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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

Before The Honorable Elizabeth D. LaPorte, Magistrate Judge

Oracle USA, Inc.; et al.,)	
)	
Plaintiffs,)	
)	
VS.)	NO. C 07-1658 PJH (EDL)
)	
SAP AG, et al.,)	
)	
Defendants.)	
)	

San Francisco, California
 Tuesday, January 26, 2010

TRANSCRIPT OF PROCEEDINGSAPPEARANCES:

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(APPEARANCES CONTINUED ON FOLLOWING PAGE)

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1 Tuesday - January 26, 2010

1:15 p.m.

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3 **THE CLERK:** Calling Civil 07-1658, Oracle
4 Corporation versus SAP AG.

5 Counsel, please state your appearances for the
6 record.

7 **MR. HOWARD:** Good afternoon, Your Honor. Geoff
8 Howard appearing for Oracle. With me is Zach Alinder and Tom
9 Hixson.

10 **THE COURT:** Thank you.

11 **MR. McDONELL:** Good afternoon, Your Honor. Jason
12 McDonell for defendants. With me is Scott Cowan, Jane Froyd,
13 Patrick Delahunty, and all the way in the back Robert
14 Middlestaedt.

15 **THE COURT:** Good morning -- or good afternoon.

16 All right. Well, we've got a lot to cover, and I
17 have matters on at 2:00. I moved this up. Well, I have quite
18 a few things going on simultaneously, unfortunately. So, even
19 with that amount of time, you know, we need to kind of march
20 through it. And let's just, I think, take it one by one
21 starting with the plaintiffs' motions.

22 A modification protective order, I -- my tentative
23 view is that that statutory section does not apply because,
24 that defendants are relying on, because that's when you're
25 trying to get discovery through that procedure.

1 And I think, although *Foltz* isn't dealing with an
2 issue where the discovery would go to another court in the
3 United States, it, nonetheless, does talk about the applicable
4 public policy as far as modifying a protective order being
5 overall a more efficient way to let related litigation have
6 access to the same material that's already been discovered.

7 So we're not talking it's much more efficient, less
8 burdensome. The question -- there are some policy
9 considerations that -- although I don't think the law, the
10 statutory provision in the case like the Supreme Court case in
11 *Intel* applies but I think, yes, it's true that foreign
12 jurisdictions, I think maybe without exception, but generally
13 limit discovery quite more so than the United States. They
14 don't have the pleasure of having endless hearings like we've
15 all had here, and just for tossing around megabytes, and so
16 forth, of information as a starter, but -- as I understand it.
17 But, nonetheless, I certainly wouldn't be forcing any court in
18 Europe to do any particular thing, admit the evidence, consider
19 it, whatever.

20 So I'm inclined to modify the order but I'm thinking
21 that, perhaps, it can be done in steps and nobody really
22 refined their positions on that.

23 I think initially what Oracle was asking for, as I
24 understand it, is to show the material to its own lawyers who
25 are familiar with the various European jurisdictions that might

1 be appropriate for advice on whether to go ahead; and if so,
2 where.

3 Is that -- I think that's the immediate issue, and I
4 wonder whether it wouldn't be appropriate to just modify it for
5 that. I think in one of the cases, I think it was *CBS*
6 *Interactive*, there was something like that necessary to prepare
7 and file its litigation, although in that case it was in the
8 State Court. And that would be without prejudice to expanding
9 that.

10 **MR. HOWARD:** Your Honor, Mr. Hixson will address
11 that for us.

12 **THE COURT:** All right.

13 **MR. HIXSON:** Yeah. Your Honor, Oracle would be
14 amendable to that if the Court prefers to phase things. It's
15 true, as we stated in our motion, that the most immediate use
16 would be to provide these discovery materials to European
17 counsel to advise on those decisions.

18 **THE REPORTER:** I'm sorry. I need you to slow down,
19 please.

20 **MR. HIXSON:** Okay. Certainly.

21 And at that point, if we determine that we want to
22 make further use of them, we can come back to this Court and
23 seek an additional modification.

24 I would add, since the Court did mention *CBS*
25 *Interactive*, the concern in that case was that the plaintiff

1 was going to file collateral litigation that would involve
2 additional parties who weren't in the first case. And, so, the
3 Court in modifying the protective order flagged the concern
4 that these other parties could have access to confidential
5 documents. That situation isn't present here because it would
6 be the same defendants likely or affiliates in Europe.

7 **THE COURT:** Well, that's true. But I'm just not
8 sure. I mean, it's, I guess, possible that nothing will and
9 ultimately be filed.

10 **MR. HIXSON:** It's likely that something will be
11 filed. We have -- that's correct. We haven't reached a
12 definitive conclusion.

13 **THE COURT:** But we don't no where either.

14 I mean, other language that I saw that might be
15 something to consider is, I think it was *Linerboard*, something
16 like that, about the Court keeping some of -- this Court
17 keeping some authority to ensure the confidentiality
18 continuing.

19 So, I mean, what I'm suggesting is, I didn't try to
20 come up with precise wording along those lines; but I think
21 that if I do take this approach, I would like the parties to
22 meet and confer and just, you know, use -- there's some things
23 that we could borrow from. And I would hope you could agree;
24 or if not agree, at least come very close to it.

25 But do you want to address the underlying? Because

1 I do view this as one of the more clear-cut, from my point of
2 view, motions, unfortunately for you, against your side. And I
3 do want to move to some of this other murkier and more
4 complicated stuff, mind you.

5 **MS. FROYD:** Sure. With regard to 1792 in *Intel*, we
6 do think 1792 is the appropriate standard because it deals with
7 cases --

8 **THE COURT:** Yeah. I just -- I'm just -- I really
9 don't agree.

10 **MS. FROYD:** If you don't want to hear, that's fine.

11 **THE COURT:** I could be wrong of course, but I --

12 **MS. FROYD:** So even if you -- sure. I'm sorry,
13 Your Honor.

14 So, even if you disagree with that position, the
15 discretionary factors that the Supreme Court advises courts to
16 consider are the same sorts of discretionary factors that
17 court's consider in the cases that Oracle brings. They look to
18 whether or not the foreign jurisdiction would be receptive to
19 the discovery sought.

20 Does Oracle's request circumvent foreign proof
21 gathering restrictions? And right now, based on the particular
22 proposed order presented to you, it's very broad. It covers
23 all discovery in this case, not a limited subset of discovery
24 as some of the cases that they cite where there are
25 modification. It was for particular deposition testimony,

1 particular documents.

2 Here they also -- the proposed order at least does
3 not tell you who will be bringing the case. They say that it
4 is between the parties and their affiliates; but we don't know
5 which Oracle entity, and it might not be the Oracle entities
6 here. We don't know the specific cause of action. It simply
7 says arising out of similar allegations.

8 **THE COURT:** All right. Okay. Well, let me just --
9 I mean, I think the approach, the phasing approach, that I just
10 discussed would moot all of that for the time being.

11 I'm not sure that any of that will make any
12 difference. I mean, I most likely will allow Oracle to use the
13 information in a -- if they decide in a foreign tribunal. But
14 it's kind of -- I think we're putting the cart a little bit
15 before the horse because specifically we don't know which
16 jurisdiction. I suppose they vary somewhat, although I do
17 think probably, as a general rule, they all have more limited
18 proof gathering than we do. But other than that, they do have
19 differences.

20 But I think that, you know, that's one of the
21 factors. I'm not sure that those factors -- I don't think that
22 I have to apply them or that that law is directly applicable,
23 but I do think they're worthy of some consideration. But I
24 think that the *Foltz* considerations probably outweigh them.

25 And, you know, some of these -- most of these -- I

1 think the only ones that might weigh against it would be, you
2 know, it's sort of -- using our discovery in some other forum
3 almost inherently circumvents foreign proof gathering; but,
4 again, that's not a factor I have to apply and it's only one of
5 many.

6 There's no burden whatsoever, really, since it's
7 already been produced; and, you know, depending what happens,
8 some of these other -- these other factors are going to
9 probably weigh in favor.

10 So -- but I think that, as of now, I think that I
11 would just like to see you propose an order that is limited to
12 allowing that without prejudice to broadening it; and I am
13 indicating I very likely would allow it to be actually used and
14 leave it up to -- my view, if they don't want the assistance,
15 that's fine. Then they can just say no. I mean, they don't
16 have to let Oracle file it, they don't have to consider it,
17 they don't have to read it, et cetera.

18 So, I mean, that's where I don't -- and there's no
19 added burden. So, I mean, that's where I probably would allow
20 it. But I think that some safeguards along the lines that I
21 just mentioned could be in their including. So I'd like some
22 proposed language, you know, with the Court like, I think, in
23 *Linerboard* keeping some authority or shorten the
24 confidentiality, et cetera.

25 **MS. FROYD:** And there's also specific restrictions

1 in the *EDPM Antitrust Litigation* case that they raise. Again,
2 those restrictions describe the sort of who, what, where,
3 when --

4 **THE COURT:** Well, I mean, I would, you know --

5 **MS. FROYD:** -- types of things that defendants
6 thought were lacked in the particular protective order offered
7 to the judge now.

8 **THE COURT:** Well, and I don't know, you know, I
9 haven't considered whether those are appropriate or not. I
10 think that was Judge Hamilton's case, so I didn't -- and there
11 were some things that might apply and some that might not, so I
12 haven't really given it much thought.

13 But I would like to have you all --

14 **MR. HIXSON:** Sure. We'll try.

15 **THE COURT:** -- try to agree. And if not, you can
16 try to minimize your agreements and give me very specific, you
17 know, like in a joint letter what you proposed. But I would
18 hope that you could agree.

19 **MR. HIXSON:** Your Honor, we'll meet and confer with
20 defendants about language on this phasing approach that the
21 Court has indicated.

22 **THE COURT:** Okay.

23 **MS. FROYD:** Thank you, Your Honor.

24 **THE COURT:** Thank you.

25 So let's get on to the next. So I think we're on to

1 the Trainor deposition, but there's kind of multiple somewhat
2 discrete issues.

3 **MR. COWAN:** We've packaged it as six issues. I
4 think both parties looked at it that way, Your Honor.

5 **THE COURT:** All right.

6 **MR. HIXSON:** I'm happy to go through them in order
7 if --

8 **THE COURT:** Why don't we go through them one by one
9 in order, yeah.

10 **MR. HIXSON:** Okay. The first area that we moved on
11 relates to the steps that Mr. Trainor took to ensure that he
12 didn't use knowledge gained as PeopleSoft's in-house counsel to
13 provide advice to SAP and TomorrowNow with respect to the
14 PeopleSoft licensing agreements.

15 And the reason for this line of questions is the
16 evidence produced by defendants, including the unredacted
17 portions of some of these e-mails, that suggest that
18 Mr. Trainor was providing information to other people at
19 TomorrowNow; and then that, in conjunction with his own
20 testimony, that at the time of these e-mails in 2005 he didn't
21 have the PeopleSoft license terms. This raised the inference
22 that, in fact, he was providing information, which is
23 concerning to plaintiffs.

24 And, so, he did state in his deposition that he did
25 not disclose any confidential information, but Oracle wanted to

1 cross-examine him about that more than just a blanket statement
2 that he didn't because the e-mail suggests that maybe he did;
3 and, so, we asked him questions about steps that he could take.
4 Steps, for example, could include an ethical wall --

5 **THE COURT:** Right.

6 **MR. HOWARD:** -- or a practice.

7 **THE COURT:** Well, and I think I previously indicated
8 that that question itself I would probably overrule, and I am
9 inclined to overrule that.

10 I don't -- I mean, one issue that runs through some
11 of this from the defendants' side is: Where is the
12 anticipation of litigation to trigger work product?

13 Now, I do think, to the extent -- and let me just
14 preface that. Obviously, he had a lawyer advising him on how
15 to answer questions at the deposition; and, so, that would be
16 protected by attorney-client privilege right now --

17 **MR. McDONELL:** Correct, Your Honor.

18 **THE COURT:** -- but that's different from what he
19 knew at the time when, you know, when he was doing what he was
20 doing, and I don't think we can presume that litigation was
21 anticipated.

22 **MR. McDONELL:** May I respond, Your Honor?

23 **THE COURT:** And some of his, I guess, subsequent
24 declaration is beginning to draw that distinction, I think.

25 **MR. McDONELL:** It does, Your Honor. As to that

1 specific example, the question was: What did you do to
2 compartmentalize PeopleSoft information from SAP TomorrowNow
3 information? And we have two levels of concern about that.

4 The first level is he answered the exact question
5 twice. And we even quote it verbatim in our brief, including
6 at page 7 where the question was: (reading)

7 "What steps did you take to ensure that you
8 kept all confidential information secure?"

9 I'm reading from line 15 of page 7 of our opposition
10 brief.

11 And he answered by saying that, I'll paraphrase now,
12 that his process was simply to not disclose it.

13 So he answered that question more than once; and
14 then, you know, we all know, it goes without saying, he was an
15 attorney acting for successive clients so there were
16 sensitivity issues.

17 When they came back in repetitious questioning and
18 asked the same question a little differently, you know, "How in
19 your mind did you compartmentalize things," the concern became
20 that he had been instructed on the record by plaintiffs'
21 counsel that under no circumstances should you disclose
22 PeopleSoft issues.

23 **THE COURT:** All right. I want to address that
24 specifically before you go on.

25 First, I do think they were allowed to get a little

1 bit more beyond, and not necessarily a lot more, and I'm not
2 going to give advisory opinions on what follow up could be
3 done; but I wouldn't authorize, you know, just whatever -- you
4 know, any amount of follow up, there could be issues with it.

5 But I think that the answer, "I simply ensured I did
6 not disclose that information," I think it's fair to ask,
7 "Well, exactly what steps did you take to ensure that?" And I
8 think he can answer that, what did he do at the time.

9 As far as Oracle instructing him not to reveal any
10 Oracle confidences, I think, it seems to me, you have to do
11 something about it. I mean, withdraw that. You know, there is
12 an attorneys' eyes only provision, and so forth; but I mean, if
13 you want to pursue this, you can't simultaneously threaten him
14 not to reveal anything.

15 I mean, he should take whatever cautions he can; but
16 to the extent you're probing and something comes up, he says,
17 well, for example -- I just think you can't have it both ways,
18 I agree.

19 **MR. HIXSON:** Your Honor, we're not trying to have it
20 both ways. The questions about what steps did he take to avoid
21 relying on his memory was directed to his employment at SAP.
22 So we're not asking about what he did at PeopleSoft.

23 **THE COURT:** I understand, but I think you're going
24 to have to -- I mean, I think that -- I forget exactly what you
25 asked for on that score, but I think there's some truth to

1 that.

2 **MR. McDONELL:** You're spot on, Your Honor. The
3 concern is, if privilege were not an issue at all and
4 confidences weren't an issue at all, this witness could go back
5 and say everything he ever knew about what went on at
6 PeopleSoft and then talk about what he did at SAP and/or
7 TomorrowNow and compare and contrast and talk freely.

8 We don't have that situation. The witness, to his
9 credit, was being cautious and trying to draw a line where he
10 was ensuring that he was being prudent in his answer. And
11 whether he can give any more answer without getting into
12 details or not remains to be seen. He's answered the question
13 twice --

14 **THE COURT:** Well, I don't --

15 **MR. McDONELL:** -- that that was his process.

16 **THE COURT:** I don't quite agree with you that he
17 fully answered the question. I think he did begin to answer
18 the question, but I think they're entitled to probe a little
19 bit more but not probably a whole lot more.

20 I mean, I don't think -- you know, what's he
21 supposed to say? I had a lobotomy on a part of my brain. I
22 mean, you're basically just trying to prove that it's
23 impossible to do. You know, I don't think you need a whole lot
24 on this.

25 But at the same time, if he comes out with something

1 that does, arguably, reveal the content of a piece of
2 information he had at Oracle because you're asking him a
3 question which could be a natch -- that could be a natural and
4 inadvertent thing. I don't think that you can threaten him
5 with some kind of sanctions at the same time.

6 **MR. HIXSON:** We have no intention of threatening
7 Mr. Trainor. And we can frame our questions in a way that it's
8 clear we're just asking about --

9 **THE COURT:** And it's pretty long ago, right? What
10 are asking about, 2000 --

11 **MR. HIXSON:** 2005.

12 **THE COURT:** So, I mean, I don't know how much the
13 secrets then are still highly secret now. I mean, I don't
14 know. But that's five years ago in a tech field. That seems
15 like a long time.

16 **MR. HIXSON:** It certainly is a number of years.
17 Again, we can ask follow-up questions about what steps he took
18 at TomorrowNow without getting into asking him about PeopleSoft
19 confidential information.

20 **MR. McDONELL:** And then our companion request that
21 goes throughout all of these questions is for some guidance
22 from the Court that this not be an open-ended thing, that they
23 get to the core of what they really seem to be going for here
24 and then --

25 **THE COURT:** I can't --

1 **MR. McDONELL:** -- stop. Because otherwise we'll be
2 back here in endless cycles.

3 **THE COURT:** I can't really give you any specific
4 guidance other than to say that I would guess that a handful of
5 questions would be sufficient, but I can't give an advisory
6 opinion in advance.

7 But, I mean, for example, if there's specific steps
8 that you think he could have taken but didn't, and he doesn't
9 volunteer them, well, then you can say: Did you set up an
10 ethical wall? Did you, you know, have a tainting? Or whatever
11 kind of things. You know, I mean, I think they should be
12 focused.

13 I do -- I agree that he began to answer the
14 question. I think it got cut off a little bit soon. I'm not
15 blaming anybody because these are -- I hate depositions of
16 lawyers.

17 **MR. McDONELL:** And one way in which the Court could
18 put some kind of objective boundaries around this is limiting
19 the time of this deposition. We're really talking about six
20 questions here. We think it's really excessive to ask to go
21 back at this witness for half a day. We, frankly, thought one
22 hour's time should be enough to ask these questions and any
23 reasonable followups.

24 **THE COURT:** Is that -- are there any other questions
25 that we're talking about now?

1 **MR. HIXSON:** It's the whole -- the six categories of
2 questions. The problem with a one-hour time limit is that his
3 previous deposition was -- a lot of it was taken up with
4 objections and arguments by counsel rather than the witness
5 testifying substantively.

6 **THE COURT:** Right. Well, I don't know. I mean, I
7 would think that two hours would be plenty; and unless it turns
8 out that, you know, the large majority of that is pauses for
9 consultations and objections, and so forth; but, I mean, that
10 would have to be predominant.

11 Okay.

12 **MR. HIXSON:** Okay.

13 **THE COURT:** So what's the next issue?

14 **MR. HIXSON:** The next one is communications with
15 prospective customers. And here this dealt with Depo
16 Exhibit 1681 where Mr. Trainor was asked about a statement he
17 made to Waste Management. It appeared in the writing that he
18 was telling them that it was to their advantage to give
19 TomorrowNow access to the PeopleSoft source code. And at the
20 deposition we asked him if that's what he meant, and he backed
21 away and he said he didn't necessarily agree with how we were
22 characterizing that communication.

23 Here we're asking him not about what's in his head
24 but the meaning of a statement he made to a prospective
25 customer.

1 **THE COURT:** Right. And I think it's been a little
2 bit coming together here. I think that he should testify as to
3 what he meant at the time as opposed to -- you know, I think
4 the issue is -- I mean, I don't think it's relevant what he
5 thinks now; is it? It's his frame of mind then, it seems to
6 me, is what's relevant.

7 **MR. McDONELL:** And he's offered to give that
8 testimony --

9 **THE COURT:** Right.

10 **MR. McDONELL:** -- now that there's been
11 clarification on it.

12 **THE COURT:** Right. Okay. And I don't see why he
13 should have to testify what he thinks about it now, and it
14 would be impossible probably for him to segregate, you know,
15 trial strategy in preparation for his, you know, defense and
16 all the rest, or his ethical issues currently. So, I think,
17 that's what I'd order, what he did then --

18 **MR. HIXSON:** Okay.

19 **THE COURT:** -- what he thought then.
20 Okay. And then --

21 **MR. HIXSON:** I can move on to misrepresentations to
22 customers.

23 **THE COURT:** Yes.

24 **MR. HIXSON:** We asked two questions here. One was a
25 narrow question concerning a statement to Waste Management that

1 TomorrowNow's rights to use PeopleSoft software come entirely
2 by way of Waste Management's license with PeopleSoft, and then
3 we moved to a broader question about whether TomorrowNow ever
4 misrepresented facts to customers. And both of those he was
5 instructed not to answer.

6 For this and all of the remaining ones I'm going to
7 talk about today, the common theme is that the defendants have
8 invoked work product but we're missing the litigation. There's
9 no showing of what lawsuit or threatened lawsuit was
10 anticipated at the time, and that's the predicate showing for
11 work product.

12 But for work product, he's a witness who's being
13 asked about a percipient question: Did you misrepresent a
14 fact? Not a legal opinion about the doctrine of
15 misrepresentation but did TomorrowNow say something that was
16 untrue. And the defendants haven't identified the anticipated
17 litigation that would give rise to a work product claim there.
18 And clearly it's not privileged because we're asking about a
19 communication between TomorrowNow and somebody else.

20 **THE COURT:** Okay.

21 **MR. McDONELL:** Okay. But they're oversimplifying
22 the issue, Your Honor. They take what was a nonprivileged
23 communication of a statement of kind of a negotiating position,
24 which is well known in this case that TomorrowNow took the
25 position with its customers that it was the customer's

1 responsibility to determine to what extent they could get
2 access to information to TomorrowNow. That's nonprivileged.
3 Those communications occurred with the customers.

4 **THE COURT:** Okay. And I think he's saying he will
5 say that it's true that TomorrowNow took the position.

6 **MR. McDONELL:** Absolutely. He will say that.

7 **THE COURT:** Now --

8 **MR. McDONELL:** Then the question goes -- probes
9 deeper to get behind it, which wants to then go into behind the
10 scenes at SAP/TomorrowNow and say: Okay. Was that really your
11 position or what was going on behind the scenes? Were there
12 going to be situations where -- you know, what was your legal
13 analysis? Were you always going to insist on that or what were
14 the risks, the legal risks, of not taking that position?

15 **THE COURT:** Well, I just -- I mean, this is all too
16 nebulous for me. I mean, he can answer, you know, questions
17 of -- I mean, I think what you say is he can answer based on
18 nonprivileged facts. He can't answer on -- based on -- he
19 can't reveal -- I mean, there is no work product. I guess,
20 though, there would be attorney-client privilege. I mean, if
21 he as a lawyer was advising his client, and so forth, about
22 what they should or shouldn't do, you can't get into that.

23 So -- and, I think, you say it will be worthless to
24 them to get based just on the facts; but, I mean, I don't --
25 you know, it may be true, but I think that's all he can do. He

1 can answer about the facts, but he can't give -- I don't think
2 there's a work product because there's no anticipation of
3 litigation.

4 There's possibly some attorney-client privilege to
5 the extent there were discussions, again, within the Legal
6 Department advising a client and the salespeople what they
7 should and shouldn't say. That would be privileged.

8 **MR. McDONELL:** There is that and it could reach back
9 to the PeopleSoft employment as well if, and this is all pure
10 speculation because I don't know this, but if he had
11 information, confidential information, from PeopleSoft that
12 bears on the question of whether, you know, IP rights in this
13 context are derivative, he's protecting that too; and we want
14 him to continue to --

15 **THE COURT:** Well, he should, but I think that's kind
16 of Oracle pursues that at its own risk in my opinion, so....

17 **MR. HIXSON:** Fair enough, and we don't intend to
18 infringe or violate our own privilege; but this, again, loops
19 in with the what steps did you take.

20 **THE COURT:** I just don't think I can go any further
21 than that. So what's the next --

22 **MR. HIXSON:** The next one is the indemnification
23 policy, and this relates to a PowerPoint presentation where
24 there was a statement that the indemnification policy was,
25 quote, a key term, no removing this, in a presentation that

1 Mr. Trainor and others made to TomorrowNow salespeople. And
2 our question to him is just whether that was an accurate
3 description of TomorrowNow's negotiating position, was that a
4 key term, no removing this.

5 **THE COURT:** Right. And I think that calls for a
6 yes-or-no answer and I don't see why he can't answer that.

7 **MR. McDONELL:** He can answer that, but they can't
8 drill then down into the confidential discussions that he had
9 as an attorney with his clients about the background of that
10 position.

11 **THE COURT:** Well, I think that's right; isn't it?

12 **MR. HIXSON:** We would -- we're not asking him to
13 reveal attorney-client privilege communications. But, for
14 example, if he were aware of negotiations between TomorrowNow
15 and another customer concerning whether that was a key term,
16 that's nonprivileged because it's TomorrowNow and somebody else
17 talking with each other.

18 **THE COURT:** Well, if it's concerning -- I mean, he
19 could ask, "Did you drop your insistent or didn't you," or
20 something like that.

21 **MR. McDONELL:** That question was not asked,
22 Your Honor.

23 **THE COURT:** Okay. And that would be a factual
24 question that I think could be answered.

25 What the -- you know, if there were legal

1 discussions about why it was a key term internally, that would
2 probably be attorney-client privileged; but -- you know, the
3 extent that, again, advice to the client, but the facts about
4 whether it was a term that was insisted on, uniformly or not,
5 that would be discoverable. And, of course, the PowerPoint
6 presentation wasn't privileged.

7 **MR. HIXSON:** And that's all we're asking for.

8 **THE COURT:** Okay. Let's move on.

9 **MR. HIXSON:** The next one is compliance with ethical
10 obligations. And this one came out of Exhibit 1181, which was
11 a long e-mail from Spencer Phillips to someone else at
12 TomorrowNow saying that he had spoken with Scott Trainor and
13 here's what Trainor had said, and it consists of a couple of
14 pages recounting PeopleSoft's practices with respect to its
15 license agreement. And, again, this gave rise to the
16 suggestion that Mr. Trainor had not complied with his ethical
17 obligations.

18 So point blank we asked him. We asked him if he
19 felt that he had, and if he had narrated what Mr. Phillips was
20 attributing to Mr. Trainor, if Mr. Trainor had said that, would
21 he had felt comfortable with that. And here, again, I think
22 the *Tardiff v. County of Knox* case draws the appropriate line
23 here, that we're not asking him about decisions made in
24 litigation.

25 There's, again, no anticipative litigation that

1 defendants have pointed to. We were asking for his view at the
2 time about his ethical obligations and whether he believed that
3 conduct would comply with them. And *Tardiff* does draw that
4 line between a lawyer -- litigation counsel making a decision
5 in the course of pursuing a lawsuit and then hypotheticals and
6 questions about what the attorney believed his obligations to
7 be, and that is the line that we want to enforce.

8 **THE COURT:** Well, I think one issue is, again, as I
9 said before, he can answer only as to his understanding at the
10 time, not now. I mean, presumably he's gotten legal advice
11 since.

12 **MR. McDONELL:** And that is in the record,
13 Your Honor, in the declarations.

14 **THE COURT:** Yeah.

15 **MR. McDONELL:** As you pointed out, he does have his
16 own counsel now.

17 **THE COURT:** Yeah. So he can answer as to his
18 understanding at the time; but, I don't know, comfortable, I
19 mean, that's kind of a very vague term, it seems to me.

20 **MR. HIXSON:** We can refine that to a more precise
21 question.

22 **MR. McDONELL:** But the thing we're concerned about
23 is putting this attorney witness in a position where they're
24 kind of boxing him in through various approaches to try to
25 force him to do an extemporaneous legal analysis here today.

1 **THE COURT:** Right. And I can't -- I mean, I'm sure
2 they are trying to box him in. That's what people do at
3 depositions; and, to some extent, that's, you know, that's part
4 of this. But I think I've drawn as clear a distinction as I
5 can that you can only ask about his understanding at the time,
6 not now.

7 **MR. HIXSON:** That's fine, Your Honor.

8 **THE COURT:** And, you know, I will tell you, I mean,
9 again, I really don't like depositions of lawyers. I
10 disapprove of them. I think that they're just -- there are all
11 sorts of reasons why they're just -- I mean, look at all of us.
12 I mean, you have he was a lawyer, then we have all these
13 lawyers, and me. We're all -- you know, per question the
14 amount of legal analysis and time and versus how much substance
15 you really get out of any of this, it's highly
16 disproportionate, I would say, and mostly, you know, a huge
17 burden on the system that really is not worth the candle.

18 So, if you push this too far, you will run into that
19 attitude from me because I really think it's, you know, it's
20 just so full of peril; but, unfortunately, he is at the
21 intersection of some relevant stuff here, so....

22 **MR. McDONELL:** Yes. And because we're at these
23 crossroads and we're getting guidance from Your Honor, which is
24 greatly appreciated, I just want to let everyone in the room
25 know that it is not at all unlikely that there will be

1 additional instructions to this witness not to answer
2 questions.

3 **THE COURT:** Well, and I can't give any further, you
4 know, advice because it has to be a question-by-question thing;
5 but I just hope you can, you know, get over this and, you know,
6 get on to more productive pursuits.

7 But, okay. So what else do we have to --

8 **MR. HIXSON:** Well, next we have the questions about
9 what we've called the willfulness of copyright infringement.
10 We asked about whether SAP or TomorrowNow took steps to
11 determine whether a particular customer's allowance or access
12 to software was copyright infringement or whether they did this
13 in connection with contract negotiations.

14 There we've identified that the defendants'
15 privilege and work product objections were overbroad. For
16 example, if TomorrowNow is talking with a customer, such as
17 Waste Management, and shares with them some kind of analysis
18 about what Waste Management can do, that's not privileged.
19 That's waived and that's something that we should be allowed to
20 ask about, or if there's work done not in connection with the
21 Legal Department at SAP or TomorrowNow; but we were shut down
22 at the very foundation of those questions before we could get
23 to the point of knowing of whether or when privilege applies.

24 It may be that there was no analysis done or maybe
25 that something was shared with the customer, but that's

1 relevant to the case.

2 **THE COURT:** All right. Well, I generally agree,
3 although it's also -- I think, you, I take it, agree that his
4 discussions about the legal strategy for interacting with
5 customers is off limits.

6 **MR. HIXSON:** Well, attorney-client privilege
7 questions are not what we're asking for there.

8 **THE COURT:** Right.

9 **MR. McDONELL:** The concern here, Your Honor, is they
10 didn't ask the question in that way that set it up as asking
11 for nonprivileged information as counsel suggests in the
12 example he gave.

13 **THE COURT:** Well, I think you need to do that. And
14 I'm just -- you know, I think that that's the distinction. So
15 you can ask for the nonprivileged. I would agree that anything
16 actually conveyed to the customer can't be privileged.

17 **MR. McDONELL:** And, so, when they ask a question and
18 they're starting to get into the privileged area, I don't want
19 them to ask questions that are so specific as to start to
20 reveal the content of any analysis. So the concern is, when
21 they bake into their question: Did you do an analysis of a
22 specific customer of a specific legal issue --

23 **THE COURT:** The answer to that --

24 **MR. McDONELL:** -- or copyright --

25 **THE COURT:** -- yes or no, is not privileged. Okay.

1 If they said, "What was the result of that analysis," unless --
2 if it was conveyed to the customer, it's not privileged. If it
3 was kept in-house, it is privileged. I mean, you all have to
4 go step-by-step.

5 **MR. McDONELL:** You know, although, the "yes" answer
6 to that question starts to say, "Okay. Now we know you studied
7 the copyright issue. What else did you say?"

8 **THE COURT:** I don't think so. I don't really think
9 so.

10 **MR. McDONELL:** So we'll take it one question at a
11 time, hopefully with yes-or-no answers, Your Honor.

12 **MR. HIXSON:** Fine.

13 The last item, Your Honor, relates to two documents
14 where there were redactions and we had --

15 **THE COURT:** Yes.

16 **MR. HIXSON:** -- asked defendants to provide them to
17 the Court for in-camera inspection and they've done that,
18 Your Honor.

19 **THE COURT:** Yes. Yes, I have looked at them. I
20 guess I want to hear from -- I know you haven't seen them and,
21 so, this is kind of a one-way discussion, but I guess I want to
22 hear.

23 **MR. McDONELL:** This is my favorite kind of argument,
24 Your Honor.

25 (Laughter)

1 **MR. McDONELL:** Your Honor, two points. One of these
2 documents was not the subject of the testimony in the
3 deposition of Scott Trainor at all, and it was just something
4 they throw in just apparently because they wanted to.

5 **THE COURT:** So this is your procedural discussion.

6 **MR. McDONELL:** This is my procedural argument. It's
7 without waiver for me to argue the other side of this issue, if
8 necessary, which I'm hoping it's not.

9 But, Your Honor, it wasn't. So they've submitted to
10 the Court nonetheless and we've addressed it on its merits. We
11 have submitted declarations.

12 **THE COURT:** Okay. Well, let's take the first one.
13 The e-mail chain involving Mia Lee.

14 **MR. McDONELL:** Yes.

15 **THE COURT:** Okay. On the first page there's a
16 redaction.

17 **MR. McDONELL:** There is, and that is the only
18 redaction in the entire thread.

19 **THE COURT:** Right. And, you know, I guess I'm just
20 wondering whether actually the only redaction -- that most of
21 that could be unredacted except for the one, two, the third
22 sentence of the first paragraph or the last sentence of the
23 first paragraph.

24 **MR. McDONELL:** The last sentence of the first
25 paragraph?

1 **THE COURT:** Right. Starting with "Apparently." And
2 you know, I may be missing something. I mean, these are all --

3 **MR. McDONELL:** May I have a moment, Your Honor, to
4 read?

5 **THE COURT:** Yes. I mean, line-drawing exercises
6 where the lines aren't completely clear, but....

7 **MR. McDONELL:** I would ask Your Honor to consider
8 the possibility of keeping redacted the second sentence of the
9 second paragraph which starts to get into content with
10 reference to certain material, which I think is a counterpart
11 for the one Your Honor identified as keeping privileged.

12 **THE COURT:** Okay. All right.

13 **MR. McDONELL:** With that, we would agree with that,
14 Your Honor.

15 **THE COURT:** Okay. All right. I guess -- well, let
16 me just say the one reason that I am -- was leaning against
17 that initially was the prior sentence, which will be
18 unredacted, "I suspect the nature of this initial call is
19 largely sales and nature," to me that casts the whole thing
20 primarily in a nonlegal light, in a business light.

21 **MR. McDONELL:** "Largely" doesn't mean "entirely,"
22 Your Honor.

23 **THE COURT:** True.

24 **MR. McDONELL:** And then if you look at the content
25 of the next sentence, you see something a little different.

1 **THE COURT:** All right. I think you're right. Okay.
2 So that's the ruling on that.

3 And then the second document is a little bit more
4 redacted. And, I guess, first I just have a process question.
5 To the extent that there's, you know, attachments, are these --

6 **MR. McDONELL:** They were not --

7 **THE COURT:** -- produced or not produced?

8 **MR. McDONELL:** They are not an issue at this time,
9 Your Honor.

10 **MR. HIXSON:** It was not raised by our motion. It's
11 just the redactions.

12 **THE COURT:** Because let's say hypothetically there
13 was some track change type of information, you know, who did
14 what to a certain document --

15 **MR. McDONELL:** I'm a little bit handicapped,
16 Your Honor, because those attachments, which as they are, are
17 not before the Court and there's no motion directed to them.

18 **THE COURT:** I'm just -- and I guess my feeling is
19 this is a sort of tempest in a teapot under those
20 circumstances.

21 **MR. McDONELL:** Your Honor, Mr. Delahunty informs me
22 the attachments have been withheld as privileged and have not
23 been challenged, so I think that flips the switch in our
24 direction.

25 **MR. HIXSON:** And I don't have that information in

1 front of me.

2 **THE COURT:** Yeah. I mean, I think that it just -- I
3 guess what I don't know -- I mean, this is -- let's see, you're
4 claiming work product because how is it anticipation of
5 litigation?

6 **MR. McDONELL:** It is -- it's also -- it's privileged
7 as well, Your Honor. It's a communication between this
8 nonattorney witness and the transactional attorney working in
9 contract --

10 **THE COURT:** Yeah. I mean, I'm going to not redact
11 it, both because I think it probably is attorney-client
12 privilege and I also think it will be useless to you.

13 **MR. McDONELL:** So you said you're -- you said you're
14 going to not redact it. I think you --

15 **THE COURT:** I did.

16 **MR. McDONELL:** -- intended to say you will not
17 unredact it.

18 **THE COURT:** I'm going to leave it as is redacted.
19 It will do you no good, believe me.

20 **MR. HIXSON:** It would do me no good?

21 **MR. McDONELL:** So that concludes that issue.

22 **THE COURT:** Yes. Okay.

23 **MR. McDONELL:** All right. Thank you.

24 **MR. HOWARD:** Shift change, Your Honor. I'll address
25 the last part of --

1 something like they're willing to use a commonsense
2 understanding.

3 **MR. COWAN:** Yeah. Just the plain meaning of the
4 term "copy," Your Honor, is something we're willing to accept.

5 **THE COURT:** Yeah. I mean, I guess, I will say this:
6 Again, the purpose of an RFA, of course, is to pin someone down
7 and the party never wants to be pinned down but that's what
8 they're for. And I have to say that overall I felt that
9 defendants were being evasive and trying mightily but crossing
10 the boundaries into not fairly answering the questions.

11 **MR. COWAN:** If I --

12 **THE COURT:** I mean, I understand the incentive and,
13 you know, that's not surprising that you would not want to be
14 pinned down; but I think that overall I would -- I think that a
15 lot of the, you know, answers weren't sufficient and were too
16 evasive.

17 And, I mean, of course, Oracle wants these to use in
18 front of a jury and, of course, you don't want anything that's
19 clear enough that the jury goes, "A ha," but I think that's the
20 dynamic I see in there.

21 **MR. COWAN:** If I can respond to that, Your Honor,
22 because -- and I can certainly see how the Court could see that
23 by -- at first blush, but the real issue is -- Rule 36 says in
24 the effective admission, "A matter admitted under this rule is
25 conclusively established." And, so, we've been very, very

1 careful, I think, in trying to admit those things that we
2 believe to be true and don't dispute in any way.

3 And, so, the issue, for example, with "copy," when
4 the act at issue in the request is really asking about
5 downloading, we admitted to downloading; but their previous
6 definition of "copy" was so broad that it would include
7 downloading and a lot of other things. So if we admitted to
8 copying, we would be admitting to something other than
9 downloading.

10 **THE COURT:** All right. Well, then I think -- I
11 mean, for an example like that I think you ought to be able to
12 agree on something, whether it's changing the definition, which
13 the plaintiffs have indicated a willingness to do, or
14 specifying "copy" in the sense of downloading; you know, copy
15 by downloading.

16 In other words, those things; but you still, I don't
17 think have the right to avoid the word "copy" altogether. And,
18 so, I think that that's -- and I will say, on the other hand,
19 I'm not, and you probably could foresee this, I'm not going to
20 deem all these things admitted.

21 **MR. HOWARD:** No, Your Honor. I understand that.
22 But on that point, what Your Honor just said is exactly what we
23 asked. We asked, "Did you get a copy of a tax update by
24 downloading?" And they said, "We acquired a tax update posted
25 by PeopleSoft by downloading." And, so, that is obtaining a

1 copy by downloading.

2 **THE COURT:** Well, they want to avoid using the word
3 "copy" at this point --

4 **MR. HOWARD:** Exactly right.

5 **THE COURT:** -- but I think you have to use it in
6 that context.

7 **MR. COWAN:** And, again, the reason why we did it in
8 that context is we were dealing with the old definition that
9 was multifarious; and given that the Court is limiting the
10 definition to the plain meaning, we certainly -- we don't have
11 a problem saying, "Yes, we took a copy by downloading." In
12 that instance I think it's the majority of time; but that way
13 it's specific enough that we don't get to trial and they try to
14 paint our activities with such a broad brush that we don't have
15 our ability to explain what, in fact, we did. And that's the
16 underlying issue, Judge, in all of these definitional issues.

17 **THE COURT:** All right. Well, then what next? I
18 mean, the "fix" and the "update" don't seem particularly vague
19 and ambiguous to me.

20 Now, you know, you seem to be raising the issue
21 rather than there's testing in quality assurance within -- with
22 subsets of the fix but, yet, the deposition witnesses weren't
23 drawing those distinctions. So I am troubled by that.

24 **MR. COWAN:** What I've done, because we've had this
25 issue come up in other hearings on other things, and I've

1 prepared a demonstrative that analogizes what we're talking
2 about with respect to fixes with something that I think
3 everybody, including the jury, can understand. And if you can
4 give me three minutes to run through this, I'd like to do that.

5 **THE COURT:** Okay.

6 **MR. COWAN:** Here's a copy.

7 Your Honor, there's a number of terms here that
8 we've given you that, and I agree, at first blush is kind of
9 hard to understand what we're talking about when we're talking
10 about master fix, we're talking about fix, we're talking
11 about --

12 **THE COURT:** First class, second class, third class,
13 all weekend.

14 **MR. COWAN:** Right. I understand.

15 So, hopefully, because we obviously have to convince
16 a jury about the details of what we've done and try to explain
17 it in a way the jury can understand it, so the purpose of this
18 demonstrative is to take that approach.

19 A master fix is much like a generic grocery list,
20 and that's what we have on this first page. It's basically
21 just identifying a need. What is the problem? In the grocery
22 list, you need groceries. That's the description of the fix.
23 Then what do you need? You need these things.

24 Well, if you go to the next analogy following this
25 grocery analogy, the fix, as it's defined, is actually just

1 like the grocery bag. All it is, is a number assigned to
2 something that holds other things, and the individual things
3 that go in the fix are specific things; and we've listed them
4 here, such as the DAT file, the DMS file, the SQR file, the
5 project file.

6 When you go to start looking at specific customers
7 or consumers in the nature of groceries, what do those
8 customers get as a result of that master fix? The problem.
9 The problem is you're out of groceries. You need -- generally,
10 these group of customers need milk, eggs, beans, and cereal.
11 You go here on page 3, fix objects for consumer A. That
12 consumer only needs the milk and the cereal. So it would only
13 need, for example, for that fix, the SQR file and the project
14 file. Customer or consumer B on 4 needs different things.

15 But look here (indicating). Here's the important
16 thing. They need milk but that customer wants soy milk, not
17 whole milk.

18 **THE COURT:** So, but -- okay. So I understand your
19 point, but isn't this kind of -- the way that this ought to be
20 gotten at, it seems to me, is along the lines of guidance I've
21 given you before, which is, this really goes to not whether you
22 did something or not but the quantity of it, was it done
23 sometimes, always. I mean --

24 **MR. COWAN:** We admitted that and we admitted it at
25 the object level; and where we could admit at least once or

1 some of the time or the majority of the time, we actually did
2 that.

3 And if you look at their motion at -- let me find
4 it --

5 **THE COURT:** I just -- I think -- I mean, the problem
6 I have with your answer is that it's completely
7 incomprehensible to a jury; and it also -- the extent not
8 admitted, denied, I mean, it results in a nonadmission even
9 though most of this is true.

10 I mean, that -- I mean the -- I think what Oracle is
11 trying to get at is that you would take something from one
12 consumer and share it with others. Now the extent that it was
13 one or two versus twenty versus a million, I think your answer
14 to that is, "That depends."

15 Okay. But it's still what's happened. And, so,
16 this is where I think -- I guess I don't think the answer is
17 satisfactory. It's not sufficient. It's too -- it's too
18 impossible. The jury won't know what an object is. Maybe they
19 will by the end of this trial. But, you know, it just -- it
20 avoids what you should have to really admit in requests for
21 admission; but there may be a way -- you know, I --

22 **MR. COWAN:** And I found the place in their motion,
23 Judge. It's on page 26 of their motion.

24 **THE COURT:** 26 of?

25 **MR. COWAN:** Of Oracle's motion.

1 **THE COURT:** Plaintiffs' papers?

2 **MR. COWAN:** Yes. And you look in the middle of the
3 page there beginning at line 12.

4 **THE COURT:** Right.

5 **MR. COWAN:** We admit it, for some of the objects,
6 meaning more than one, and to the extent -- this is just an
7 exemplar. For example, when they ask for majority, we would
8 respond, because the requests for admission were admit at least
9 one, and the next request was admit some, and then the next
10 request was admit that a majority.

11 **THE COURT:** Okay. Now, this one you're pointing to
12 has to do with a generic environment, which is a similar issue
13 but --

14 **MR. COWAN:** But it's the exact same issue, and the
15 issue is: Are we discussing this at a fix or update level or
16 are we discussing it at an object level?

17 Because we can admit at an object level, but they're
18 asking us to admit it at a fix level. They are asking us to
19 admit it at the grocery bag level. But the substance of this
20 case, what is potentially copyrightable is not the bag. It's
21 the contents of the bag.

22 And, so, we're focused on what we did and all of
23 their RFAs --

24 **THE COURT:** Well --

25 **MR. COWAN:** -- are focused on what TomorrowNow did

1 with the objects, not with the fixes.

2 **THE COURT:** Yeah, but why is it that your actual
3 high-level, highly knowledgeable people at deposition didn't
4 draw this distinction?

5 **MR. COWAN:** Because they're talking about --
6 depending on the nature of the question, they could be talking
7 about the overall process of how they assembled the fix, which
8 has all these objects in it; but it's a component-by-component
9 construction.

10 **THE COURT:** Well, I guess, I feel just -- I feel
11 that there's probably a middle ground, although I shouldn't say
12 middle. I think far more towards Oracle's side of this.

13 In other words, I think there may be a little bit of
14 something to what you're saying, but I don't think it justifies
15 these kind of unusable answers.

16 **MR. COWAN:** The concern --

17 **THE COURT:** Essentially you've taken these very
18 technical distinctions, which may have a little bit of merit,
19 although the bigger picture, they're being -- the result is
20 distortion, where things that should be admitted aren't
21 admitted in appearance to the jury. I mean, it just is unclear
22 and gobbledygook, you know, in what you're admitting and what
23 you're denying, and that's the problem with it.

24 So I'm not satisfied. I think a lot better needs to
25 be done. I'm not sure exactly -- I don't think it's -- I guess

1 I ought to here from you. I'm not sure that -- it's true that
2 the witnesses, I think, might not have been trying to be as
3 precise as this RFA calls for, but --

4 **MR. HOWARD:** Well, Your Honor, if I may address
5 that. I mean, there is this new issue that has emerged through
6 their opposition that we're very concerned about; and that is,
7 that we took their representations about what this SAS database
8 had in terms of these fixes and we went and we spent an untold
9 amount of money and time examining these witnesses using the
10 terms that we were asked to use, and now the -- now we're
11 getting denials because we used those terms.

12 And if I could just compare the two categories at
13 issue in the motion. On the fix RFAs that we're discussing
14 right now, they object essentially that we're not talking about
15 objects. On the second category where we ask about objects,
16 they say that that's too much work to do and it's burdensome.

17 And if, Your Honor --

18 **THE COURT:** Well, and we haven't gotten to that;
19 right?

20 **MR. HOWARD:** Yes. And I just wanted to put those in
21 relief because if we go back to early 2008, counsel said to
22 Judge Legge, for example, "If you want to look at every master
23 fix we have ever provided, it may take a second to open, but
24 you go through and see every fix that was provided."

25 The witnesses testified the same way. Catherine

1 Hyde in her declaration to Your Honor in July 2009 declares the
2 same way. They use the language of fix, interchangeable with
3 master fix and that's the basis in which we examined them.

4 It creates -- so, Your Honor, I think that they
5 should be required to answer on the basis of fix, which is the
6 terminology. This distinction that's being drawn between "fix"
7 and "fix container" is evasive and it really does -- it would
8 unwind all of the discovery we have taken so far in the case.

9 And if they're determined to do that, then I do
10 think that we ought to have an opportunity to brief that to
11 Your Honor. We see it as tantamount to the type of motion that
12 Your Honor heard from them.

13 **THE COURT:** Well, I don't -- I mean, I don't think
14 it is tantamount. It's different, but whether it's serious is
15 a different issue, but -- and I'm not sure I understand the
16 idea that this unwinds all the past discovery.

17 What is your response to that?

18 **MR. COWAN:** It's real quick. It doesn't,
19 Your Honor. And he said -- Mr. Howard indicated that, you
20 know, they used the terms that they were asked to use. They
21 used the terms they selected in questioning our witnesses, not
22 terms we told them to use.

23 **THE COURT:** Well, but I still think that -- but,
24 nonetheless, the witnesses could have said, "I don't know what
25 you mean by that. A fix is merely a container and inside it

1 are a bunch of objects and we" -- you know, they didn't say
2 that, and these were people -- director of PeopleSoft Support
3 Services, and so forth. I mean, it's --

4 **MR. COWAN:** We're not denying, Your Honor. I want
5 to make clear --

6 **THE COURT:** Now, to my mind you are switching gears
7 on that and I don't think it's justified and it's problematic.

8 **MR. COWAN:** We're not denying that the terms "fixes"
9 and "updates" were regularly used at TomorrowNow. We've never
10 said that. The issue is: What are they asking? What is the
11 focus on?

12 And on page 10 of their reply brief, plaintiffs'
13 reply brief, I think really cuts to the chase, and in
14 page 14 -- I'm sorry, page 11 of the demonstrative I gave you
15 is really good.

16 **THE COURT:** You know, it's after 2:00 o'clock and
17 we're not even through the first set of motions, and I've got a
18 lot of people who have 2:00 o'clock hearings. I tried to warn
19 you about the amount of time. So I don't know what to do about
20 this.

21 **MR. COWAN:** This will take one second and then I'll
22 be done on this issue, Your Honor, because it relates to all
23 these definitional issues just so you can understand where
24 we're coming from.

25 And I'll just read it to you. Mr. Howard in

1 questioning one of the witnesses says: (reading)

2 "When I say 'fix,' I'm referring to the
3 objects that comprise the functionality that's
4 being delivered to the client."

5 And, again, what he's saying is, he's referring to
6 the contents of the grocery bag, given my analogy, not the bag
7 itself.

8 And, so, when we answered these requests for
9 admission, we're answering them based upon the focus of this
10 case, which is: What did TomorrowNow do allegedly with
11 Oracle's alleged copyright material? And if you want to focus
12 on that, you have to focus at the object level. You can't
13 focus at the fix level, and here's why:

14 If you look at page 11 on the demonstrative, this is
15 one type of object in one fix for Waste Management. It has
16 nine -- or one example of one type of object in a Waste
17 Management fix. There are seven SQR files in that fix. How
18 each one of those were done may differ depending on what
19 development and testing was done.

20 They're asking us to admit something at a fix level
21 when, in fact, you've got to look at what happened at the
22 object level to determine whether that's true or not. And, so,
23 if we admit it at the fix level, then we will, by virtue, have
24 to admit, even though --

25 **THE COURT:** Well, I can't --

1 **MR. COWAN:** -- we would dispute it at the object
2 level.

3 **THE COURT:** I don't -- I can't. This is not helping
4 me decide.

5 **MR. COWAN:** Okay.

6 **THE COURT:** I'm sorry, but it just isn't.

7 I don't think I can tell you anything more right now
8 than that I think your answers are too evasive. I don't know
9 whether Oracle could change this to something like, "Admit that
10 for some fixes or updates or the components thereof," or
11 something like that. I mean, that's infringement it seems.

12 **MR. HOWARD:** Right. I think we can work with --

13 **THE COURT:** But so that you don't avoid -- you know,
14 you clutter up -- because this answer, whether intentional or
15 not, like all the other answers that are at issue, results in
16 something that really is a gobbledygook, unusable by the jury
17 to figure out what you admitted and what you didn't. And, so,
18 I think something like that is probably the best solution.

19 **MR. COWAN:** And, so, Your Honor, are you suggesting
20 that we work together to try to address some of the concerns --

21 **THE COURT:** Yes.

22 **MR. COWAN:** -- we have and revise their request?

23 **THE COURT:** Yes. But I am trying to tell you that I
24 mostly agree with Oracle. I very little agree with you. I
25 think there's a few grains of correctness that it's not exactly

1 as precise as it could be, but I think mostly what's happening
2 is those are being used to leverage giving evasive and
3 unhelpful answers. That's my view of this.

4 **MR. HOWARD:** We'll take that and work with it,
5 Your Honor.

6 **THE COURT:** Okay.

7 **MR. HOWARD:** How would you like to proceed?

8 **THE COURT:** Well, I mean, I think the generic
9 environment -- let's see... It seemed to me, again, that there
10 could be an agreement that the definition "generic environment"
11 could be tweaked a little bit, that it had some limitations on
12 customer scope and purpose. I mean, it's very parallel to what
13 I was just saying.

14 **MR. HOWARD:** As to that one, Your Honor, we did not
15 make up that term.

16 **THE COURT:** Right.

17 **MR. HOWARD:** That's a term that they use.

18 **THE COURT:** I agree.

19 **MR. HOWARD:** And if you look at their answer, I
20 think it just -- it just ignores what the common meaning was
21 within the company. We asked about generic environments. They
22 answer in terms of an environment specific to TomorrowNow's
23 retrofit support of specific customers.

24 Our question is not limited to retrofit support. It
25 goes to environments, which the witnesses are crystal clear

1 about in their testimony, that are not named for or used for
2 the support of specific customers, whether that is in the
3 retrofit model or the critical support model.

4 So the complaint that we made that up and it's --

5 **THE COURT:** Right.

6 **MR. HOWARD:** -- not fair to use, we just think it's
7 wrong.

8 **THE COURT:** Right. No. It's true, and it's even
9 used in the answer.

10 **MR. COWAN:** But we do -- because we admit that to
11 the extent we can admit it, we do; and to the extent we have to
12 qualify it, we do, and the rule allows us to do that.

13 Again, they're trying to shoehorn what might be some
14 specific conduct into a broader context.

15 **THE COURT:** Well, I really -- you know what? I just
16 I don't know what to do right now. It's 2:11. I've given
17 you -- I mean, this -- these motions turned into, you know, the
18 equivalent of about 20 motions, and it's very burdensome on the
19 Court, and I feel like I made a mistake authorizing these, I
20 can tell you. Now we're more than an hour into this and we're
21 not even half way through. So I'm not sure how to proceed.
22 We've got other people waiting.

23 **MR. COWAN:** I think on this issue, Your Honor, we've
24 got the direction from the Court in terms of --

25 **THE COURT:** But I think I'm -- I mean, I probably

1 lean even more in Oracle's favor on this issue. I mean, I
2 really -- I think "generic environments" were -- has been used
3 a lot, and I think they're understandable, and I think the
4 answer should include those terms. It might be that there's
5 some slight tweaking. I'm not even sure about that.

6 **MR. HOWARD:** Your Honor, I'm trying to figure out a
7 way to get through this. Should we come back and schedule with
8 Your Honor? I mean, I think the parties, unfortunately, and we
9 recognize the burden and --

10 **THE COURT:** Yeah.

11 **MR. HOWARD:** -- I would say you haven't authorized
12 three of these motions --

13 **THE COURT:** I know.

14 **MR. HOWARD:** -- but I think that we need to -- we
15 need an order from the Court because we've got some things --

16 **THE COURT:** I know. I know. I know.

17 **MR. HOWARD:** -- that are stacked up. Should we ask
18 Your Honor to reschedule us for the remaining issues?

19 **THE COURT:** No. No. Well, I'm just thinking maybe
20 I'll take the other -- the two motions from the other parties.
21 We'll take a recess in this case, but then I'll try to bring
22 you back again.

23 **MR. HOWARD:** Okay.

24 **THE COURT:** And I do have, I think, maybe just one
25 Case Management, so I might take that at 3:00 and then keep

1 going.

2 **MR. HOWARD:** Very well, Your Honor.

3 **MR. COWAN:** That makes sense.

4 **THE COURT:** Believe me, I don't want to put this
5 aside and take it up again.

6 **MR. HOWARD:** Okay.

7 **MR. COWAN:** Okay.

8 **MR. HOWARD:** Fair enough.

9 **THE COURT:** That would be a disaster from my point
10 of view.

11 **MR. HOWARD:** Thank you for being able to take the
12 additional time, Your Honor.

13 **THE COURT:** All right. Okay.

14 **THE CLERK:** Court's in recess.

15 (Recess taken at 2:14 p.m.)

16 (Proceedings resumed at 2:51 p.m.)

17 **THE COURT:** All right. Any new developments?

18 **MR. HOWARD:** No, Your Honor.

19 **THE COURT:** You haven't settled the case?

20 **MR. HOWARD:** Your Honor, it's 20 minutes later.

21 (Laughter)

22 **THE COURT:** Yes.

23 **MR. COWAN:** I'm not going to revisit what we talked
24 about before the break in the sense of rearguing anything I've
25 already reargued.

1 **THE COURT:** Especially if you've already reargued
2 it, yes.

3 **MR. COWAN:** I understand. I understand.

4 And I think the Court understands our positions, but
5 disagrees with many of them, and I've taken to heart what the
6 Court has said so far.

7 I just want to make sure that we understand on the
8 first part of the motion relative to the RFAs, the definitional
9 piece of it, what you're ordering us to do; and if I can
10 summarize what that is, then hopefully we're not back here
11 again or facing some motion to deem what we supplement
12 admitted.

13 The issue in the definitions you've acknowledged,
14 and I think Oracle's agreed, to go on "copy" to a plain meaning
15 term.

16 On "fix" and "update" you have agreed with Oracle's
17 definition of that and overruled defendants' objections to
18 those terms.

19 On "generic environment" you acknowledge there's
20 some room for meet and confer on that relative to the fact that
21 those environments were used for some subset or specific
22 customers, which was the scope issue.

23 **THE COURT:** Yeah, although I'm looking at my notes
24 and what my -- I did have a feeling this issue environment --
25 you're saying, well, it was used for retrofit support and

1 limitations on customer's scope and purpose. I don't know that
2 that's contrary to what they're asking you to admit. I mean,
3 that's sort of an argument, but it wasn't as big a deal or
4 something. But is that really -- what in the wording of admit
5 is wrong about this?

6 **MR. COWAN:** Our concern is the only RFAs that are at
7 issue in the motion relate only to the retrofit environment the
8 way we read them; and, therefore, we believed that our answers
9 needed to be qualified to make sure that we're all on the same
10 page there.

11 But I think we can get at this issue and address the
12 Court's concerns and preference and, hopefully, meet our
13 obligations, as the Court expects us to under the rules, by,
14 once we get to a point on a definition on that issue,
15 incorporating the words from their request in our answer
16 because that seems to be the biggest concern they have and,
17 obviously, one the Court has focused on.

18 **THE COURT:** Yes.

19 **MR. COWAN:** The concern I have is, as we get into
20 summary judgment motion practice and trial, if we're not
21 afforded the opportunity at this time, even if we use their
22 words, to have some other qualifying language, whether it be in
23 the objection piece or as a separate sentence in the answer
24 that could be taken out for purposes of trial once
25 Judge Hamilton rules how these admissions would be used.

1 **THE COURT:** Well, I think if it's in the objections
2 and then she -- you know, she'll either decide whether she
3 wants the address those or not is that -- do you have any
4 problem with it being in the objections as opposed to the
5 answer?

6 **MR. HOWARD:** No, Your Honor, as long as it's a valid
7 objection, which is really what we're here talking about.

8 **THE COURT:** Right.

9 **MR. HOWARD:** So the answer --

10 **MR. COWAN:** Well, it's more of a qualification.
11 It's not an objection at that point. It's a qualification of
12 our answer, and that's -- I don't care where we put it as long
13 as we have a record of, "Hey, when we're admitting these things
14 using your words, this is what we mean." And that's really the
15 crux of it.

16 And I understand the Court is not pleased with how
17 we've done it to this point. I want to get it right but I also
18 want to preserve our ability to not have it misconstrued in a
19 way that we didn't intend it to admit.

20 **MR. HOWARD:** Your Honor, if I may, I have a -- we
21 need to move on, I think. I have a concern that we're just
22 moving the evasion from one place in the document to another.
23 We need to have straightforward answers to the questions. They
24 can explain those answers; but if the answer to the question is
25 that they did use generic environments, which we all know they

1 did, then they need to say that and I'm not sure what the
2 objection is to that.

3 **THE COURT:** Right.

4 **MR. HOWARD:** I guess my suggestion would be,
5 Your Honor is going to issue an order, and I think we've all
6 heard what you've said, and we need to get down to the business
7 of getting these updated based on your order. There's some
8 things that depend on it.

9 **THE COURT:** Yeah. I can't -- I mean, I just can't
10 give you -- this is just too much for the Court to rewrite
11 these things.

12 **MR. COWAN:** And I'm not asking that, Your Honor.

13 **THE COURT:** So I just can't give you more. We have
14 to move on. I can't give you more than I've given you.

15 **MR. COWAN:** Can I get one clarification, not on the
16 requests themselves but on what are --

17 **THE COURT:** But I definitely -- I just -- I
18 definitely agree that you have to go ahead and not -- and use
19 the words in your response that have been used throughout the
20 litigation and the witnesses have used without any problem,
21 like "generic environment," and so forth.

22 And, as I say, they might be, and I can't keep them
23 straight in my head anymore, some places where it wouldn't be
24 inconsistent with that to say "portions of," or something, like
25 we discussed before, as long as it's -- but it's basically an

1 admission as opposed to something that's unclear what it is.

2 And I am concerned with -- I do share Mr. Howard's
3 concern that I don't want to just move the problem to a
4 different point, but at the same time I can't really give you
5 more guidance than that right now.

6 **MR. COWAN:** Rule 36(a)(4) says: (reading)

7 "When good faith requires that a party
8 qualify an answer or deny only a part of a
9 matter, the answer must specifically specify the
10 part admitted and qualify or deny the rest."

11 I don't interpret --

12 **THE COURT:** That's correct, but it has to be in good
13 faith and it can't be manipulated to create something that's
14 unusable.

15 **MR. COWAN:** Understood. And that's what -- I was
16 trying to get clarification from the Court in terms of if we
17 have the answer period and then if we have the qualification
18 that follows it, then at least we're not in the situation back
19 to the fix issue where we're admitting something as to the fix,
20 even though one or two objects of the fix may be affected when
21 there's 10 objects in that fix, for example. Otherwise, we get
22 to trial or in summary judgment and they're going to say, "You
23 admitted it as to all 10."

24 **THE COURT:** You know, I just -- my opinion -- when
25 we started with you're not going to reargue what you've already

1 reargued, we've now reargued it even more. So I just -- you
2 know, there comes a point where we need to move on, so....

3 **MR. COWAN:** But are you -- and I understand, and I
4 want to do that, but what I don't want to be in a position
5 we're having something admitted. Are you saying we can't
6 qualify it?

7 **THE COURT:** I'm not saying that --

8 **MR. COWAN:** Okay.

9 **THE COURT:** -- but I'm saying the qualifications you
10 made so far are not acceptable, and I'm not doing anything more
11 than that and you'll just have to take the guidance that I was
12 able to give you now and do the best you can.

13 **MR. COWAN:** I hate to keep pressing this issue, but
14 when you say, "Qualifications we made so far," are you talking
15 about you haven't read all the requests but you're talking
16 about the ones that have been presented in the motion?

17 **THE COURT:** I've only dealt with the ones that are
18 in the motion. I haven't looked at anything that was not the
19 subject of the briefing.

20 **MR. COWAN:** Quoted to the motion.

21 **THE COURT:** Quoted to the motion, right.

22 **MR. COWAN:** Okay. Because, I mean, from what you
23 just said, I could see Oracle saying, "You've got to take out
24 all your answers and you can never say that again."

25 **THE COURT:** Well, you may. I don't know. I have no

1 idea whether the other answers that they -- I mean, were these
2 meant to be examples?

3 **MR. HOWARD:** Well, that's just it, Your Honor. I
4 mean, I thought we were clear about that. They are just
5 examples and, so, they're all categorical. They're all framed
6 the same way.

7 **THE COURT:** To the extent that -- I've looked at
8 these examples.

9 **MR. COWAN:** Okay.

10 **THE COURT:** I've given you my thoughts on these
11 examples. I agree with Oracle that the answers were not
12 proper. So I'm granting the motion with that regard; and to
13 the extent that these are exemplars of other similar things, I
14 would rule the same way, but I have not looked at any of those
15 other similar things. So I am not -- I am not -- I haven't
16 looked at those at all.

17 **MR. COWAN:** Okay.

18 **THE COURT:** Okay. But if they are, in fact,
19 similar, which they probably are, then I would make the same
20 ruling.

21 **MR. COWAN:** Yeah. In some ways it's back to some of
22 the same issues, but we'll take the Court's guidance and do our
23 very best.

24 **THE COURT:** Yeah. You can't -- I mean, the Court
25 cannot look at 500 plus RFAs.

1 **MR. HOWARD:** Which is why we made no effort to put
2 that in front of you.

3 **MR. COWAN:** Nor am I asking that. We're not asking
4 that.

5 **THE COURT:** Thank you. Thank you.
6 Can we move on now?

7 **MR. COWAN:** Yes, we can.

8 The other issue in the RFA is the burden issue,
9 Your Honor, that we haven't addressed.

10 **THE COURT:** Right. And I'm not very sympathetic to
11 the burden issue because I do agree with Oracle's basic
12 fundamental point that you made your bed, you lie in it. You
13 wouldn't -- you know the Court tried to get stipulations. It
14 tried to find ways to reduce the burden. You wouldn't go along
15 with those; and, so -- and as far as burden, you know, it's
16 proportionate to what? It's proportionate to, you know,
17 potentially a billion in damages.

18 So I'm just -- as a general rule, I would like to
19 see a way to reduce the burden somehow, and I'm open to that;
20 but my overall I'm not terribly sympathetic to that argument.
21 I agree with Oracle's basic point.

22 **MR. COWAN:** Let me break these things down, then,
23 where we make sure we're talking about the same thing.

24 On the second part, the burden part, there's a
25 request in the fifth set. Requests 4 through 63 deal solely

1 with downloads and have no relationship to any other requests
2 contained in this motion.

3 There's no use of any of those requests as examples
4 in the motion. They don't make any specific arguments about
5 those requests specifically, other than referring to them
6 generally, and you haven't -- to the extent you haven't looked
7 at the actual requests in the exhibits, there's nothing in
8 front of the Court on the motions themselves for the Court to
9 decide that.

10 But, generally, the requests 4 through 63 say that
11 for a given file path where downloaded files are located, admit
12 that all the files came from customer connection. And then
13 they ask us to go through all these file paths, which, by the
14 way, we went to the burden and gave them the file paths. So
15 we're back to a download-by-download analysis of millions of
16 downloads, which is exact same issue that the Court has already
17 ruled on.

18 **THE COURT:** Well, I see one thing that I -- one
19 thought that occurred to me is maybe the way to avoid the
20 burden but not is -- and what I have a feeling is probably
21 true, admit that it is likely that the vast majority of the
22 files were obtained at some point and then that might end this
23 whole controversy.

24 **MR. COWAN:** Yeah. They're right now asking us to do
25 it on a path-by-path basis.

1 **THE COURT:** Okay. But, I mean, isn't it the reality
2 that we know the vast majority but you don't know if it's
3 100 percent versus 99 percent?

4 **MR. COWAN:** And we've admitted that, I think,
5 Your Honor, or not vast majority but certainly admitted
6 majority.

7 **THE COURT:** Right, but that's what I'm saying. In
8 other words, you know, majority still leaves potentially
9 49 percent. So what I'm saying is, isn't it true that the vast
10 majority?

11 **MR. COWAN:** Depending on a given file path, likely
12 the vast majority and depending on time. That's one we have to
13 go look at those things in that context.

14 **THE COURT:** Well, then maybe you can -- you
15 should -- you know, again, I would think you could meet and
16 confer on this, but come up with an answer that says, "For this
17 time period we admit the vast majority," and then I don't know
18 that you need to go out and look at every one.

19 **MR. HOWARD:** Yeah. Your Honor, I think we would
20 accept vast majority certainly if the evidence bears it out.
21 The issue -- the issue that was framed in our papers was that
22 when we asked them to admit that they all came from the Web
23 site, they said that it was likely that the majority did but
24 they didn't undertake the burden of evaluating.

25 Then we followed up with a follow-on RFA --

1 **THE COURT:** That's right.

2 **MR. HOWARD:** -- and said, "Admit that you don't have
3 access to readily obtainable information indicating that it was
4 not originally download." So in the sense it's the same --

5 **THE COURT:** Right, and I agreed with Oracle on that,
6 too. I didn't see how you could refuse to answer either of
7 those. To me it was inconsistent, and I just -- I don't think
8 that that's what -- readily accessible is not the same as
9 burdensome as it's been interpreted up until now, I don't
10 think, in this context. I'm not talking about --

11 **MR. COWAN:** There's two issues. One is the readily
12 accessible information --

13 **THE COURT:** Right.

14 **MR. COWAN:** -- that is requested in the request --

15 **THE COURT:** Right, RFA, yeah.

16 **MR. COWAN:** -- in the RFA, and then the readily
17 accessible documents that would be used to get that
18 information. We've conceded the documents are readily
19 accessible. We've produced those.

20 The question is, to answer their request you have to
21 go through -- because the rule is --

22 **THE COURT:** Well, let me --

23 **MR. COWAN:** I've got it highlighted.

24 **THE COURT:** Okay.

25 **MR. COWAN:** It's 36-4. The last sentence of 36-4,

1 Your Honor.

2 **THE COURT:** I mean, the thing is this: You can
3 readily obtain the information. I mean, at least this is one
4 way of reading this. It's just that it would take an enormous
5 amount of time, but it's right there at your fingertips. It's
6 just extremely burdensome.

7 **MR. COWAN:** If it's knowable.

8 **THE COURT:** That's different from readily
9 obtainable. But I still think -- I mean, I think that I agree
10 with Oracle, that I can't understand why, then, you can't
11 answer that you can't do it because it's too vast for you to
12 look at.

13 **MR. COWAN:** On a file-by-file basis?

14 **THE COURT:** Well, I agree with what Oracle said in
15 its reply. I don't know that I need to be more specific than
16 that. I agree with that. I think it was inconsistent to first
17 give the one answer and then give the second answer. So I
18 don't need to give any more detail. I agree with them.

19 **MR. COWAN:** Because they're effectively shifting --
20 if that's the case, they're effectively shifting the burden --
21 their burden of proof to us.

22 **THE COURT:** I don't see how that is. I mean, first
23 you say it's not -- you don't have the information. And then
24 they say, "Admit you don't have the information," and then you
25 say you won't admit that. I mean, that's what your argument

1 is; right?

2 **MR. HOWARD:** That's what they're arguing.

3 **THE COURT:** To me I agree with that.

4 **MR. COWAN:** They said, "Admit you don't have any
5 readily obtainable information to answer this request." The
6 answer is we do have readily obtainable information. We don't
7 have -- the information sought in the request is not readily
8 obtainable. I now understand, based on the Court's
9 interpretation of 36-4, that you're not equating information
10 that knows or can readily obtain as being analogous to
11 burdensome.

12 **THE COURT:** I mean, maybe -- you know, I think it's
13 an interesting question, but I don't -- I mean, there's no case
14 law that says that; is there?

15 **MR. COWAN:** Your Honor, we've cited the cases that
16 we've cited in our response are the only cases we could find on
17 this issue, but it doesn't take away the burdensome argument of
18 requiring us to go --

19 **THE COURT:** So what I suggest -- I've given you
20 several options for avoiding the burden. You can come up with
21 something along the lines of the vast majority, or you can
22 answer -- now maybe I'm forgetting the nuances and really, I
23 think, this is too many motions and small tiny points to bring
24 to the Court to try to address in one hearing, and I think
25 you're, you know....

1 So -- you know, I mean, keep in mind, like most
2 judges, I'm dealing with many other motions today. I have
3 complex summary judgment motions in a patent case tomorrow. I
4 had criminal matters all morning. I have a search warrant
5 waiting behind me. I spent as much time over the weekend as I
6 could, but now it's three days later -- I mean, two days later.

7 So, I mean, I can't reiterate and give you more
8 detail than I've already given you. I basically agree with
9 Oracle. It may be that I'm -- you know, there's slight
10 difference in wording between "readily obtainable manner" and
11 "readily obtainable something else." I can't keep that
12 straight any more. If so, you're entitled to make that
13 correction, but the basic thrust I did agree with.

14 **MR. COWAN:** Okay. Then -- but what I hear the Court
15 saying is you're not ordering us to go through file by file if
16 we're willing to do it in some quantifiable general order.

17 **THE COURT:** Some more use -- exactly. Something --
18 I think that would be the preferable approach, I mean, for
19 everybody; wouldn't it?

20 **MR. HOWARD:** Yes, Your Honor. And I think with --
21 the downloads is one set, but the object RFAs is the other
22 category within this burden, the ones that they haven't
23 answered based on burden; and those are actually the ones where
24 they said even more directly in the first answer they lack
25 sufficient information to respond to these requests because the

1 information wasn't maintained in a readily obtainable manner.
2 Then we said, "Admit that you don't have access to readily
3 obtainable information." And then they said, "We deny that."

4 **THE COURT:** Well, that may be the one I'm thinking
5 of.

6 **MR. HOWARD:** That, I think, is the one where the
7 language is more directly lined up. It's true --

8 **THE COURT:** Yeah, as long as the language -- I mean,
9 if it's not perfectly lined up, it needs to be perfectly lined
10 up; but if it's perfectly lined up, then I think you have to
11 admit it.

12 **MR. HOWARD:** And I think, Your Honor, just, if I
13 could, to cut through it, if you are not going to order them to
14 go do all of the RFAs, it would be, I think, acceptable to us
15 to carve out a subset and allow us to extrapolate from that.

16 So, for example, although there are a lot of
17 objects, they are grouped. They're grouped according to fix.
18 They're grouped according to update. There are 179 fixes and
19 there are 65 updates. And, so, if they were to -- if we were
20 to take a slice of that and then we were allowed to extrapolate
21 from that, that would at least give us the ability to apply the
22 evidence that is there to be applied.

23 **THE COURT:** Yeah. But what do you mean by, "We were
24 allowed to extrapolate by that"?

25 **MR. HOWARD:** Well, in other words, that whatever the

1 answers were for the subset that we picked out of these, you
2 know, the objects, fixes, updates, they were all within --
3 they're all within, you know, Tupperware containers that fit
4 inside of each other. Whatever the answers are, then we get to
5 extrapolate that statistically to the universe that is
6 implicated.

7 **THE COURT:** Well, your expert could. But the
8 question is: Are you asking for that as an irrebuttable
9 presumption or are you asking that as just an evidentiary
10 foundation?

11 **MR. HOWARD:** What I'm asking is that we be allowed
12 to statistically extrapolate without a challenge to the way
13 that that subset was --

14 **THE COURT:** Right.

15 **MR. HOWARD:** -- generated, otherwise they should
16 answer all of them, but just to make it easier on them to
17 answer.

18 **THE COURT:** This is the same place we were before;
19 right?

20 **MR. COWAN:** Yeah. Because it's the same issue we
21 were on rog 14, Your Honor. And all they're asking on this
22 issue, the 33,000 files, the objects they want us to
23 specifically admit for each request, 37 separate requests
24 33,000 times, is exactly what this Court ordered we shouldn't
25 have to do in answering rog 14; and you picked and, I thought

1 at the time, the Court believed it was being -- you know, we
2 first started with five. They then asked for five more. We
3 did 10 which resulted in the 772 objects that -- 1772 objects
4 we looked at that took 500 attorney hours to do.

5 **MR. HOWARD:** Your Honor --

6 **MR. COWAN:** And, so --

7 **THE COURT:** Okay. I am going to take a recess. I
8 just I can't remember the substance of this well enough and I'm
9 not sure. I mean, I am concerned about the burden, I am very
10 concerned, and I don't have indelibly etched on my memory all
11 of the twists and turns this has taken and the Oracle-like
12 pronouncements that, I've not meant to favor one party or the
13 other, but Oracler-like pronouncements I may or may not have
14 made. So I'm going to take a recess, ten minutes.

15 **MR. HOWARD:** Thank you.

16 **THE CLERK:** The court's in recess.

17 (Recess taken at 3:22 p.m.)

18 (Proceedings resumed at 3:29 p.m.)

19 **THE COURT:** Okay. Well, I looked a little more
20 closely at the response, the plaintiffs' followup RFA for each
21 item 1 to 33, 1 to 86, "Admit that defendants do not have
22 reasonable access."

23 I think that probably to track exactly what they
24 said better it would be more like something like, "Admit the
25 defendants do not have reasonable access to sufficient, readily

1 obtainable information to indicate whether or not the copy of
2 the listed fixed object was created using a local environment."
3 I think that -- you know, that may not be the exact magic
4 language, but I think that's -- I think you would have to admit
5 something like that.

6 **MR. COWAN:** Yeah. And I wasn't following where you
7 were reading from, but I assume you were reading right out of
8 our objection.

9 **THE COURT:** Well, I was just reading your -- yes, I
10 was reading your objection and then amending the plaintiffs'
11 RFA to track the objection. I mean, the wording is very close.
12 It's not exact, but I think that -- but as I say, I think that
13 you did -- I mean, you have to do one or the other, I think.

14 **MR. COWAN:** Right. When it comes to the specific
15 request for each one of these 33,000, because the real issue,
16 Your Honor, on the burden -- and, by the way, one of the things
17 I thought up during the break, you asked about is there a
18 specific case about whether the readily obtainable language in
19 Rule 36 is the equivalent of a burden issue, and the answer is
20 we haven't found anything on that specific language from the
21 rule but Rule 26 certainly applies to all discovery.

22 **THE COURT:** Yes. No, it does. I mean, there's a
23 burden-shift objection but I don't think it's the same as what
24 you used in your --

25 **MR. COWAN:** Okay.

1 **THE COURT:** -- objection here. I don't know. I'm
2 not sure that was what's meant by the rule.

3 But -- and I think the approach, something like vast
4 majority, would also be one way to deal with it. But I think
5 the problem is -- I mean, I think you should be willing to
6 stipulate but along the lines it's been said. I've tried to
7 get you to do it, but I'm not sure that I can.

8 I mean, the idea of ordering a stipulation is
9 somewhat oxymoronic. So I think the law probably hasn't
10 developed to that point; but I can't let you have it both ways,
11 where you basically say -- I mean, everybody knows that most of
12 this is true, but you give evasive answers, that's my concern.

13 **MR. COWAN:** And, Your Honor, I think it depends on
14 how you phrase -- how they phrase the request as to what is
15 true or what is not.

16 **THE COURT:** Well, and that's where I'm just -- you
17 know, I don't know that I can give you more guidance --

18 **MR. COWAN:** Okay.

19 **THE COURT:** -- but I think that you ought to try to
20 meet and confer and come up with something that follows as much
21 guidance as I've been able to give you.

22 **MR. HOWARD:** Your Honor, we accept Your Honor's
23 proposal, and we're happy to leave it at that right now and
24 take the order that tracks that language.

25 **THE COURT:** Yes.

1 **MR. COWAN:** Again, I need clarification in terms
2 of -- I understand the guidance the Court has given us relevant
3 to the meet and confer; but absent reaching some agreement, is
4 the Court ordering us to answer for each of these requests
5 33,000 times?

6 **THE COURT:** No, but I've given you ways to avoid
7 doing that --

8 **MR. COWAN:** Okay.

9 **THE COURT:** -- such as, vast majority. Okay. So
10 I'm giving you alternatives to doing that, but --

11 Okay. Let's go to the interrogatories, because
12 that's different from the RFAs.

13 **MR. COWAN:** I don't think there's any
14 interrogatories on this issue.

15 **MR. HOWARD:** Our motion was confined to RFAs,
16 Your Honor.

17 **THE COURT:** Okay. All right. Well, I guess there
18 was the issue -- well, you've done the interrogatories 11 and
19 14.

20 **MR. COWAN:** Well, that's the burden issue.
21 Your Honor, it goes back to the same 33,000 issue, and
22 that's --

23 **THE COURT:** Okay. Right, and they were a burden. I
24 mean, I am concerned about the burden, but I've given you
25 some --

1 **MR. COWAN:** Okay.

2 **THE COURT:** -- approaches to deal with the burden,
3 and the approach you did take is unacceptable. It's not
4 sufficient.

5 **MR. COWAN:** So we're back -- to summarize, we're
6 back to the --

7 **THE COURT:** I can't do the summarizing anymore.

8 **MR. COWAN:** Okay.

9 **THE COURT:** You'll just have to order the
10 transcript.

11 **MR. COWAN:** Okay.

12 **THE COURT:** Okay. Let's go on.

13 **MR. HOWARD:** Your Honor, are you going to issue an
14 order? If not and you're waiting for the meet and confer, may
15 we have it happen in five days? We have experts that are
16 waiting on answers to these and for supplemental reports, and I
17 would request that Your Honor issue an order based on what
18 you've said. It can say that we have to meet and confer on
19 some things and allow us to come back if we have to and
20 hopefully we don't, but that would be our request.

21 **THE COURT:** Well, I'm not going to promise you I can
22 get an order out immediately. So I will separately order you
23 to meet -- orally now order you to meet and confer on these
24 issues. I would say, today is Tuesday, by the end of the week.

25 **MR. COWAN:** We can do that.

1 **MR. HOWARD:** Yes.

2 **THE COURT:** Yeah. And then inform the Court of the
3 results --

4 **MR. HOWARD:** Okay.

5 **THE COURT:** -- because I'm not sure when I'll get an
6 order out; but I think you should in the meantime, my order may
7 be just very summary, you should rely on the transcript.

8 **MR. HOWARD:** Okay.

9 **MR. COWAN:** Okay.

10 **THE COURT:** Okay. I think we're on to the motion to
11 compel. I mean, I am concerned about the procedural issue and
12 I also -- just I found this was -- I did agree with Oracle, to
13 some extent, that some of these topics seem like multiple
14 topics kind of shoehorned in.

15 At the same time, I'm -- and certainly something
16 like, I think, interrogatory 7 wasn't -- was never, ever
17 disclosed in advance. I may be inclined to let defendants
18 substitute, although it certainly would have been better to ask
19 permission.

20 I guess the main, on the mapping, the main reason
21 the defendant gives for bringing this is something supposedly
22 new at the deposition of Jason Rice and you're saying it's not
23 new, I guess.

24 **MR. HOWARD:** It's absolutely not new, Your Honor.

25 **THE COURT:** All right. Well, let's take these

1 issues one by one.

2 **MR. COWAN:** Since it's our motion --

3 **THE COURT:** Okay. Yes, go ahead. You're right.

4 **MR. COWAN:** -- Your Honor, do you want me to address
5 the procedural issue first given that's what you commented on
6 first?

7 **THE COURT:** Yes.

8 **MR. COWAN:** The Court, as you know, permitted three
9 issues. We readily admit that we substituted one of the issues
10 and included in our motion that request that we be permitted to
11 do so, and it was simply a hangover issue from the discovery
12 conference where we discussed these issues.

13 The folder 11 issue was discussed, we thought ruled
14 on and resolved, and then when Oracle refused to give us the
15 documents that we asked for is one we included that issue in
16 the motion. So that's just -- we readily admit it's not
17 anything that was identified to the Court. It's one of our two
18 identified motions.

19 The other one, Your Honor, relates broadly to the
20 expanded claims in the First-Amended Complaint. You will
21 recall, or maybe you don't, probably don't, quite frankly,
22 while we were attempting to describe these topics, there were a
23 number of open meet-and-confer issues out there and I did my
24 best to describe kind of categorically where those issues may
25 fall; and you instructed me, "It better be specific when you

1 actually file the motion or I'm not going to hear it." And
2 that issue is the six-custodian issue related to the expanded
3 discovery timeline agreement. So we think that's sufficiently
4 narrow.

5 The download issue was something that was
6 identified. I'll concede that interrogatory 7 was not
7 identified to them a week in advance of the motion, but it was
8 identified to them the following Tuesday when they asked for
9 further clarification. So it's not -- it's a matter of days of
10 not being addressed.

11 But be that as it may, the request for production
12 numbers 44, 45, 47, and 51 were certainly timely designated to
13 Oracle on December 4th when they were supposed to be
14 identified.

15 The issue is real simple, Your Honor, on that first
16 issue and it is back to the old product-to-download-mapping
17 issue that we've quoted extensively in our brief and in our
18 reply brief.

19 **THE COURT:** Well, I'm left with this big uncertainty
20 about whether there was -- whether it was clear or not clear,
21 this distinction that the plaintiffs are arguing between
22 download to product versus download to, what was it, customer?

23 **MR. COWAN:** Contract.

24 **THE COURT:** Contract.

25 **MR. COWAN:** It is clear, in our view, as a bell

1 because there is no way that you can automatically in an
2 automated way map downloads to contracts. You have to
3 physically look at the contracts; that nobody's ever in this
4 case ever contended that there's an automated way to do that
5 mapping. There's a lot of manual work that has to be done to
6 map downloads to contracts.

7 We've focused all along, and we quoted extensively
8 from the record, both the pleading record and the transcript
9 records, both in front of Your Honor and in front of
10 Judge Legge, that substantiates what we're talking about is
11 mapping these downloaded items to specific products that Oracle
12 sold.

13 **THE COURT:** Let me skip to a different issue. I
14 think the real rub of this whole motion, assuming if I was
15 going to allow it procedurally, is the issue of work product.
16 And, I mean, I think it took a long time and there was a huge
17 amount of underbroach to get to that, but he says he created
18 this document at the direction of counsel. So it is work
19 product.

20 And now they've given it to you and I don't think
21 that there was necessarily an error in waiting given that I
22 think it is work product, as far as I know, and I don't think
23 you really say why it isn't. Then the question would be -- but
24 you have it now. So the question is: What relief if any? And
25 I don't really see where all the relief you put out there is --

1 **MR. COWAN:** All we want to do --

2 **THE COURT:** -- justified no matter what. And it
3 just seems like sort of a grab bag of things that don't follow
4 logically to me.

5 **MR. COWAN:** We simply want an order compelling them
6 to fully respond to those requests for any information they
7 have in their possession, custody, control. It may be nothing
8 else. Their response may be nothing else. But they have
9 admitted in their opposition that they do have some
10 download-to-contract-mapping information that they've now done
11 manually and they say, "We're not giving that to you," and we
12 certainly don't have it.

13 So the real issue is timely disclosure of this
14 information certainly before trial, but we didn't have it over
15 the past two years when we were questioning their witnesses.

16 On the work-product issue, we dealt with that
17 extensively in our reply brief; and we think, first of all,
18 Mr. Howard's statements to the Court, to this Court and to
19 Judge Legge, he said repeatedly, "If we have the information,
20 we'll give it to them." He never indicated that they did have
21 some information related to that that was work product. We've
22 been pushing for this information since the very first motion
23 to compel.

24 **THE COURT:** Well, I don't really think that they
25 waived work product. I mean, it's, you know, it's arguable but

1 I don't find that.

2 So -- but is there anything you have that your
3 withholding now?

4 **MR. HOWARD:** Yes, work product, Your Honor. We do
5 have work product that was not relied on by our experts.

6 And I would like to bring Your Honor back to some
7 important facts that were not disclosed in the moving papers or
8 addressed in the reply but that we put before the Court in our
9 opposition.

10 Pertinent to this discussion, in particular, we
11 asked to give them our work product. We offered it. In
12 January of 2008 we said, "We can go create spreadsheets if you
13 agree not to depose the attorneys who are creating them," and a
14 couple other things that are the same thing that they had put
15 to us and we had accepted.

16 So the notion that there was work product, it's no
17 secret. It was on our privilege log that was submitted to them
18 in May of 2008 next to Jason Rice's name. Jason Rice submitted
19 a declaration in March of 2008.

20 This work product issue has been out there all along
21 and we tried to get around it with them cooperatively. In lieu
22 of that, since they wouldn't accept that, we gave them the
23 underlying data and, again, something they don't address in the
24 form of the customer connection databases from which Mr. Rice
25 created the very spreadsheet that they now have.

1 **THE COURT:** Well, they say they don't know how to do
2 that.

3 **MR. HOWARD:** Well, two things, Your Honor. They do
4 because we've put before Your Honor very similar spreadsheets
5 drawn from the same set of information created by their
6 litigation consultants from the same source data on customer
7 connection.

8 And, number two, Judge Legge gave them the
9 opportunity to have an Oracle engineer come help them do all of
10 this mapping, and they didn't ever pursue that; and we made it
11 clear repeatedly to the Court, to them, that we were prepared
12 to do that.

13 So we've done everything we possibly can. We've
14 given them all of the underlying data. We've given them all of
15 the spreadsheets that preexisted that were not work product.
16 We've told them we have work product, we've tried to give it to
17 them, and they haven't accepted any of that.

18 And, so, what's left, Your Honor is quite right, is
19 that there is the formerly work product spreadsheet that was
20 given to our experts, was timely disclosed pursuant to *Wixon*,
21 which they don't address, in accordance with the timing set
22 forth by the rules; and then there are, as there has been since
23 May of 2008, some additional work product spreadsheets that are
24 work product created for litigation not relied on by the
25 experts, but they've had the underlying data to use themselves

1 for the entire time.

2 **THE COURT:** Okay.

3 **MR. COWAN:** Several issues, Your Honor. The offer
4 to give us what they had in their possession in exchange for
5 this agreement not to depose even their experts on how it was
6 created, et cetera, he's trying to parallel that with something
7 that was a separate agreement that we had with -- that a hired
8 expert did that we produced to them in exchange for a similar
9 agreement, not something that an employee in a matter of hours
10 extracted data out of a database that Oracle had in its
11 possession.

12 **THE COURT:** Well, I'm going to deny this one. I'm
13 going to deny that motion. I think I've just -- I know you
14 disagree with me, but I'm denying it.

15 On the Folger Levin (phonetic) subpoena, again there
16 was procedural argument, but I'm going to reach it; and I guess
17 the question is -- I do think that the list that defendants
18 have come up with, although it's down to 64 pleadings, still
19 has a number of irrelevant ones on it; but then there are some,
20 too, that I don't know how they can tell whether they're
21 relevant or not, like interrogatories or depositions, without
22 seeing them, and there's no burdensomeness involved in this.

23 **MR. HOWARD:** No. We're not -- at this point, I
24 think we're standing on relevance, Your Honor, and it's a
25 fishing expedition. The relevant -- from the very beginning of

1 this discussion --

2 **THE COURT:** Well, I don't think it's a total fishing
3 expedition. I mean, you know, the lawsuit did put these
4 damage-related issues in play.

5 I need that Exhibit I that has what's still at issue
6 on that that you're still looking for.

7 So I'm going to grant this one in part, but I think
8 I'm just not sure exactly where I draw the line, certainly at
9 least the six items that you're own person said relate to those
10 customers but I think there may be others, too.

11 Okay. So Exhibit I has what you're looking for now;
12 right?

13 **MR. McDONELL:** It does, Your Honor, and I would just
14 offer to the Court that this is just a stack of documents
15 sitting in a conference room a matter of blocks from here --

16 **THE COURT:** Right.

17 **MR. McDONELL:** -- that have been reviewed --

18 **THE COURT:** Right.

19 **MR. McDONELL:** -- and could be turned over to us so
20 we can assess based, instead of on this cryptic --

21 **THE COURT:** Right. I mean, I have no reason to
22 think she's not telling the truth, but different eyes knows
23 different things, see different significances.

24 **MR. McDONELL:** So our request remains that it be
25 turned over or if we can go look at them.

1 **THE COURT:** Well, but some of them, I think, I don't
2 see -- for example, Larry Olsen's (phonetic) character and
3 reputation motion in limine, I mean, I would agree that that's
4 not relevant.

5 **MR. HOWARD:** Your Honor, I looked --

6 **THE COURT:** Postmerger layoffs, I don't see how that
7 could be relevant. I mean, those things -- it has to be -- so
8 I just would narrow this down some more.

9 **MR. HOWARD:** Your Honor, I looked at the documents
10 that have been identified, the six. Those are ones that
11 identify customers that are in play in this litigation.
12 Sometimes they're just included in a long list of these
13 customers wouldn't buy software. Unless there is a relevance
14 argument made before anything beyond the references to those
15 customers, which is the set that we have been limited to --

16 **THE COURT:** Well, I just don't see -- I mean,
17 frankly, I'm not sure why you're resisting this so hard
18 which -- because, I mean, there's no burden. They can look at
19 them. These are court-filed documents. Some have portions
20 sealed but you all have protective orders. And I just think
21 this is making a mountain out of a molehill, basically, at this
22 point.

23 So I'm going to -- I think you specifically called
24 out as examples of ones you thought weren't relevant. The ones
25 related to the motion in limine of Mr. Olsen (phonetic), I

1 agree with that is irrelevant; and I'm not sure -- was there
2 other specific ones you mentioned?

3 **MR. HOWARD:** We were just going by way of example,
4 Your Honor.

5 **THE COURT:** Well, I thought -- well, but still, I
6 don't -- you know, post -- how would postacquisition layoffs be
7 relevant?

8 **MR. McDONELL:** Your Honor, for example, if they're
9 laying off the PeopleSoft employees because they intend to
10 de-emphasize the PeopleSoft product line or do away with it
11 altogether and that message gets to a customer or gets into the
12 marketplace, then it decreases the chance that those customers
13 want to stay with the Oracle slash PeopleSoft organization.

14 But, again, we are limited because we know the
15 general issues in the case --

16 **THE COURT:** All right. Well, other than the Larry
17 Olsen (phonetic) ones, I'm ordering those produced.

18 **MR. McDONELL:** Thank you, Your Honor.

19 **THE COURT:** Now custodian production. It seems as
20 if there wasn't really a meeting of the minds. There was a
21 miscommunication involved as to whether these were going to be
22 updated or not updated; and I think that although the
23 stipulation didn't -- it didn't specifically specify that there
24 was a right to this, I think it put it in the category there
25 was a right to ask for it.

1 **MR. HOWARD:** You're talking about the expanded
2 timeline discussion, Your Honor?

3 **THE COURT:** Right.

4 **MR. McDONELL:** The only way in which the timeline is
5 even debatable is: What's a key custodian? There's no
6 question that it allows for production of documents from that
7 later time frame from key custodians on the topics. And by
8 narrowing our request from 131 overall custodians down to 6, I
9 think presumptively we've been focused and have narrowed it to
10 key custodians.

11 We've also offered instead of the 900 search terms,
12 they could use a reduced number of 71 search terms. These are
13 all likely to be trial witnesses that we're talking about,
14 their key documents for a period after the lawsuit was filed up
15 until the time TomorrowNow went out of business, but a time
16 frame in which there will be undoubtedly a great amount of
17 evidence from other sources, but these key custodians should
18 turn over their documents as well.

19 **MR. HOWARD:** Your Honor, you said there's no meeting
20 of the minds.

21 **THE COURT:** Yes.

22 **MR. HOWARD:** They do not dispute --

23 **THE COURT:** I mean, on whether Oracle was pursuing
24 this issue or not pursuing -- I mean, whether --

25 **MR. HOWARD:** SAP was.

1 **THE COURT:** -- whether SAP was pursuing it. I think
2 they thought that you had refused but were looking into it, you
3 know, that sort of thing.

4 **MR. HOWARD:** They do not dispute our account, which
5 is that we had objected to it. There was a meet and confer,
6 and the ball was in their court to come back with an
7 explanation. They don't dispute that. They say their notes
8 are unclear.

9 And their subsequent actions corroborate our
10 account. They never raised it with you, with us, with anybody
11 even when the specific topic of late custodian productions was
12 before the Court. And there is substantial prejudice to us now
13 to be addressing that. We've shut down, in large part, the
14 review apparatus. I think we were entitled to take the view
15 that it was abandoned.

16 **THE COURT:** Well, I guess one thought I have is
17 whether -- because it is, arguably, somewhat late to bring this
18 up but I also think it's relevant and I don't think it was
19 abandoned, although I think that I don't -- I'm not certain it
20 was abandoned. I can understand how you perceived it that way.

21 So I think it's caused a bigger burden on the
22 plaintiffs than it otherwise would because, as I say, they
23 thought they were through that phase, is whether some of the
24 expense of this should be shifted. That's one thought I had.

25 **MR. McDONELL:** We're openminded to your guidance on

1 that, Your Honor. We do want the documents. And if it's a
2 matter of offering to pay a portion of it, we can certainly
3 confer with our clients and I imagine they would be quite
4 openminded to that.

5 **THE COURT:** All right. Because I think that would
6 assuage some of the burden. But I think it is relevant and I
7 don't buy that they're absolutely foreclosed from it, but I
8 realize that it probably is more burdensome than it otherwise
9 would have been because it's at a late stage.

10 **MR. HOWARD:** Right. Well, the money is one thing
11 and the distraction while we're trying to do experts and
12 summary judgment, and all of the rest, is not something they
13 can compensate for, but we'll accept the Court's ruling on it
14 or whatever you decide.

15 **THE COURT:** Yeah. Well, I think I'm inclined to
16 something like a 50/50 split on the expense and a reasonable
17 time frame, I mean, recognizing you have those other things to
18 do, but I don't have a set idea in mind.

19 **MR. McDONELL:** So we'll confer. I imagine we'll be
20 able to resolve that issue.

21 Your Honor, we gave notice to counsel that there's
22 one bit of guidance for the future that we want to just give
23 you a heads up about. We are currently about the business of
24 scheduling expert depositions, and we have a disagreement on
25 how many days of testimony will be permitted for certain

1 experts. Maybe we'll work it out, maybe we won't.

2 **THE COURT:** Is this -- did Judge Hamilton -- are
3 there any orders that govern this at all?

4 **ALL:** No.

5 **THE COURT:** Because hers was on fact witnesses when
6 we set deposition limits?

7 **MR. HOWARD:** The deposition limits are presumptively
8 governed by the seven-hour rule.

9 **THE COURT:** Okay.

10 **MR. HOWARD:** And, so, I don't think she certainly
11 didn't speak beyond that --

12 **THE COURT:** Right.

13 **MR. HOWARD:** -- and Your Honor hasn't either.

14 **THE COURT:** Right.

15 **MR. COWAN:** Your Honor, there is a statement in the
16 order that says that the parties should meet and confer about
17 the length of expert depositions.

18 **THE COURT:** Okay.

19 **MR. McDONELL:** But there's not a ripe dispute for
20 you now. We're just thinking ahead. Should we not be able to
21 reach an agreement, is there a preferred way to bring it to
22 your attention? Perhaps letter briefs would be appropriate. I
23 don't know that it would really require an in-person argument.

24 **THE COURT:** Right. Well, maybe a joint letter brief
25 with a point counterpoint.

1 I seem to be --

2 **MR. HOWARD:** Well, we have our own issues,
3 Your Honor. I've identified one of them. Your Honor didn't
4 indicate a lot of enthusiasm for a brief from us on the issue
5 of changing the -- what they've said about fixes.

6 For the record, though, I think I just need to
7 confirm it's a similar list of issues that we have. Your Honor
8 is not inclined to entertain that. If we want to raise that,
9 that would be something we raise with Judge Hamilton it sounds
10 to me.

11 **THE COURT:** I don't remember what you're talking
12 about.

13 **MR. HOWARD:** I was just trying to put our
14 counterpoint on the record. I know it's been a long day. We
15 have issues as well. Maybe that's all I need to say. I had
16 identified one earlier.

17 **THE COURT:** I think it's more than enough.

18 **MR. HOWARD:** Submitted, Your Honor.

19 **MR. McDONELL:** I think that concludes it from the
20 defendants' point of view, Your Honor.

21 **ALL:** Thank you, Your Honor.

22 (Proceedings adjourned at 3:56 p.m.)

23

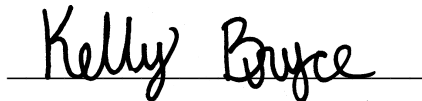
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CERTIFICATE OF REPORTER

I, KELLY BRYCE, Court Reporter for the United States Court, Northern District of California, hereby certify that the foregoing proceedings in C 07-1658 PJH (EDL), Oracle USA, Inc.; et al. versus SAP AG, et al., were reported by me, a 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.

The validity of the reporter's certification of said transcript may be void upon disassembly and/or removal from the court file.

A handwritten signature in cursive script that reads "Kelly Bryce". The signature is written in black ink and is positioned above a solid horizontal line.

Kelly Bryce, Court Reporter

Thursday, January 28, 2010