. SO THIS IS A REAL
20 ISSUE AND WE CANNOT ANTICIPATE EVERY SINGLE SPECIFIC THING THAT
21 MIGHT COME UP.

22 **THE COURT:** WELL, MY RULING IS THAT, OBVIOUSLY,
23 BASED UPON THE ORDERS THAT I HAVE ISSUED IN THE LAST TWO WEEKS,
24 THE HYPOTHETICAL LICENSE EVIDENCE IS OUT OF THE CASE AND YOU
25 MAY NOT CALL WITNESSES OR ASK QUESTIONS DESIGNED PRIMARILY TO

1 TO THE STIPULATED CLAIMS THAT THEY STIPULATED TO ON BEHALF OF
2 TOMORROWNOW IN THE FIRST STIPULATION.

3 SO THERE ARE A VARIETY OF WAYS THAT THIS EVIDENCE
4 COMES IN BECAUSE IT RELATES SPECIFICALLY TO THE DAMAGES
5 THEORIES AND TO CAUSATION, IT RELATES TO THE CONTEXT, WHICH WE
6 ARE ENTITLED TO PUT IN, AND YOUR HONOR ALLOWED AND I ASSUME IS
7 GOING TO CONTINUE TO ALLOW IN THIS TRIAL, AND IT --
8 SPECIFICALLY THE OBJECTIONS TO IT HAVE BEEN SPECIFICALLY WAIVED
9 THROUGH THE, THROUGH THE TRIAL STIPULATION.

10 **THE COURT:** ALL RIGHT.

11 YOU KNOW, THIS IS A WASTE OF TIME. I CAN'T FIGURE
12 OUT WHAT EVIDENCE IT IS. I NEED TO SEE A LIST OF WHAT SPECIFIC
13 EVIDENCE IT IS THAT THERE'S AN OBJECTION TO, THEN I NEED TO
14 HEAR YOU OUT, AND THEN MAKE A DECISION.

15 BUT THEORETICALLY, ANY BIT OF EVIDENCE COULD
16 ARGUABLY BE USED TO SUPPORT ONE THEORY OR ANOTHER. I NEED TO
17 BE ABLE TO PUT IT IN CONTEXT. THIS IS NOT HELPING ME AT ALL.

18 ALL RIGHT. SO THE MOTION'S DEFERRED UNTIL SUCH TIME
19 AS THE EVIDENCE IS OFFERED OR IF WE COME UP WITH ANOTHER
20 MECHANISM FOR RESOLVING THESE THINGS BEFORE TRIAL.

21 **MR. LANIER:** THANK YOU, YOUR HONOR.

22 OUR MOTION IN LIMINE NUMBER TWO SOUGHT TO EXCLUDE
23 THE INTRODUCTION OF EVIDENCE OF THE FACT OF OR EVIDENCE
24 SURROUNDING THE CONVICTION OF TOMORROWNOW THAT RESULTED FROM
25 ITS GUILTY PLEA IN SEPTEMBER OF 2011.

1 **THE COURT:** WELL, THEY ARE DIFFERENT.

2 **MR. HOWARD:** WELL --

3 **THE COURT:** THE CONVICTION DOESN'T, IN AND OF
4 ITSELF, DOESN'T ESTABLISH THE CAUSATION. IT'S THE ACTUAL
5 ADMISSIONS MADE AT THE TIME OF THE PLEA THAT GO TO THAT EFFECT.

6 **MR. HOWARD:** YES. I THINK THEY ARE WRAPPED UP IN
7 EACH OTHER. AND THESE ARE -- THESE ARE STATEMENTS THAT WERE
8 MADE IN THE COURSE OF PLEADING GUILTY TO THE COUNTS THAT ARE
9 REFLECTED IN THE PLEA AGREEMENT.

10 THERE'S NO QUESTION THAT -- I DON'T THINK YOU CAN
11 SEPARATE THE BASIS FOR THE CONVICTION FROM THE CONVICTION
12 ITSELF. AND, IN FACT, IT MAKES IT EVEN MORE RELEVANT BECAUSE
13 OF THE -- BECAUSE THESE ARE THE BASIS FOR A CRIMINAL PLEA.

14 IT'S NOT HEARSAY. IT'S NOT HEARSAY BECAUSE IT'S THE
15 STATEMENT OFFERED AGAINST THE PARTY, AND THEIR OWN STATEMENT.
16 AND IT'S NOT PREJUDICIAL. NOT UNDULY PREJUDICIAL. BECAUSE AS
17 COUNSEL POINTS OUT, IT IS NOT LIKE A CASE WHERE YOU'RE TRYING
18 TO, FOR EXAMPLE, USE A TAX EVASION CONVICTION IN AN OIL SPILL.
19 THIS GOES DIRECTLY TO THE CONDUCT THAT IS THE BASIS FOR THE
20 CASE AND SPEAKS IN TERMS OF THE IMPACT OF THAT CONDUCT ON
21 ORACLE. SO IT -- IT -- IT CANNOT BE UNDULY PREJUDICIAL GIVEN
22 ITS RELEVANCE TO THE DAMAGES AND TO THE OTHER ISSUES.

23 IT IS ALSO PERMISSIBLE IMPEACHMENT. AND UNDER RULE
24 609, BECAUSE IT IS A CRIME OF DISHONESTY, IT COMES IN WITHOUT A
25 403 BALANCING TEST. AND IT IS A CRIME OF DISHONESTY; IT SPEAKS

1 DOING ANY RESEARCH AND/OR ANY ONLINE POSTING.

2 I DON'T THINK THAT WE SHOULD SINGLE OUT THE ISSUE OF
3 THE PREVIOUS TRIAL AS ONE BECAUSE I JUST THINK THAT SENDS A
4 SIGNAL DIRECTLY TO THEM TO DO EXACTLY THAT TO ANYONE WHO IS
5 TEMPTED. SO, I AM NOT GOING TO GIVE THIS ONE.

6 BUT YOU CAN TELL ME WHAT YOU THINK ABOUT THE ONE,
7 THE NINTH CIRCUIT MODEL. AND IF YOU HAVE ANY SUGGESTIONS FOR
8 MODIFICATION, YOU CAN MODIFY IT. IF YOU JOINTLY AGREE TO
9 ANYTHING, YOU CAN MODIFY. THIS IS JUST A GUIDE FOR NOW.

10 I DO WANT TO ANTICIPATE, THOUGH, HOW THE PRIOR
11 TRIAL -- HOW WE ARE GOING TO DEAL WITH THAT. I ANTICIPATE THAT
12 IT WILL COME UP. AND I ANTICIPATE THAT THE FIRST TIME WE WILL
13 SEE SOMETHING ABOUT IT IS IN THE VOIR DIRE QUESTIONNAIRES. AND
14 I WOULD JUST LIKE YOUR INPUT ON HOW YOU WISH TO HANDLE IT.

15 **MR. LANIER:** YOUR HONOR, WE ANTICIPATE IT COMING UP
16 IN TWO WAYS. ONE WAS THERE AND ONE WAS IF WE ARE GOING TO
17 IMPEACH PEOPLE EITHER SIDE WITH TESTIMONY. TYPICALLY THERE WE
18 REFER TO "A PREVIOUS PROCEEDING" OR "YOU TESTIFIED PREVIOUSLY"
19 WITHOUT SAYING IN A PREVIOUS TRIAL. THAT'S HOW I HAVE USUALLY
20 DONE IT.

21 **THE COURT:** EXACTLY. I HAVE, TOO. THAT'S EASY.

22 I DIDN'T EVEN RAISE THAT. THAT'S EASY. WE DON'T
23 NEED TO LABEL THE PRIOR TESTIMONY, WE ALL KNOW WHAT IT WAS.
24 IT'S PRIOR RECORDED TESTIMONY.

25 BUT IN ADDITION TO THE IMPEACHMENT ISSUE, IT'S GOING

1 RELATIONSHIP THAT THE DEFENDANT IS REQUIRED TO SHOW. THAT IS
2 TO CONNECT THE EXPENSES TO THE PRODUCTION, SALE, OR
3 DISTRIBUTION OF THE INFRINGING GOODS.

4 **THE COURT:** WHAT CASE ARE YOU RELYING ON?

5 **MR. FALZONE:** THIS IS THE HAMIL VERSUS GFI CASE,
6 SECOND CIRCUIT CASE 193 F. 3D 92. I CAN READ YOU THE LANGUAGE
7 IF YOU WANT. IT SHOWS UP ON PAGE 107.

8 IT SAYS: "WHEN INFRINGEMENT IS FOUND TO BE
9 WILLFUL, THE DISTRICT COURT SHOULD GIVE EXTRA
10 SCRUTINY TO THE CATEGORIES OF OVERHEAD EXPENSES
11 CLAIMED BY THE INFRINGER TO ENSURE THAT EACH
12 CATEGORY IS DIRECTLY AND VALIDLY CONNECTED TO
13 THE SALE AND PRODUCTION OF THE INFRINGING
14 PRODUCTS. UNLESS A STRONG NEXUS IS ESTABLISHED,
15 THE COURT SHOULD NOT PERMIT A DEDUCTION FOR THE
16 OVERHEAD CATEGORY."

17 AND THAT CITES THE KAMAR CASE FROM THE NINTH CIRCUIT
18 WHICH SAYS THAT'S A FACT ISSUE FOR THE JURY.

19 SO IF WE ARE GOING TO ALLOW THEM TO DEDUCT THE
20 OVERHEAD, WE AT LEAST NEED TO FOLLOW THE CASE THAT ANNOUNCES
21 THAT RULE THAT THEY CITED TO YOUR HONOR AND MAKE SURE THE JURY
22 IS CLEAR ON THE HEIGHTENED BURDEN.

23 **MR. LANIER:** YOUR HONOR, A COUPLE OF RESPONSES.

24 FIRST OF ALL, THAT IS NOT REQUIRED BY THE ZZ TOP
25 CASE OR THE SECOND CIRCUIT CASE.

1 SECOND OF ALL, THE SCRUTINY THAT WOULD BE APPLIED TO
2 SOMETHING THAT SHOULD HAVE BEEN TESTED DURING DISCOVERY, THEY
3 SHOULD HAVE -- MR. MEYER SHOULD HAVE SAID, LOOK, THAT'S AN
4 OVERHEAD EXPENSE OF THE TYPE YOU'RE NOT ENTITLED TO DO.

5 THIS WILL BE ANOTHER TRIAL BY SURPRISE ON AN ISSUE
6 THAT GIVEN THAT WILLFULNESS WAS RAISED IN THE THIRD AMENDED
7 COMPLAINT BEFORE THEY HAD MADE THEIR ELECTION OF STATUTORY OR
8 ACTUAL DAMAGES, WHICH DOESN'T HAVE TO BE MADE UNTIL TRIAL,
9 GIVEN THAT THEY COULD HAVE AND SHOULD HAVE TESTED THIS THEN, WE
10 SHOULD HAVE BEEN ABLE TO RESPOND AND DEVELOP THE CASE ON THAT.

11 IT IS ANOTHER WHOLLY NEW ISSUE WHEN -- AGAINST A
12 RECORD WHERE MR. MEYER HAD ACCEPTED THAT AND TESTIFIED IN THIS
13 COURT ONE FLOOR BELOW TO THAT 50 PERCENT MARGIN.

14 SO THEY HAD THE OPPORTUNITY TO ASK FOR THE SCRUTINY.
15 THEY HAD THE OPPORTUNITY TO DO IT. THERE IS NOTHING TO BE
16 SERVED FOR TELLING THE JURY BE EXTRA -- GIVE EXTRA SCRUTINY
17 WHEN OUR EXPERTS AGREED TO IT. IT'S AGAIN SUBSTITUTING
18 INFLAMMATORY SUGGESTIONS FOR THE ANALYSIS THAT OUGHT TO HAPPEN
19 HERE.

20 **THE COURT:** BOTH SIDES SUBMIT AN INSTRUCTION, AND I
21 WILL DECIDE IT.

22 **MR. FALZONE:** THANK YOU.

23 **MR. LANIER:** OKAY. THEN THE OTHER ISSUE ON THE
24 INFRINGER'S PROFITS INSTRUCTION WAS THIS WORD "FULL" AGAIN, BUT
25 WE WILL SUBMIT INSTRUCTIONS AND YOUR HONOR WILL DEAL WITH THAT.

1 THAT HAS BEEN IDENTIFIED IN THEIR MOTION IN LIMINE NUMBER TWO
2 SHOULD COME IN. AND I THINK PROBABLY THE OTHER CATEGORY
3 OBVIOUSLY OVERLAPS, TOO.

4 AS TO THE AT RISK REPORT, YOUR HONOR HAS RULED ON
5 THAT TWICE. THE LAST TIME THEY ACTUALLY REQUESTED LEAVE TO
6 FILE A MOTION FOR RECONSIDERATION. THIS TIME THEY JUST PUT IT
7 INTO THEIR TRIAL BRIEF.

8 SO, YOU KNOW, I AM ASSUMING THAT YOUR HONOR IS NOT
9 GOING TO CHANGE HER RULING ON THAT, BUT WE WILL RE-BRIEF THAT
10 FOR A THIRD TIME IF THAT'S REALLY NECESSARY.

11 AND THEN I THINK THERE ARE PROBABLY SOME CATEGORIES
12 THAT WILL FALL OUT OF THE MEET AND CONFER PROCESS. BUT SINCE
13 WE HAVE JUST BEGUN THE PROCESS OF LOOKING AT THE EXHIBIT LIST,
14 I'M NOT SURE I COULD IDENTIFY THEM ALL RIGHT NOW.

15 **THE COURT:** SURE. I CERTAINLY AM NOT GOING TO
16 PRECLUDE THEM FROM ARGUING THE SAME ISSUES. ALL OF YOUR
17 MOTIONS IN LIMINE WERE ARGUING THE SAME ISSUES. THAT'S WHAT
18 BOTH SIDES ARE DOING. SO, OF COURSE, THEY CAN DO IT.

19 AS I RECALL, THOUGH, THE RULING WAS, AS STATED IN
20 THE PRETRIAL ORDER, IT DID JUST DEAL WITH THEIR -- THE
21 OBJECTION THAT WAS RAISED TO THE NOTES PORTION AND THE
22 COMMENTS, THE ACTUAL HEARSAY COMMENTS FROM THE CUSTOMERS.

23 **MR. HOWARD:** CORRECT.

24 **THE COURT:** I DIDN'T ACTUALLY LOOK AT IT FOR ANY
25 OTHER PURPOSES. SO TO THE EXTENT THEY ARE RAISING OBJECTIONS

1 TO THE EXCLUSION OF OTHER ITEMS THAT DON'T FALL WITHIN THAT
2 CATEGORY, THEN IT WILL BE THE FIRST TIME THAT I WILL ACTUALLY
3 CONSIDER THAT.

4 SO, IN ANY EVENT, YOU WILL NEED TO PUT IT IN
5 WRITING.

6 **MR. HOWARD:** WE WILL.

7 **THE COURT:** I WILL NEED TO HAVE A WRITING FROM BOTH
8 SIDES. YOU WILL PROBABLY BENEFIT FROM THE MEET AND CONFER
9 PROCESS, AND THEN YOU CAN MAKE YOUR SUCCINCT AND FOCUSED
10 ARGUMENTS ON THOSE EVIDENTIARY QUESTIONS. AND WE WILL, WE WILL
11 HAVE A HEARING THEN ON THE 8TH.

12 **MR. HOWARD:** AT WHAT TIME?

13 **THE COURT:** WE WILL DO IT IN THE MORNING AS OPPOSED
14 TO THE AFTERNOON. LET'S SAY --

15 **THE CLERK:** NINE?

16 **THE COURT:** 9:00 O'CLOCK.

17 **MR. MCDONELL:** THEN GUIDANCE AS TO HOW LONG IN
18 ADVANCE YOU WOULD LIKE TO SEE THE PAPER?

19 **THE COURT:** AS SOON AS YOU CAN GET IT TO ME.

20 **MR. MCDONELL:** VERY WELL.

21 **THE COURT:** GIVE ME SOME TIME TO REVIEW IT BEFORE
22 THE HEARING. SO AS SOON AS YOU HAVE YOUR MEET AND CONFER AND
23 YOU CAN GET THEM TO ME. SAME WITH THE DEPOSITION DESIGNATIONS;
24 AS SOON AS YOU CAN GET THEM TO ME THE BETTER.

25 **MR. HOWARD:** THEIRS IS ALREADY WRITTEN, SO IT'S

CERTIFICATE OF REPORTER

I, DIANE E. SKILLMAN, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C-07-1658 PJH, ORACLE USA, INC., ET AL., VERSUS SAP AG, ET AL., PAGES NUMBERED 1 THROUGH 129, WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, 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.

/S/ DIANE E. SKILLMAN

DIANE E. SKILLMAN, CSR 4909, RPR, FCRR