

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

ORACLE CORPORATION, a	)	
Delaware corporation,	)	
ORACLE USA, INC., a	)	
Colorado corporation, and	)	
ORACLE INTERNATIONAL	)	
CORPORATION, a California	)	
corporation,	)	
	)	
Plaintiffs,	)	
	)	
vs.	)	No. 07-CV-1658 (PJH)
	)	
SAP AG, a German	)	
corporation, SAP AMERICA,	)	
INC., a Delaware	)	
corporation, TOMORROWNOW,	)	
INC., a Texas corporation,	)	
and DOES 1-50, inclusive,	)	
	)	
Defendants.	)	
_____	)	

VIDEOTAPED DEPOSITION OF  
STEPHEN K. CLARKE

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VOLUME 1; PAGES 1 - 323

TUESDAY, JUNE 8, 2010

HIGHLY CONFIDENTIAL - ATTORNEYS' EYES ONLY

REPORTED BY: HOLLY THUMAN, CSR No. 6834, RMR, CRR

(1-427117)

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14:15:54 1 not waiving anything.  
14:16:01 2 MR. PICKETT: Q. Let me show you what's  
14:16:02 3 been marked as Exhibit 3204.  
14:16:04 4 (Deposition Exhibit 3204 was marked for  
14:16:06 5 identification.)  
14:16:18 6 MR. PICKETT: Q. Have you seen this  
14:16:18 7 before, Mr. Clarke?  
14:16:19 8 A. Yes.  
14:16:20 9 Q. Can you identify it?  
14:16:22 10 A. My recollection is, it was -- I can't  
14:16:26 11 swear that it's an exact copy, but it was included  
14:16:29 12 in papers we got from Mr. Meyer.  
14:16:33 13 Q. These are his notes of the scope of the  
14:16:35 14 license that he is analyzing. Correct?  
14:16:39 15 A. Yes. I think so. I think that's what  
14:16:41 16 this was intended to be.  
14:16:44 17 Q. Would you agree that Mr. Meyer's scope is  
14:16:47 18 broader than the scope you suggest on page 116 of  
14:16:51 19 your report?  
14:16:52 20 MR. McDONELL: Take your time to read to  
14:16:53 21 the extent you need to.  
14:16:56 22 THE WITNESS: I'm going to read it  
14:16:57 23 carefully.  
14:17:00 24 (Examining document.)  
14:18:39 25 So the question is, does -- do these three

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14:18:44 1 items in the delta cover these items on Mr. Meyer's  
14:18:48 2 list?  
14:18:49 3 MR. PICKETT: Q. The question was, wasn't  
14:18:50 4 his broader than yours?  
14:18:51 5 MR. McDONELL: Vague and ambiguous.  
14:18:54 6 THE WITNESS: Well, it's got more words in  
14:18:56 7 it, but actually, I think pretty much everything on  
14:18:58 8 this list falls somewhere within these three items.  
14:19:03 9 MR. PICKETT: Q. Do you disagree with the  
14:19:04 10 scope of use as defined by Mr. Meyer in  
14:19:07 11 Exhibit 3204?  
14:19:10 12 MR. McDONELL: Vague and ambiguous.  
14:19:12 13 Assumes facts. Object to the form.  
14:19:16 14 THE WITNESS: When I look at this listing,  
14:19:20 15 it's a document that I would never have prepared,  
14:19:23 16 so to that extent, I disagree with it, in that I  
14:19:28 17 think it's got some things that are just -- you  
14:19:34 18 know, they have a flavor of being pejorative, and I  
14:19:38 19 don't think that's necessary.  
14:19:41 20 As I read down these items, I think they  
14:19:45 21 pretty much fall within 1, 2, and 3 here.  
14:19:52 22 MR. PICKETT: Q. So from your standpoint,  
14:19:53 23 there's -- at least on this issue, there's no  
14:19:56 24 dispute that is the scope of use?  
14:19:58 25 MR. McDONELL: Assumes facts. This is

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14:20:00 1 Mr. Meyer's scope. Vague and ambiguous, object to  
14:20:03 2 the form.  
14:20:05 3 THE WITNESS: Well, at a minimum, I'd say  
14:20:07 4 they're very close, and I think the piece that's  
14:20:15 5 missing from this is -- is the delta. So this --  
14:20:25 6 if this piece fits with 1, 2, and 3 from page 116,  
14:20:30 7 I don't see how that was ever reflected in the  
14:20:33 8 calculations for the value of use that he had made.  
14:20:38 9 MR. PICKETT: Q. I'm trying to limit it  
14:20:40 10 to scope of use at this point.  
14:20:41 11 You're saying there's no meaningful  
14:20:43 12 distinction between Mr. Meyer's 3204 description  
14:20:46 13 and your description on page 116?  
14:20:50 14 MR. McDONELL: Asked and answered  
14:20:50 15 repeatedly. Object to the form of the question.  
14:20:53 16 THE WITNESS: I don't see -- I don't see  
14:20:55 17 much difference between the two.  
14:20:57 18 MR. PICKETT: Why don't we take a break.  
14:20:59 19 THE VIDEO OPERATOR: Going off the record,  
14:21:01 20 the time now is 2:21. This also will be the  
14:21:06 21 conclusion of Tape 2.  
14:21:07 22 (Recess from 2:21 p.m. to 2:37 p.m.)  
14:37:37 23 THE VIDEO OPERATOR: The time now is 2:37.  
14:37:41 24 We are back on the videotape record. This also  
14:37:44 25 marks the beginning of Tape 3.

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14:37:45 1 MR. PICKETT: Q. Could you please turn to  
14:37:46 2 page 51 of your report?  
14:37:59 3 A. At the bottom of the first full paragraph,  
14:38:02 4 you state:  
14:38:03 5 The value of use must be limited to the  
14:38:06 6 actual use Defendants allegedly made of the  
14:38:08 7 subject IP, which means the value must be  
14:38:11 8 related to the actual customers, not the  
14:38:14 9 customers SAP hoped for in an unsupported  
14:38:16 10 business case.  
14:38:18 11 Is it fair to say that you limited the  
14:38:21 12 value of use to the value related to the actual  
14:38:25 13 customers that TomorrowNow was able to retain?  
14:38:29 14 MR. McDONELL: Objection. Misstates the  
14:38:31 15 testimony, misstates the document. Object to the  
14:38:33 16 form.  
14:38:36 17 Counselor, can you tell me -- I didn't  
14:38:37 18 quite follow what paragraph you were looking at.  
14:38:41 19 MR. PICKETT: Q. It's the first full  
14:38:42 20 paragraph at the bottom. It has a number 2 in the  
14:38:46 21 front.  
14:38:47 22 MR. McDONELL: Thank you.  
14:38:55 23 THE WITNESS: The -- there are two parts  
14:39:05 24 to that answer.  
14:39:07 25 The first part is that addressing

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14:39:12 1 TomorrowNow at this point, the reasonable royalty  
14:39:18 2 that I computed was based upon all of the  
14:39:24 3 activities at TomorrowNow. I applied it to all of  
14:39:29 4 the customers' revenues, except for those revenues  
14:39:34 5 related to the no accused conduct.  
14:39:38 6 So that's the answer to your question, I  
14:39:42 7 believe.  
14:39:43 8 MR. PICKETT: Q. So the value was limited  
14:39:45 9 to those revenues you deemed to be related to the  
14:39:48 10 accused conduct?  
14:39:51 11 MR. McDONELL: Vague and ambiguous.  
14:39:54 12 THE WITNESS: I'm sorry?  
14:39:55 13 MR. McDONELL: I said vague and ambiguous.  
14:39:56 14 That was my objection.  
14:40:02 15 THE WITNESS: Yes. That's accurate,  
14:40:03 16 because I took out the ones that had no accused  
14:40:06 17 conduct. So yes, those that remained were the ones  
14:40:09 18 with accused conduct.  
14:40:13 19 MR. PICKETT: Q. By that approach, does  
14:40:15 20 the measurement of damages necessarily depend on  
14:40:22 21 the success of the infringer in obtaining  
14:40:25 22 customers?  
14:40:27 23 MR. McDONELL: Vague and ambiguous.  
14:40:32 24 THE WITNESS: Yes. I believe in the  
14:40:35 25 context of the reasonable royalty, that will be an

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14:40:39 1 element, a factor that you would want to consider,  
14:40:42 2 the success of the product in the market.  
14:40:46 3 MR. PICKETT: Q. Is it -- isn't it the  
14:40:48 4 case that the relevant fact is the parties'  
14:40:55 5 expectation at the time of the negotiation of the  
14:40:57 6 hypothetical license rather than the actual success  
14:41:01 7 or failure of the venture after the date of the  
14:41:05 8 hypothetical negotiation?  
14:41:06 9 MR. McDONELL: Calls for a legal  
14:41:06 10 conclusion, vague and ambiguous, compound, assumes  
14:41:10 11 facts. Object to the form.  
14:41:14 12 THE WITNESS: That again is a two-part  
14:41:16 13 answer.  
14:41:18 14 One of the Georgia-Pacific factors relates  
14:41:22 15 to the success of the product -- in this case, a  
14:41:25 16 service. So clearly, that's part of the  
14:41:31 17 consideration, and it is a factor that we experts  
14:41:36 18 ought to consider.  
14:41:38 19 I think there's another element to the  
14:41:40 20 hypothetical negotiation, which is that the parties  
14:41:48 21 at that negotiation are assumed to have knowledge  
14:41:51 22 of the relevant -- the relevant facts. Of course,  
14:42:01 23 at that point they wouldn't know what the future  
14:42:02 24 was going to hold, but they may have some  
14:42:04 25 expectations.

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14:42:05 1 MR. PICKETT: And their expectations, with  
14:42:07 2 respect to the value of the license, from either  
14:42:11 3 the buyer's or the seller's standpoint, is a  
14:42:14 4 relevant factor. Right?  
14:42:16 5 MR. McDONELL: Calls for a legal  
14:42:16 6 conclusion, vague and ambiguous.  
14:42:19 7 THE WITNESS: I think those would be  
14:42:20 8 relevant facts.  
14:42:31 9 MR. PICKETT: Q. In a real-world  
14:42:32 10 situation, with a lump-sum royalty, the actual  
14:42:42 11 success of the licensee -- licensee's business  
14:42:47 12 would not be meaningful. Right?  
14:42:50 13 MR. McDONELL: Vague and ambiguous, calls  
14:42:51 14 for a legal conclusion, incomplete hypothetical,  
14:42:54 15 object to the form of the question.  
14:43:01 16 THE WITNESS: At the time of the  
14:43:03 17 hypothetical negotiation, if your hypothetical  
14:43:10 18 requires the agreement to be a reasonable -- not  
14:43:14 19 a -- a royalty that would be based on a lump-sum  
14:43:17 20 paid in advance, then of course the parties don't  
14:43:20 21 know what the future is going to hold.  
14:43:23 22 And the -- while the licensee might have a  
14:43:28 23 very large interest in the success of the product,  
14:43:33 24 the licensor probably doesn't care at that point.  
14:43:36 25 They've been paid.

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14:43:43 1 MR. PICKETT: Q. So the business success  
14:43:44 2 would not be meaningful to the licensor?  
14:43:48 3 MR. McDONELL: Same objections. Calls for  
14:43:49 4 a legal conclusion, vague and ambiguous, incomplete  
14:43:51 5 hypothetical. Object to the form of the question.  
14:43:59 6 THE WITNESS: Well again, I -- in order to  
14:44:00 7 answer that, I have to round out your hypothetical  
14:44:03 8 a little bit and give you a caveat.  
14:44:05 9 If what you're going to assume is that a  
14:44:09 10 paid-up license is the only possible outcome, and  
14:44:14 11 everything else stays the same, then you're right.  
14:44:20 12 The licensor, once they've got their money, they  
14:44:24 13 don't really care what happens.  
14:44:25 14 They might rue the fact that they sold it  
14:44:28 15 for too little. They might be happy that they sold  
14:44:33 16 it for too much.  
14:44:35 17 MR. PICKETT: Q. And neither the seller  
14:44:37 18 nor the buyer would know in advance what the  
14:44:40 19 success of the venture was. Right?  
14:44:42 20 MR. McDONELL: Objection. Calls for a  
14:44:43 21 legal conclusion about the nature of that test,  
14:44:48 22 vague and ambiguous, incomplete hypothetical.  
14:44:52 23 Misstates the test and the law.  
14:44:56 24 THE WITNESS: Since the hypothetical  
14:44:58 25 negotiation occurs before infringement has begun,

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CERTIFICATE OF REPORTER

I, HOLLY THUMAN, a Certified Shorthand Reporter, hereby certify that the witness in the foregoing deposition was by me duly sworn to tell the truth, the whole truth, and nothing but the truth in the within-entitled cause;

That said deposition was taken down in shorthand by me, a disinterested person, at the time and place therein state, and that the testimony of said witness was thereafter reduced to typewriting, by computer, under my direction and supervision;

That before completion of the deposition review of the transcript [] was [ ] was not requested. If requested, any changes made by the deponent (and provided to the reporter) during the period allowed are appended hereto.

I further certify that I am not of counsel or attorney for either or any of the parties to the said deposition, nor in any way interested in the event of this cause, and that I am not related to any of the parties thereto.

DATED: June 17, 2010

Holly Thuman  
HOLLY THUMAN, CSR