

EXHIBIT 33

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
OAKLAND DIVISION

ORACLE CORPORATION, a Delaware)
corporation, ORACLE USA, INC., a)
Colorado corporation, and ORACLE)
INTERNATIONAL CORPORATION,)
a California corporation,)
Plaintiffs,)
vs.) CASE NO. 07-CV-01658 (MJJ)
SAP AG, a German corporation,)
SAP AMERICA, INC., a Delaware)
corporation, TOMORROWNOW, INC., a)
Texas corporation, and DOES 1-50,)
inclusive,)
Defendants.)

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ORAL VIDEOTAPED DEPOSITION

WILLIAM R. THOMAS

DECEMBER 4, 2009

ORAL VIDEOTAPED DEPOSITION OF WILLIAM R. THOMAS, produced as a witness at the instance of the Plaintiffs and duly sworn, was taken in the above-styled and numbered cause on the 4th day of December, 2009, from 7:00 a.m. to 9:47 a.m., before Dana Richardson, Certified Shorthand Reporter in and for the State of Texas, reported by computerized stenotype machine at the Hilton Hotel & Conference Center, 801 University Drive East, College Station, Texas 77840, pursuant to the Federal Rules of Civil Procedure and the provisions stated on the record or attached hereto.

Job No. 1603-93515

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Q. Do you have an understanding as to whether and how
Oracle's database software was used by TomorrowNow?

07:03:26 17

07:03:26 18

A. Yes.

07:03:29 19

Q. What is that understanding?

07:03:33 20

A. It was used primarily by the PeopleSoft team to
support customers.

07:03:37 21

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Q. What -- can you tell me what the source was of each
of the server-installed instances of Oracle database software

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07:07:13 1 that existed on TomorrowNow systems?

07:07:16 2 A. The source for the installation files?

07:07:17 3 Q. Right.

07:07:18 4 A. Is that the question?

07:07:21 5 From my understanding in speaking with John

07:07:24 6 Baugh, he had downloaded those from the Oracle technology

07:07:25 7 website.

07:07:29 8 Q. Other than the software that John Baugh downloaded

07:07:35 9 from the Oracle technology website, did TomorrowNow obtain

07:07:39 10 Oracle database software that it installed on its systems from

07:07:40 11 any other source?

07:07:55 12 A. No, not that I'm aware.

07:07:58 13 Q. And are you aware of any license that TomorrowNow had

07:08:02 14 to any Oracle database software?

07:08:02 15 A. Yes.

07:08:04 16 Q. What are you aware of?

07:08:05 17 A. The development license.

07:08:08 18 Q. That would be the license that Mr. Baugh clicked on

07:08:12 19 when he downloaded the software originally from the Oracle

07:08:13 20 website?

07:08:15 21 A. I'm not sure exactly if it was clicked on; but after

07:08:19 22 speaking with John Baugh, I believe that's -- that's how he

07:08:20 23 got the license.

07:08:27 24 Q. But it was the license that -- that was a development

25 license that covered the Oracle database software that he

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07:08:38 1 downloaded and then was later used for all of the
07:08:41 2 installations at TomorrowNow?

07:08:42 3 MR. FUCHS: Objection, form.

07:08:45 4 A. I don't believe it was a single install. I don't --
07:08:49 5 the way you phrased it, it sounded like you said one install
07:08:51 6 for all installations, I believe.

07:08:52 7 Q. (BY MR. HOWARD) Yeah, I didn't -- I didn't mean to
07:08:53 8 say that.

07:08:54 9 A. Okay. I'm sorry.

07:08:57 10 Q. Working out there early in the morning --

07:08:59 11 A. I understand.

07:09:02 12 Q. So, just to back up, is it your understanding that
07:09:08 13 for all installed instances of Oracle's database software, the
07:09:11 14 only license that TomorrowNow had for any of those installed
07:09:14 15 instances was a development license?

07:09:15 16 A. Yes.

07:09:19 17 Q. And is it your understanding that that -- that the
07:09:23 18 development licenses that applied to all of those installed
07:09:26 19 instances were the ones that Mr. Baugh obtained through the
07:09:29 20 original download that he performed?

07:09:34 21 A. Yes.

07:09:37 22

07:09:44 23

07:09:48 24

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07:13:43 14

07:13:47 15

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07:13:53 18

07:14:02 19

Q. What did you speak with Mark White about?

07:14:05 20

A. We basically covered the documents that I was going

07:14:10 21

over for -- in preparation, the e-mails, the interrogatories

07:14:15 22

and the -- the Oracle software and licensing.

07:14:18 23

Q. What did you talk to him about with respect to the

07:14:21 24

Oracle software and licensing?

25

A. Is -- the question was -- was raised as to, with

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07:14:34 1 TomorrowNow, once he was in his -- his executive role there
07:14:40 2 and on site, if he was aware of the development licenses that
07:14:46 3 were being used; and -- and I'm sure there were a few other
07:14:51 4 topics that I can't recall right off the top of my head.

07:14:53 5 Q. What did he say about whether he was aware of the
07:14:57 6 development licenses that were in use by TomorrowNow for
07:14:58 7 Oracle database software?

07:15:02 8 A. He said he did speak to someone. He couldn't recall
07:15:07 9 exactly who or what the context was or the time frame; but he
07:15:10 10 did know that at some point in time, once he had stepped in,
07:15:17 11 that he learned that we had a development license.

07:15:22 12 Q. Did he tell you whether he thought the development
07:15:24 13 license was adequate to cover the nature of TomorrowNow's use
07:15:26 14 of the Oracle database software?

07:15:29 15 A. We asked that specific question and he said,
07:15:36 16 honestly, at that point in time, you know, what was in place
07:15:40 17 was already in place and he was concerned with moving forward
07:15:47 18 with the company and really didn't give it -- I mean, it
07:15:56 19 wasn't a major priority for him at the time.

07:15:58 20 Q. Did he answer your question as to whether or not the
07:16:02 21 development licenses were adequate to -- in his view, at the
07:16:05 22 time to cover TomorrowNow's use of the Oracle database
07:16:10 23 software in its ongoing operations?

07:16:14 24 A. As I sit here right now, I can't recall specifically.
25 If -- if it clicks later, I'm definitely let you know.

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07:16:21 1 Q. But he did confirm to you he was aware that
07:16:24 2 TomorrowNow was using Oracle's database software to support
07:16:27 3 its customers under a development license?

07:16:30 4 A. Yes.

07:16:34 5 Q. And he did confirm to you that with the other things
07:16:38 6 that he had going on, taking over TomorrowNow, that dealing
07:16:44 7 with that situation wasn't his highest priority?

07:16:45 8 A. Well, I don't know if it was -- if he viewed it as a
07:16:48 9 situation. He may have thought it was -- it was fine to run
07:16:52 10 under a development license, and that's why it was never an
07:16:52 11 issue.

07:16:54 12 Q. Well, did he tell you that he thought it was fine to
07:16:57 13 run under a development license?

07:17:07 14 A. He didn't say that specifically.

07:17:10 15 Q. You said, "He was concerned with moving forward with
07:17:14 16 the company and really didn't give it -- I mean, it wasn't a
07:17:16 17 majority priority for him at the time."

07:17:17 18 That's what he told you?

07:17:22 19 A. Well, yeah. I'm paraphrasing, of course, and just
07:17:26 20 recalling from memory. I can't say verbatim that that's
07:17:28 21 exactly what he said.

07:17:29 22 Q. Sure. But that's your best recollection?

07:17:31 23 A. That's my best recollection, yes.

07:17:36 24

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Q. Did you review the terms of the development license
as part of your preparation?

07:18:30 12

07:18:33 13

A. There is an e-mail that had the terms in it that I
read through, yes.

07:18:34 14

07:18:38 15

Q. That's an e-mail from George Lester to Greg Nelson?

07:18:40 16

07:18:43 17

A. I -- I believe so. I would have to look at the
document, but that sounds correct.

07:18:45 18

07:18:49 19

Q. When you -- when you read that e-mail, you understood
it to be a recitation of the terms of the development license?

07:18:56 20

A. Yes.

07:19:01 21

07:19:03 22

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Q. Do you agree that the database -- Oracle's database software was being used by TomorrowNow to help generate revenue for TomorrowNow?

A. I -- I can say it was a component used to create the patches and fixes for the customers, which I would assume, in turn, generates revenue.

Q. Was the Oracle database software at TomorrowNow used to develop any applications?

A. Not that I'm aware of.

Q. Was the Oracle database software installed at TomorrowNow used to develop any prototypes of any applications?

A. Not that I'm aware of, no.

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Q. Was any of that software installed on more than one
computer at TomorrowNow?

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07:29:59 1 A. Yes.

07:30:01 2 Q. Was all of it installed on more than one computer?

07:30:03 3 A. I -- I couldn't say all of it was installed.

07:30:06 4 Q. Was the 8.1.7 software installed on more than one

07:30:07 5 computer?

07:30:07 6 MR. FUCHS: Objection, form.

07:30:08 7 A. I -- I believe so.

07:30:11 8 Q. (BY MR. HOWARD) And was the 9.2 software installed

07:30:12 9 on more than one computer?

07:30:12 10 MR. FUCHS: Objection, form.

07:30:13 11 A. I believe so.

07:30:16 12 Q. (BY MR. HOWARD) And was the 10.2 software installed

07:30:18 13 on more than one computer?

07:30:18 14 MR. FUCHS: Objection, form.

07:30:19 15 A. That one, I'm not sure of.

07:30:25 16 Q. (BY MR. HOWARD) And was the 8.1.7 database software

07:30:26 17 installed on more than two computers?

07:30:27 18 MR. FUCHS: Objection, form.

07:30:29 19 A. I would have to look back at -- at the notes and the

07:30:32 20 preparation materials to actually see exactly what servers

07:30:36 21 were running which version of Oracle software.

07:30:38 22 Q. (BY MR. HOWARD) What notes are you referring to?

07:30:42 23 A. The -- basically the notes that -- in the binder that

07:30:46 24 I used for preparation that have the interrogatories. And I

25 also created some personal notes.

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07:31:09 1 Q. Was the -- Oracle database software, any version of
07:31:13 2 it that -- that had been downloaded by Mr. Baugh and installed
07:31:16 3 on TomorrowNow systems, was any of it used by more than one
07:31:17 4 person?

07:31:18 5 A. Yes.

07:31:23 6 Q. Was it basically used by the entire PeopleSoft
07:31:30 7 support organization from time to time?

07:31:31 8 A. That -- that's -- that's a fairly general statement,
07:31:35 9 but I would say the potential would be there for any of the
07:31:37 10 engineers to use the software.

07:31:40 11 Q. And your understanding is that many of them did in
07:31:43 12 the course of working with the various local environments
07:31:47 13 running on Oracle database software at TomorrowNow?

07:31:49 14 A. Well, I'm -- I'm aware that some of them did, yes.

07:31:52 15 Q. And did TomorrowNow make more than one copy of any of
07:31:59 16 the software that Mr. Baugh downloaded?

07:32:02 17 A. Are you talking about just the install files
07:32:03 18 themselves?

07:32:03 19 Q. Yes.

07:32:05 20 A. I believe so.

07:32:08 21 Q. And did it make more than copy of the 8.1.7 software
07:32:13 22 that he downloaded?

07:32:13 23 MR. FUCHS: Objection, form.

07:32:16 24 A. I can't say specifically that they -- that they did
25 because I'm not sure how the installs were run. They may not

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07:32:24 1 have even made a copy. It may have just been, you know, a
07:32:27 2 link through the network. So, I can't say specifically, yes,
07:32:33 3 it was; but I would assume that since it was installed on the
07:32:36 4 machines, that there was a copy made to install it.

07:32:39 5 Q. (BY MR. HOWARD) And -- and you would assume that
07:32:42 6 there would be a copy made for each machine on which it was
07:32:42 7 installed?

07:32:46 8 A. Yeah. I don't know their method -- specific
07:32:51 9 technical method of install. There could be several so...

07:32:56 10 Q. And is it true that for each machine on which the
07:33:03 11 downloaded software was installed, that that would constitute
07:33:06 12 an additional copy of that software?

07:33:08 13 A. Can you state that again? I'm sorry.

07:33:12 14 Q. Yeah. Is it true that when you take the downloaded
07:33:16 15 software and you install it on an additional machine, then
07:33:20 16 that would be an additional copy of that downloaded software?

07:33:22 17 MR. FUCHS: Objection, form.

07:33:33 18 A. It would -- you could say that, I -- I guess.

07:33:44 19

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07:38:51 5

Q. And do -- do you know the operating systems of any of the servers that you have listed here in your notes?

07:38:55 6

07:38:58 7

A. I would have to -- to look back through the notes to be sure, but I believe that PSDEV01 and PSDEV02 are AIX machines. DCPS TEMP01 and TEMP02 should be Windows machines, along with the -- the other two.

07:39:06 8

07:39:13 9

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07:39:29 11

Q. So, DCSBLPROD03 and TNFS01 are both Windows machines?

07:39:29 12

A. I believe so.

07:39:29 13

07:39:32 14

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Q. All right. You have in front of you Exhibit 1871.

07:45:49 4

That's the amended notice of deposition. Is this a document
that you've seen before?

07:45:51 5

07:45:52 6

A. I would have to look through it --

07:45:53 7

Q. Sure.

07:45:55 8

A. -- to be sure but --

07:45:56 9

Q. Let me just direct you to page 3 --

07:45:58 10

A. Okay.

07:46:01 11

Q. -- where it says "Scope of Testimony" --

07:46:01 12

A. Okay.

07:46:05 13

Q. -- and ask you if you've looked at the 12 topics that
are identified there.

07:46:10 14

07:46:12 15

A. Yes.

07:46:16 16

Q. And you understand that you're designated as
TomorrowNow's corporate representative today on those
12 topics?

07:46:19 17

07:46:21 18

07:46:33 19

A. Yes.

07:46:37 20

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Q. Were there any policies in place at TomorrowNow that specifically applied to copying or use of Oracle database software?

08:13:47 20

08:13:51 21

08:13:55 22

A. No. Not that I'm aware of.

08:14:02 23

08:14:08 24

Q. Were there any policies in place at SAP that governed copying and use of Oracle database software at TomorrowNow?

25

A. I -- I can't actually say what policies SAP had in

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08:14:29 1 place.

08:14:31 2 Q. Other than the development license that you've

08:14:32 3 already identified --

08:14:32 4 A. Uh-huh.

08:14:35 5 Q. -- are there any other contracts or licenses that

08:14:43 6 TomorrowNow contends gave it the right to copy or use Oracle's

08:14:44 7 database software?

08:15:02 8 A. No.

08:15:04 9

08:15:11 10

08:15:14 11

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08:15:21 14

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08:15:35 16

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Q. (BY MR. HOWARD) Mr. Thomas, let me show you what's
been previously marked as Exhibit 1829.

08:34:55 11

08:34:56 12

A. Okay.

08:34:58 13

08:35:03 14

Q. Is that the e-mail from George Lester to Greg Nelson
on May 11, 2005, setting forth the Oracle development license
agreement terms that you referred to earlier in your
testimony?

08:35:06 15

08:35:13 16

08:35:17 17

A. Yes. It appears to be the same one.

08:35:19 18

08:35:20 19

Q. And that's the e-mail that you reviewed in preparing
for your testimony today?

08:35:26 20

A. Yes. That's one of the e-mails.

08:35:29 21

08:35:34 22

Q. That's the e-mail that you referred to, that you
described earlier as being sent from George Lester to Greg
Nelson setting forth the Oracle license development -- the
development license terms?

08:35:37 23

08:35:40 24

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A. Yes.

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Q. Turning back to page 9 of the interrogatory response
to Interrogatory 122, do you have anything to add to the
identification of installed database instances on various

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09:38:47 1 machines at TomorrowNow to what's been listed here in response
09:38:54 2 to Interrogatory 122?

09:38:57 3 A. Do I -- do I have anything just to add to this
09:38:58 4 document?

09:39:00 5 Q. Right. Is -- is the list of -- of installed database
09:39:04 6 instances on various machines that's listed here in response
09:39:08 7 to Interrogatory 122 accurate and complete, so far as you
09:40:06 8 know?

09:40:09 9 A. One thing that I did notice is I may have misspoke
09:40:14 10 earlier when I -- I pointed to the DC Siebel product as
09:40:17 11 containing the virtual machines. It's actually the TN-FS01,
09:40:39 12 after reading through this.

09:40:43 13 And what I have in front of me now, I mean,
09:40:46 14 it -- it does look complete. Without actually physically
09:40:49 15 going and looking at -- at the machines, having them in front
09:40:52 16 of me, I can't say definitively this is everything there;
09:40:56 17 but -- but it does look like it is complete.

09:40:57 18 Q. All right. And that's my question: As -- as
09:41:01 19 TomorrowNow's corporate representative, based on what you know
09:41:03 20 and -- and the work that you did to prepare for your testimony
09:41:10 21 today, can you adopt, with the -- with the -- you know, the
09:41:12 22 understanding that you can't be perfectly certain, the -- the
09:41:17 23 list of database instances on various machines that are
09:41:22 24 identified here in response to Interrogatory 122 as -- as your
25 testimony?

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09:41:24 1 A. Yes.

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Q. Mr. Thomas, is it correct that from the time the litigation was filed in March of 2007 to the time that TomorrowNow sent out its last deliverable to its last customer, there continued to be locally installed instances of Oracle database software on TomorrowNow machines?

A. Okay. From -- from the time of litigation until when? I'm sorry.

Q. From the time that TomorrowNow sent out its last deliverable to its last customer from TomorrowNow, there continued to be Oracle database software on TomorrowNow machines?

A. Yes.

Q. And Mr. White was the one that made the decision that Oracle -- that TomorrowNow would continue to maintain Oracle database software on TomorrowNow machines for that period of time; is that correct?

MR. FUCHS: Objection, form.

A. I would have to assume that he made that decision.

Q. (BY MR. HOWARD) And did he tell you why he made the decision to continue to maintain Oracle database software installed on TomorrowNow local machines pursuant only to a development license for a year and a half after Oracle filed

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09:45:42 1 this litigation?

09:45:43 2 MR. FUCHS: Objection, form.

09:45:46 3 A. No, he did not.

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09:46:04 10 MR. HOWARD: We proceeded today based on a ---

09:46:11 11 something of an agreement worked out between counsel, and I

09:46:15 12 proceeded with my questioning today in part based on the

09:46:19 13 designation last evening by Defendants' counsel of

09:46:25 14 Mr. Garafola's testimony and Mr. Baugh's testimony yesterday

09:46:28 15 as 30(b)(6) testimony in response to the amended notice of

09:46:33 16 deposition. That's the operative notice for today's

09:46:37 17 deposition. And, so, my understanding is that in response to

09:46:45 18 that notice, SAP defendants have now designated Mr. Garafola's

09:46:49 19 testimony, Mr. Baugh's testimony and Mr. Thomas' testimony

09:46:55 20 here today as responsive 30(b)(6) testimony and --

09:46:57 21 MR. FUCHS: So, we agree that we have

09:47:02 22 designated Mr. Baugh's testimony yesterday, Mr. Garafola's

09:47:05 23 previous 30(b)(6) testimony, not testimony in his individual

09:47:09 24 capacity, and Mr. Thomas' testimony here today in response to

25 this notice. One clarification is that Mr. Garafola's

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09:47:19 1 testimony is designated as to Siebel, related to Topics 3 and
09:47:23 2 Topic 5. But your -- you proceeded under the correct
09:47:27 3 assumption and agreement that we reached last night.

09:47:28 4 MR. HOWARD: Okay. And then the final thing is
09:47:30 5 that there was also a stipulation that was discussed in e-mail
09:47:33 6 between counsel, and I believe that I have established the
09:47:37 7 fact represented by that stipulation through Mr. Thomas'
09:47:41 8 testimony today, but to the extent I haven't, I'll, you know,
09:47:45 9 assume that that stipulation is still in force and effect.

09:47:47 10 MR. FUCHS: That's correct.

09:47:48 11 MR. HOWARD: Okay. Thank you. Nothing
09:47:51 12 further.

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STATE OF TEXAS
COUNTY OF HARRIS

REPORTER'S CERTIFICATE

I, Dana Richardson, a Certified Shorthand Reporter in and for the State of Texas, do certify that this deposition transcript is a true record of the testimony given by the witness named herein, after said witness was duly sworn by me. The witness was requested to review the deposition.

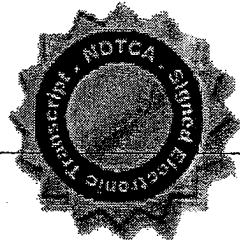
I further certify that I am neither attorney or counsel for, related to, nor employed by any parties to the action in which this testimony is taken and, further, that I am not a relative or employee of any counsel employed by the parties hereto or financially interested in the action.

I further certify that the amount of time used by each party at the deposition is as follows:

Mr. Geoffrey M. Howard - 02:17
Mr. Joshua L. Fuchs - 00:00

SUBSCRIBED AND SWORN TO under my hand and seal of office on this the 9th day of December, 2009.

Dana Richardson



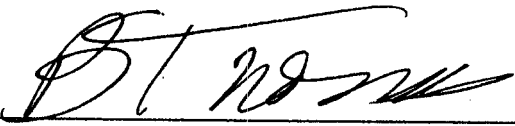
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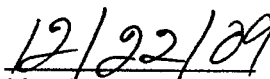
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_____ Subject to the above changes, I certify that the transcript is true and correct.

~~_____~~ ☒ No changes have been made. I certify that the transcript is true and correct.



(signature)



(date)